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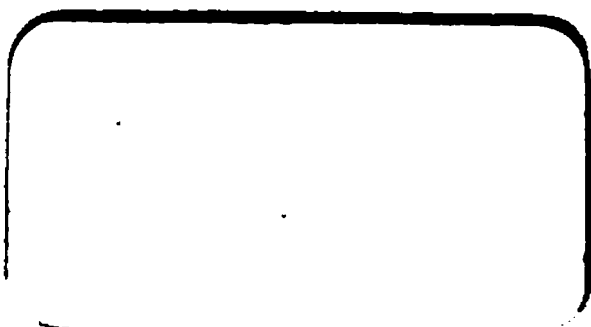
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3. an entry on the books of the employer by his bookkeeper of a transaction between them, in the way the bookkeeper understood it, and which differs from the understanding of the employer, is an issue of a civil and not of a criminal nature, and does not put the character of the bookkeeper in issue so as to permit him, in a controversy over the transaction, to introduce evidence, over the objection of the employer, of his general reputation for honesty	426
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2. in an action against one as guarantor of notes executed for fertilizer, who filed answer, alleging that the notes sued on were given for the price of a fertilizer on a warranty that it was a good wheat producer, but that it was worthless and of no value, on which answer issue was joined by a traverse, it was competent and relevant for the defendant to prove by the farmers who purchased and used the fertilizer that it would not, and did not, produce wheat	188
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5. where an action was brought by an infant by next friend against the Snider Heading Manufacturing Co., alleging that it was a corporation and service had on C. as its agent, to which a plea in abatement was filed by the company, denying that it was incorporated, but was a partnership, composed of M. S. & L. S. and C., doing business as the Snider Heading Manufacturing Co., it was error in the court to dismiss the action and refuse to allow an amended petition then tendered withdrawing the averment that the defendant was a corporation, and making the members of the firm doing business in that style as partners defendant to the action... 1061
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7. where an action is brought and a recovery had by the personal representative for the killing of plaintiff's intestate, a subsequent action can not be maintained for the killing of a horse and destruction of a buggy which occurred at the same time of the killing of plaintiff's intestate. The rule is that the entire claim arising out of a civil transaction, whether in the nature of a contract or tort, can not be divided into separate and distinct claims and each form the basis of an action... 1087
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ACTION TO SETTLE AN ESTATE—

In an action to settle an estate valued at \$75,000, consisting almost wholly of lands lying in different tracts, in several counties, for the payment of the indebtedness of the estate amounting to over \$10,000, and requiring of the attorneys engaged a great deal of

ACTIONS TO SETTLE AN ESTATE—Continued. Page.

labor in ascertaining the quantity, quality, value and location of these various tracts, and in the examination of titles and also in investigating the claims of the various creditors of the estate, an allowance in the aggregate for the services of the several attorneys so employed in such settlement of \$1,250, which was fixed by the lower court upon a "hearing" of the value of such services, can not be held to be excessive or unreasonable 581

ADMINISTRATORS—

1. where an action was brought against a railroad company by L. B. and F. R., who sued as administrators of deceased for damages for causing his death, it was error in the lower court to sustain a plea in abatement to the action on the ground that the plaintiffs were not entitled to be appointed as such administrators, because not next of kin to the deceased 1011
2. the county court having the jurisdiction to appoint an administrator of a decedent, necessarily has the right to determine whether a given applicant is related to the decedent in the degree authorizing her appointment, and the fact that such court erred in so deciding, and appointed another, such appointment, though erroneous, is not void 1011
3. under section 3896, Kentucky Statutes, providing that "the court having jurisdiction shall grant administration to the relatives of deceased, who apply for same, preferring the surviving husband or wife, and then such others as are next entitled to distribution, or one or more of them whom the court shall adjudge will best manage the estate," the first in rank as distributee is entitled as a matter of right to administer upon the decedent's estate, provided such distributee possesses otherwise legal qualifications to act. Where, however, there is but one distributee this discretion can not exist if the distributee makes application before the second county court from the death of the intestate 1032
4. where it is shown by the evidence that a child was born to the wife after her marriage to her husband, and during their wedlock and within the usual period of gestation, the law's conclusive presumption is that the offspring is legitimate 1032

ADVERSE POSSESSION—See Lands, 26, 27, 28, 29—

1. after thirty years' continuous, adverse possession of land in this State, all rights of others are barred, no matter under what disabilities the true owner may have labored. 610
2. where a grantee of land took possession of his purchase, not recognizing or admitting the right of any other person to enjoy it, or any part of it, with him, but in hostility to every other title, under a warranty of a complete title, his possession is adverse to any owner who did not join in the conveyance, although such owner may have been an infant 610
3. lands sold at a judicial sale which had been in the adverse possession of the decedent (for whose estate it was sold) and those claiming under him, for more than fifteen years before the suit, which fact was set out in the petition, conferred upon the purchaser a good title thereto 610

AFFIDAVIT FOR CONTINUANCE—See Practice, 2, 3—

a motion for a new trial in this action upon the ground that appellee made an affidavit for a continuance on the ground that an absent witness would swear to certain facts, if present, when after the trial was over appellant learned that the witness would have sworn to the reverse, was properly overruled in view of the ruling of this court in Gibson v. Sutton, 24 Ky. Law Rep., 868, the witness had been present. 54

AFTERBORN CHILDREN—See Wills, 20, 21, 36.

AGENCY—See Attachments, 1; Pleading, 18.

AGENT—See Insurance—

where the agent of an insurance company had the power to issue a policy of insurance no reason can be seen why he could not make a new contract by annulling a space clause upon receiving additional premiums. A contract of insurance is not within the statute of frauds. It is not necessary that it should be in writing, it may be changed by parol, even though the contract provides that it shall only be changed by writing 105

AGENTS—See Contracts, 83, 84.

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1. where a former appeal settled all questions between the parties and nothing remained except to state the claims between them and calculate the interest it was not error to refuse an allowance to the executrix of commissions, or attorney's fees, but the lower court erred in fixing the date from which interest must be computed, May 8, 1888, being the date from which interest must run	19
2. where the appellant dies after his appeal has been filed in the appellate court and the appeal is decided in said court without an order of revivor, the decision of the appellate court is not void, but is erroneous, and the error can be corrected only in the Court of Appeals, and until so corrected is binding upon the parties and the lower court.	2
3. it is elementary that on a second appeal the opinion on the first appeal must be treated as the law of the case, and all questions which were then properly before court are as conclusively settled as if each were specifically referred to in the opinion.	392
4. where appellee had in no way violated appellant's right, no judgment for costs should have been entered against him.	438
5. a motion to dismiss an appeal in this court because the transcript was not filed in time can not be considered unless notice thereof has been given to the adverse party, or unless such motion is made on the regular call of the case.	824
6. on the return of a case from this court to the circuit court, where the entire judgment is reversed, the case stood as though it had not been tried, and the principles announced by this court in its opinion must control the circuit court on the subsequent trial of the case; the language of this court must be understood to refer to the facts then shown to the court.	863
7. in an action on the bond of a tax collector of city taxes for school purposes, such collector can not excuse his failure to collect the taxes on the ground that no notice of the time and place of the meeting of the board of equalization was given, as such notice is required to be given for the benefit of the taxpayer, and if he waives it and pays his taxes the collector must account to the board for the money collected.	864
8. in an action on the bond of a tax collector of city taxes for a graded school, where a part of the district lies outside the city, the failure of the board to take a bond from the assessor of tax did not render the assessment void as to the property lying outside the city as the assessor was a de facto officer, having been regularly appointed and recognized by the board as the assessor.	864
9. the board of education in levying taxes must speak by its records. If the order levying the tax for the year 1899 was void, under the Constitution it was a nullity and gave no authority to the collector to collect tax or retain the money when collected. His obligation as to the money collected is to the taxpayer and not to the public.	864
10. rule 3 of this court authorizes a dismissal of an appeal without prejudice, upon the motion of the appellee, where the appellant has not filed his brief twenty days prior to the day the case is set for hearing; the purpose of the rule is to give appellee an opportunity to file his brief after appellant's brief is filed.	987
11. under section 738 of the Civil Code, providing that "the appellant shall file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal, where an appeal was granted on November 22, 1904, and the appeal bond was given on December 12, and the supersedeas was issued on December 13, the appellee, by filing a copy of the judgment and bond in this court on May 16 following, was entitled on his motion to have the appeal dismissed.	908
12. in an appeal from a judgment allowing a city attorney \$190 against the city for services and salary where the case does not involve the possession of the office, only the salary, this court has no jurisdiction of the appeal.	1066

APPEALS—Continued.	Page.
13. on rehearing the court withdraws the former opinion in this case (26 Ky. Law Rep., 909,) and now holds that though the court had no jurisdiction over the property except to enforce a mortgage lien thereon for an amount that might be found to be due on final trial, yet where a sale of the property would have the effect to divest the owner of a property right, and in such manner as to put it out of the power of the court, after the expiration of the term, to place the parties in their original condition, it was a final order from which an appeal would lie	1175
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APPROPRIATIONS— See Act General Assembly, March 26, 1900; Auditor, 1, 5; Section 184, Constitution—	
1. an aid to the interpretation of this section is a reference to the debates of the constitutional convention, which show that when this section was reported from the committee of education without the proviso it was objected to upon the grounds that it might be construed to prevent further appropriation to the very institutions which have been named, including appellant, when members of the convention, including the chairman, a distinguished citizen and lawyer, disclaimed such a purpose and defended the report by the assertion that it could not properly be so construed, and which, after debate, culminated in the adoption of the proviso	1179
2. another aid to its interpretation is its contemporaneous practical construction by all the other departments of the State government, including the legislature, by which every one of these institutions has been sustained by annual appropriations at nearly every session since the adoption of the present Constitution, which have been approved by the chief executives of the State...	1179
3. the final canon of construction is, where there may be doubt after all sources of aid have been resorted to, whether the act violates the Constitution, the doubt is resolved in favor of its constitutionality	1179
4. this appropriation is not upheld on the ground that it is not a levying of taxes. If an object can not have a tax levied for it if deemed necessary by the proper power, then no appropriation of public money can be made to it. Where the Constitution forbids the levying of a tax for a given purpose it must be held that it also withholds the power of making appropriations for that purpose unless there is something in the Constitution which particularly and unmistakably authorizes an appropriation, which is not the case here	1179
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it is the duty of an assignee before paying out the money of the assignor to know that his estate is solvent, or to have the fact judicially ascertained, else he takes the risk, and if he pay out the estate to some of the creditors, believing them to be all, he is still liable to those he negligently failed to pay	582
ASSIGNMENT FOR CREDITORS— See Building and Loan Associations, 2, 8.	
ATTACHMENTS— See Fraudulent Conveyances, 1—	
1. the tobacco in controversy was raised upon appellant's farm, one-half of it belonged to them and the other half to a tenant. W. E. Monroe, creditor of appellees, did no work in the tobacco, and had no interest in it so far as the record shows. While he had been in the habit of selling the crops made on the place in his own name, he seems to have done this with the knowledge and acquiescence of appellants and as their agents, but this gave him no title to the land or its products. Upon this state of fact it was error to dismiss the petition of appellants seeking to recover for the value of the tobacco in the hands of appellees, the attaching creditors	575
2. an attaching creditor stands in the shoes of his debtor and has no higher rights than the debtor has, and the proof in this action showing the debtor could not hold the tobacco, certainly appellees as attaching creditors can not do so	575

ATTACHMENTS—Continued.

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3. on the day an attachment was sued out against his property a debtor conveyed his property to Wells, who was on his bail bond. Wells did not have to pay anything on the bond, and about ten months later conveyed the property to the wife of the debtor at the latter's request. The record seems to establish a fraudulent intent to defeat the recovery of the appellant's claim. 163-
4. where a defendant in an attachment proceeding sued the sheriff for damages because of the loss of his property while in the officer's possession, the latter can not complain that the judgment was for the entire amount of the property where the attaching creditor was made a party and a lien was adjudged in his favor for the extent of his debt. Such judgment protects the officer from further action either by the creditor or debtor. 998.
5. the act of a deputy sheriff in levying an attachment was the act of the sheriff, and an allegation in appellee's petition that the loss sued on was occasioned by the sheriff's agent, when the proof showed that the employment was by the deputy sheriff, is within the rule that facts may be pleaded according to their legal effect, and the act of the agent in this case was that of the principal. 998.
6. where a defendant in possession of attached property executed bond to perform the judgment of the court, the court did not lose power over the attached property by reason of the execution of the bond. 1004.
7. where the record of a sale of attached property is silent as to why it was sold, and it is not shown that any proof was heard upon the motion for an order of sale, or that the sureties in the attachment bond were insolvent, and where the issues were incomplete and not tried, it was error to direct a sale of the attached property. 1004.
8. while the levy of an order of attachment on a tract of land, by giving the occupant a copy and posting another copy on it, creates a lien on that tract and affects the parties to the action, as well as subsequent purchasers, such a levy can not be extended to another and different tract at least a half a mile distant from the other so as to give a lien on it, which would affect a subsequent purchaser, lessee or incumbrancer. There being no one occupying the land, a lien could only be created on it so as to affect a subsequent purchaser, by leaving in a conspicuous place on the land a copy of the order. 1016.

ATTORNEYS—See Action to Settle an Estate, 1; Divorce and Alimony, 1, 2; Fiscal Courts, 8; Practice—

1. the claim of appellants for an attorney's fee in this action was properly rejected. Whatever may have been the rule anciently, by our present statute the attorney's fee allowed to be taxed in favor of the successful party in cases involving the title to land is all that can be recovered in a case like the one at bar. 51
2. a lawyer should never be disbarred upon testimony of a doubtful character. 87
3. where all the testimony in the case supports the claim the judgment of the lower court fixing an attorneys' fee should be affirmed. 718.
4. under the Code, sections 38 and 59, the court appointing the guardian ad litem or attorney for the nonresident defendant should make him a reasonable allowance for his services. The same rule applies whether the services are rendered in this court or in the circuit court. 1038.

AUCTION SALE OF LOTS—

- where two persons verbally agreed to form a copartnership and to attend an auction sale of town lots and each was to buy in his own name certain lots, and both were thereafter to pay for and own all of them as copartners, and in pursuance thereof each of them did attend said sale and bid in certain lots, of each of which bids a memorandum was kept and signed by the auctioneer, such agreement constituted a copartnership, and the owner of the lot having tendered them a joint deed for said lots and demanded a compliance on their part with the terms of the sale, which they refused, was entitled in a joint action against them to enforce a specific execution of the contract. 505.

AUDITOR—

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| 1. a stipulation in a contract that neither party may resort to the courts is void, as tending to oppression and being contrary to the public policy..... | 957 |
| 2. the auditor of public accounts is a public agent of the State, whose duties and powers are limited by the law. All persons dealing with him in his official capacity are conclusively presumed to take notice of this limitation. Wherein he may exceed his authority his act is void in so far as it attempts to bind the State | 957 |
| 3. the State can not be made liable at all except under a statute passed by the legislature incurring the liability, nor can it then be liable to suit against its auditor to compel him by mandamus to issue his warrant upon the treasurer for the same unless the legislature has expressly appropriated the money to discharge the liability..... | 957 |
| 4. there can be no implied undertaking on the part of the State to pay clerks employed by the auditor otherwise than out of the fund expressly appropriated for the purpose, and then only in such sums as the auditor may in his discretion determine | 957 |
| 5. the fact that the auditor and the claimant have compromised the claim adds nothing to its validity | 958 |

AUDITOR'S AGENTS—

under Kentucky Statutes, section 4259, providing that "the auditor of public accounts may appoint a revenue agent in each county of the State, and may in addition appoint four revenue agents from the State at large, whose term of office shall be four years," a revenue agent appointed on August 28, 1892, for the State at large by the auditor then in office can not be removed from his office by the successor of the auditor who made the appointment, but is entitled to hold his office for four years from the date of his appointment

710

AUCTIONEERS—

the auctioneer's memorandum, signed by him, describing the lots sold and stating the terms of the sale, was sufficient to bind both seller and buyer, and was a compliance with the statute

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AVOWAL—See Claim and Delivery, 8.

BAIL BONDS—

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| 1. in a proceeding upon a forfeited bail bond in the circuit court no judgment can be rendered thereon against the bail in the absence of the record from the examining court showing that the accused was held over and was in custody at the time the bail bond was executed. | 647 |
| 2. the fact that an accused under bond for his appearance to answer an indictment was sick in a hospital, and unable to appear, does not release the bail, which will stand until accused is able to appear..... | 652 |
| 3. offer to surrender the accused when the latter is not present is unavailing and is not a compliance of section 98, Criminal Code. | 652 |

BANKS AND BANKING—

- | | |
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| the fact that the bank in which the stock is held will soon go into liquidation, or have to be reorganized because of its charter, can not affect the rights of the remaindermen or other parties in interest. In case the bank should go into liquidation the chancellor may, upon the petition of the parties in interest, direct the reinvestment of the proceeds in other good securities, to be held for the benefit of the devisees as provided in the will | 868 |
| 2. the evidence upon trial of this action in the lower court for damages, resulting to appellant from the dishonor of his draft upon appellee, does not show that appellant suffered any substantial damages by the failure of the payee to pay his check, but shows that the whole trouble grew out of a mistake by which the proceeds of the note in question were placed to the credit of another. | 874 |
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2. the bill of exceptions failing to show the statements of counsel complained of, they will not be considered		428
3. it appearing from the record that the sixty days allowed by the lower court for the filing of appellant's bill of exceptions had expired before the order was made extending the time, the motion to strike the bill of evidence from the record will be sustained . .		863
4. section 4639, Kentucky Statutes, provides that the official stenographer's transcript of the evidence "shall be filed among the papers to be used in making up the bill of exceptions to the Court of Appeals, but the transcript in this case not having been filed by order of court, the record is here without a bill of exceptions.		518
5. although the Code provides that the time for filing a bill of exceptions shall not be extended beyond a day in the succeeding term, the parties may by consent extend the time		567
6. in a county having six terms of court a year, and by an order of court alternate terms are set apart for the trial of civil and criminal cases, where at one of the civil terms plaintiff's motion for a new trial was overruled, and in the presence of and without objection of one of the opposing attorneys he was given until the 10th day of the next civil term to file his bill of exceptions, and it was filed on the 9th day of said term against the objection of the defendant, the failure of the attorney to object to the extension of the time when it was made must be held to be an agreement to the extension, and a motion in this court to strike the bill of exceptions from the files will be overruled		567
BILLS OF LADING—See Contracts, 19.		
BLOODHOUNDS—See Criminal Law, 2—		
while the pedigree of bloodhounds used in trailing supposed criminals was not asked about nor stated with particularity, yet where it is shown that they were pure bloodhounds and had been carefully trained in tracking men, evidence of their trailing the defendant on the night of the alleged offense was properly allowed to go to the jury for what it was worth as a circumstance tending to connect the defendant with the crime		172
BOATS—See Carriers, 1, 8.		
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BRIBERY—		
there is no statute punishing the bribery of a private citizen, and in order to constitute an officer guilty of taking a bribe it must occur while he is such officer and a reference to a matter that occurred whilst he was a candidate, and before he was elected to the office, was no charge of bribery		826
BUILDING AND LOAN ASSOCIATIONS—		
1. where a building and loan association is insolvent and in the hands of an assignee for the benefit of creditors, a borrowing member will not be allowed to apply to his debt the amount paid by him to the association as dues on his stock, but as to these he stands as any other stockholder, and must take such dividends as are coming to the stockholders on the settlement of the affairs of the corporation		842
2. where two old companies were consolidated and a new one formed which simply succeeded to their rights, took all their assets and liabilities, the renewal of a note to the new company in no way changed the situation of the parties or affected any of their rights, and the case must be determined though the new corporation had continued to hold the note executed to the old association		842
3. the fact the appellee accepted the new stock and was credited thereon for the dues he had paid on the old stock, was an election to continue as a stockholder, and an acquiescence in the dues he had paid to the old company being applied as payments on the stock issued to him in the new. He was thus entitled to all the profits which might accrue to him as a stockholder in the new concern, and took the risk of whether there would be such profits		842

BUILDING AND LOAN ASSOCIATIONS—Continued.	Page.
4. the rule is that a borrowing member of an insolvent building and loan association will not be allowed to apply to his debt, the amount paid as dues on his stock, but to these he stands as any other creditor, and must take such dividends as are shown to be due the stockholders on a final settlement	759
5. as to the dues paid by appellee on his new stock in the new association the rule applies, but it can not apply to his dues paid on the stock in the old company, which had been, by consent, canceled, for as to this he was never a stockholder in the new company. By surrendering his old stock and accepting the credit on his debt he elected to treat these dues as paid on it, and thereafter as to this money only the relation of debtor and creditor existed between him and the association	759
BURDEN OF PROOF—See Account, 2.	
CARRIERS—See Local Option—	
1. in an action by a shipper of a lot of brick against defendant company, who was doing a general towing business on Green river, and who agreed to carry the brick for hire and which was lost while being carried by striking a hidden snag in said river, Held—That while defendant's boats were not common carriers at all times, still if on certain trips when they had no towing to do they held themselves out as ready to carry for all, they would be common carrier for the time being	1122
2. on the trial of the case the jury should have been instructed that if defendant had expressly and publicly offered to carry for all persons, indifferently, or had by its conduct and the manner of conducting its business held itself out as ready to carry for all on such trips as the boat was then making, then it was a common carrier and was liable, although there was no negligence on the part of the defendant in the loss of the brick, but if defendant had not offered to carry for all persons, indifferently, or by its conduct or the manner of conducting its business held itself out as ready to carry for all, but only in each case acted in consequence of a special employment, it was not a common carrier and was not liable unless the bricks were lost by its negligence.	1122
3. where there was any evidence tending to show that the defendant company was a common carrier the case should have been submitted to the jury to determine whether the defendant had assumed the character of a common carrier	1122
CHANGE OF VENUE—See Criminal Law, 42; Homicide, 2; Practice, 1, 2—	
1. unless application be made at the appearance term a party is not entitled to a change of venue, where he failed to give ten days' notice to the opposite party of his intended application therefor, or failed to file a verified petition accompanied by the affidavits of two credible housekeepers of the county	198
2. a party is not entitled to a change of venue by reason of the alleged undue influence of the counsel of his adversary in the "community" where the trial is to be had	198
3. under Kentucky Statutes, section 1118, providing that "no more than one change of venue, or application therefor, shall be allowed to any person or to the Commonwealth in the same case," the first application having been withdrawn, the last one should be regarded as the only one made in the case.	561
4. under Kentucky Statutes, section 1113, providing that "upon granting a change of venue in a criminal case the judge of the court shall direct that the defendant be delivered to the jailer of the county where the trial is to be had," and Ib., section 2238, providing "if in any county the jail is insecure, or there is danger, or probable danger, that a person confined therein * * * will be rescued therefrom by violence, the judge of the circuit court * * * shall by an order * * * direct that such person shall be transferred to the jail of the nearest county in which the jail is secure, and it shall be deemed that he shall be safely kept in the absence of anything appearing in the record to the contrary, it must be presumed that the judge's action in the premises was based upon some of the grounds authorized by the statute	561
CHECKS—See Banks and Banking, 2, 3.	

CHILDREN—See Deeds, 2, 5.

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CITIES—See Ordinances, 1, 2, 3; Damages, 10, 14.

1. an ordinance enacted by a board of town trustees, providing for the extension of the town limits one-third of a mile from the public well from a certain corner in each direction of the compass, is sufficiently definite, and the criticism that it should have stated from what part of the well is not apt, but the beginning point may be assumed to be the center of the well... 745
2. permitting the answer to be filed in this action after the expiration of twenty days was in the discretion of the court..... 745
3. where property was not situated within the corporate limits of a city on the date at which it should be assessed for taxation, it was not liable to taxation in that city for that year (sections 3535 and 3533, Kentucky Statutes), and the property of appellant not having been annexed to the city of Latonia at the time fixed for its assessment by these statutes, it was clearly not subject to taxation there for that year, but in South Covington, from which it was transferred, if it was subject to a tax at all..... 746
4. in an action against the city by the owner of about eight acres of land therein, on the margin of which the city opened two sewers, discharging thereon a deposit of foul matter to the depth of two or three feet, on which there was a pretty pond which was thereby made a cess pool, and which filth spread over about three acres of the land, impregnating and poisoning the air, and destroying the comfort and endangering the health of persons living several hundred yards away, a verdict for \$2,250 under all the evidence is held not to be excessive..... 962
5. on the trial of the case the court gave the following instructions, which are held to be correct. "1st. The jury are instructed to find for the plaintiffs such damages as they believe from the evidence resulted to the plaintiffs' property from the discharge of sewerage from the Bank Lick street and Holman street sewers, and the deposit thereof on the plaintiff's property between May 21, 1898, and May 24, 1903..... 962
6. "3d. In ascertaining said damages, the jury are instructed that there are two measures of damages: First, the diminution in value of the plaintiffs' property caused by said discharge and deposit between said dates, if there be any such diminution in value; and, second, the cost of restoration of said property to the condition it was in on May 24, 1898, if any such restoration be possible..... 962
7. "3d. If the jury believe from the evidence that it is practicable and possible to restore said property to its condition on May 24, 1898, then the jury will adopt the one of said measures of damages which will result in the lesser damage to plaintiff's property, not to exceed \$5,000"..... 962
8. the difference between the value of the property when the injury was inflicted and its value after the injury is not the proper measure of damages, where it is shown that there has been an increase in the value of the land due to the general enhancement of property in the neighborhood from the growth of the city..... 962
9. the court properly allowed the plaintiffs to show what was the expense of filling the place that was covered with slime, as this evidence tended to show the extent of the injury, and it was competent to show that they had used ordinary care to reduce the damages. The effect on the health of the neighborhood was also competent for the same reason, and to show why the market value of the property was lessened..... 962
10. under section 157 of the Constitution, providing that "no city * * * shall be authorized or permitted to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the voters thereof voting at an election held for the purpose," where under an ordinance of a city of the fifth class the proposition was submitted to the voters of said city to incur an indebtedness of \$15,000 and issue bonds therefor, for the erection of a school building therein, more than two thirds of the voters voting on said proposition were cast in favor thereof, the proposition was adopted, although the number of votes cast in favor of such proposition was not equal to two-thirds of all the votes cast at said election on other questions then voted on.. 994

CITIES—Continued.

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11. where the Constitution authorizes the incurring of an indebtedness by a city, county or taxing district by the assent of two-thirds of the voters of such city, county or taxing district, voting thereon the legislature can not add to such constitutional restriction, and the case of *Belknap v. Louisville*, 99 Ky., 474, in so far as it holds otherwise is overruled 994.

CITY TAXES—See Interest—

while Kentucky Statutes, section 2981, provides that the various named subdivisions of the city government, including the schools, shall receive their proportionate part of the tax bill after it is collected, there is no provision which in terms imports that they shall receive any part of the interest accruing on delinquent taxes. Each must receive that which the statute gives it, but they have no right to any part of the interest on the delinquency in the absence of an express provision of the law governing the matter. 209.

CLAIM AND DELIVERY—

1. in an action for damages in detaining logs that floated out and lodged on plaintiff's land, to which defendants pleaded a counterclaim for damages done by plaintiff to his land in permitting his logs to get loose, float on and injure his land, it is too late after the trial and verdict for the plaintiff to raise the question of the impropriety and irregularity of permitting defendants to file their counterclaim and have it litigated on the trial of plaintiff's action for claim and delivery of personal property. 798.
2. it was not improper for the court to say on the trial, after six or seven witnesses had been heard, "that is enough evidence on that point," where it is not shown that the remark was heard by the jury. 798.
3. we can not consider an alleged error of the court in refusing to permit a witness to state a contract he had made with one of the appellees, where there is no avowal of what the witness would have stated in answer to the question. 798.
4. it is the province of the jury to determine the amount of damages from the evidence, and the court should not interfere unless the verdict should be flagrantly against it. 798.

CLERKS OF COURTS—See Transcripts, 7.**COLLATERAL ATTACK—See Settlements, 2.****COMMISSIONER—See Accounts, 1.****COMMONWEALTH'S ATTORNEY—See Bill of Exceptions, 6, 7; Homolde, 6, 7—**

if the Commonwealth's attorney who prosecuted a case has received all the money that is coming to him, that is, \$4,000 per year, then his prior right to a per cent. on judgment collected after he has gone out of office ceases, and the Commonwealth's attorney who is in office when the money is paid into the treasury, if he has not received his \$4,000 for the year, is entitled to the per centum. 189.

COMPROMISE—See Auditor, 5 Railroads, 43, 44.**CONDEMNATION PROCEEDINGS—See Railroads, 33, 35.****CONSIDERATION—See Contracts, 23, 27; Infants, 4; Mortgages, 4, 5.****CONSTITUTION—See Cities, 1.****CONSTITUTIONAL LAW—See Appropriations, 1—**

section 7 of the Constitution provides "that the ancient mode of trial by jury is to be held sacred and the right thereof to remain inviolate," was not intended to be so strictly construed as to prevent the due and proper administration of justice in cases of complicated accounts when the remedy at law was deemed inadequate, so that a jury could not arrive with accuracy upon the condition of the account between the parties. 400.

CONSTRUCTION OF STATUTES—

the common law remedy for the obstruction of public roads has not been supplanted by chapter 110, Kentucky Statutes. (20 Ky. Law Rep., 604) 29.

CONSTRUCTIVE TRUST—

1. constructive trusts are held not to be within the statute because they rest in the end on the doctrine of estoppel, and the operation of an estoppel is never affected by the statute of frauds. 536.

- CONSTRUCTIVE TRUST—Continued.** Page.
2. the fact that the purchaser of the land paid the consideration himself does not destroy the trust, where the purchase was made for another, who offered to pay it, and was kept from paying it by the act of the purchaser, who refused to accept it, and had the deed made to himself 536
- CONSTRUCTION OF WRITING—**
- the paper sued on limits each subscriber's liability to a pro rata proportion of the total amounts subscribed. No one guarantees the solvency of another, or that another subscription will be paid. The association risked the solvency of each subscriber, and where any are insolvent the association will bear that loss..... 89
- CONTEMPORANEOUS CONSTRUCTION—**
- the contemporaneous construction of legislation for a long period of time by those charged with its enforcement is highly persuasive of the correctness of that interpretation, and the city council having acted upon this construction of the statute for a long period of years, illustrates the necessity of the courts giving great weight to such contemporaneous construction of the statute 209
- CONTESTS—**See Primary Elections, 5, 14.
- CONTINUANCES—**See Criminal Law. 43.
- CONTRACTS—**See Auditor, 1; Evidence; Lands, 1, 2; Lease; Life Insurance, 19, 21; Sale of Timber, 1, 3—
1. where the contract for the building of a house provided for arbitration, in case of disagreement between the parties, there being nothing in the record showing that appellant dissented from the decision of his architect upon any of the matters in dispute, or that appellant ever asked arbitration before the bringing of this action by the contractor, or asked it in his answer, the lower court was not without jurisdiction, and the judgment for the balance of the contract price was properly rendered 12
 2. where the petition alleged, in this action upon a contract for services rendered as overseer, that appellant performed the labor at the special instance and request of the deceased; that he looked after her farm and stock, collected her debts, paid off her indebtedness and transacted all of her business, and the evidence conducing to substantiate these allegations and the further allegation that deceased agreed and promised to pay for these services, it was error for the lower court to peremptorily instruct the jury to find for defendant..... 12
 3. the evidence conducing to show that appellee was seventy-four years of age, in infirm health and illiterate; that the mineral rights were worth much in excess of the amount appellant agreed to pay for them; that appellee had another tract of land which was the one he thought he was selling the mineral rights in; that he was induced by the nephew of appellant, who was a secret partner of appellant's in the transaction, to go over to appellant's house where the conveyance was signed, and there given whisky, the lower court improperly adjudged a specific performance. The purchase money paid should be returned appellee and the action dismissed 88
 4. where parties to a contract have written and signed a memorial of their undertaking, it is conclusively presumed, in the absence of fraud or mutual mistake, that the whole of the undertaking and all negotiations leading up to it, are merged in the writing. The writing is the best evidence, and so long as it can be produced is the only evidence of what the parties have agreed to do and of their whole meaning with reference thereto 181
 5. in construing a written contract by which T. and H. agreed with T. to take charge of T.'s farm of 125 acres, lying adjoining the city of W., and lay it off into lots, by streets and alleys, and to pay T. \$600 per acre for two-thirds of the whole tract, and to allow T. to retain the other third of the land so divided, an allegation by H., in pleading a mistake in the contract, is not available unless it alleges a mutual mistake of both parties to the agreement 182
 6. in an action for damages for a breach of contract to sell land, where the breach alleged is an abandonment of the contract by the vendee and a refusal to execute his part of it, it is not neces-

CONTRACTS—Continued.

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|---|-------|
| sary for the vendor to tender to his vendee a deed to the land when the vendee has declared that he will neither pay for the land nor accept the deed | 182. |
| 7. in an action on a written contract by a vendor against the vendee for damages for a breach of his contract to sell land, while it was a necessary allegation in the petition that plaintiff was willing, able and ready to convey the title to the land, it affirmatively appearing after verdict and judgment that plaintiff was able, ready and willing to convey, the failure to make such allegation in the pleading was cured | 182. |
| 8. where the vendee of an executory contract to buy land abandons and refuse to comply with its terms, the vendor upon electing to proceed for damages for the breach may, after making his election, and after the time when by the terms of the contract the conveyance was to have been made, dispose of the property by sale or mortgage without regard to the contract | 182. |
| 9. in an action by a vendor against a vendee for damages for the breach of an executory contract to buy land, the quantum of damages is the difference between the contract price and the actual value of the land at the date of the breach, and to which interest may be added | 182. |
| 10. under a contract by a city with a water company to supply the city with water, such company is liable to an individual property owner for damages by fire resulting to her property from lack of water | 282. |
| 11. in an ordinary action for breach of contract the general rule is that time is always of the essence of the contract, and a party who seeks damages for a breach of contract must show a compliance by himself of his own precedent covenants within the time required by the agreement | 380. |
| 12. even in equity, if it be apparent from the contract that the parties so intended, time will be considered of the essence of the contract, and a strict performance within the time fixed will be considered a condition precedent to an action for a breach | 380. |
| 13. the general rule for construing a contract is to take it as a whole, and if possible ascertain the true meaning of the parties, and where there is ambiguity or doubt as to its meaning it should be resolved against the party preparing it, if it can be done without violence to the rights of the parties thereto | 421. |
| 14. while an agreement to devise land is not enforceable under the statute of frauds, unless in writing, yet where the party has received the consideration of the contract the court will not allow him to rely on the statute and keep the consideration | 792. |
| 15. where the party who has performed the contract can not be restored to the situation in which he was before the contract was made, the contract itself is the best evidence of the value of what has been received | 472. |
| 16. under a contract by which appellants agreed to deliver lumber on board cars at Bowen, Ky., where appellant delivered twenty carloads, nineteen of which appellee accepted and paid for without complaint, in an action by appellant for the agreed price of the remaining car it was error for the court to permit appellee, the purchaser, to plead as a counterclaim damages for alleged defects in the nineteen carloads which appellees had inspected, accepted and paid for, as appellees were stopped to claim damages therefor | 621. |
| 17. in an action for a breach of a continuing contract the plaintiff has a right to sue at once for his entire damages without waiting for the expiration of the contract period | 636. |
| 18. evidence considered, and, Held—That appellee was guilty of a breach of its contract for the shipment of phosphate rock to appellant | 680. |
| 19. a delivery of a bill of lading is a symbolical delivery of the property which it represents, and where by the terms of a contract two tanks of oil were sold and the bills of lading therefor were delivered to a bank to be disposed of by the bank at current market prices and the proceeds applied in a given way, the title to the oil under the laws of Louisiana, where the contract was made, vested in the bank and was not subject to an attachment by the consignee in Kentucky | 645. |

CONTRACTS—Continued.

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20. where a creditor has part of his debt secured and part unsecured, the law does not apply a payment by the debtor to the older items of the account, but will apply it to the unsecured debt 645
21. in an action to enforce a lien for lumber furnished for the erection of a dwelling house, which was controverted, and on the trial was dismissed by the court on the evidence, the appellant is not entitled to the favorable consideration of the court in alleging that appellee while intoxicated, in consideration of \$5 paid to him by appellant, agreed to withdraw his defense, while at the said time appellee was not the owner of the house nor in possession of it, and this fact was known to appellant. 686
22. B., in consideration of \$1, leased to F. & Co. the right to go on his land and prospect for oil, coal, gas and all other minerals, the said F. & Co. to have four months from date of contract to determine whether they would accept the grant, and if accepted to so notify B. in writing, and to have two years from date of acceptance to prospect and locate said minerals, and as compensation to give B. 10 per cent. of the product in the dump at the mine. F. & Co. gave notice of acceptance, sunk some wells on adjacent lands, finding some oil and gas, and within the two years applied to B. to make deed of conveyance to said mineral rights, which B. refused. Held—That the contract when accepted bound the lessees to, within two years therefrom, explore the land by actually sinking a well or wells upon it. If oil or gas or coal was found therein in paying quantities then the lessees were bound to diligently work and operate same so as to bring the product to a present market, and so as to promptly yield to the lessor his royalty; that unless the lessees did so actually develop the land in question, and in good faith and diligence operate it, the lease should be deemed abandoned, and in no event were the lessees entitled to a deed provided for by the option, until, as the result of such actual development within the life of the contract, gas, oil or coal was found in paying quantities. 724
23. such contracts lack the mutuality essential to their validity. A unilateral executory contract is, in law, nudum pactum, and is unenforcible. Where it is left to one of the parties to an agreement to choose whether he will proceed or abandon it, neither can specifically enforce its execution in equity, nor is a recited consideration of \$1 sufficient to uphold an action for the specific enforcement of a contract otherwise unsupported by consideration. 725
24. where a sale of property is made by a drummer subject to the approval of the principal, it is a mere order for the goods and is revocable at any time at the option of the party giving it until accepted by the principal and notice of such acceptance is given to the purchaser, and the order may be withdrawn at any time by the purchaser before its final acceptance 832
25. where it is admitted that the telegram was to be delivered at Pineville in this State, it follows that the contract could not be fully performed without such delivery in this State, and if the failure to deliver it within a reasonable time was negligence, it is immaterial whether the negligence was that of its West Virginia or its Kentucky agent, as in either case it caused a breach of its contract in this State, which entitled appellant to receive some part of the damage claimed 858
26. G. and M. agreed in writing with M. to build a house on M.'s lot at \$5 per month for the lease of the lot until the house was built, and then \$5 per month for the rent of the house until the cost of the building of the house was paid for, and if they left it before paying for it, it was to belong to M. G. and M. procured appellants to build the house at an agreed price and assign them the contract as collateral, and abandoned the building before paying for it, and M. then took possession and refused to pay the contractors. Held—That the contract was such as gave G. and M. a longer lease than two years and was assignable without M.'s consent, and the appellants, as assignees of G. and M. were entitled to the house by paying M. the agreed rent of \$5 per month until the cost of the building was paid for 870

CONTRACTS—Continued.

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27. where a parol contract was made between appellant and appellee by which, in consideration of the use of his land for the construction of its telephone line, appellee was to give appellant free telephone service, an action to enjoin appellee from removing the box and interrupting his service is not an action within the meaning of the statute to charge appellees upon a contract or sale of real estate, and is not an action upon a verbal contract which was not to be performed within a year 868
28. under the facts as above recited appellant did not have a complete remedy at law, and, therefore, an injunctive proceeding was the proper one to preserve his rights. 869
29. where it is clearly stated in a contract that the consideration for transfer of designated property are services and assistance to be thereafter rendered, a purchaser from one under such contract must have known that he took only their rights, and he should have inquired what they were and what the contract was in this regard. 900
30. the appellant under the contract relied on in this action only bought one-half of appellees' rights, whatever these rights might turn out to be, and there can not be an implied warranty from this contract that appellees owned one half of the property referred to, and his cause of action not having been instituted within ten years after the cause of action accrued, his action to recover upon the contract was barred by limitation 900
31. where a letter from a dealer in yarns, fixing the price at which he proposed to sell his goods, was received by the buyer at Paducah on Saturday after business hours, and was answered both by telegram and letter on the following Monday, accepting the proposition at the price named, such acceptance was within a reasonable time and made it a binding contract between the parties, for a breach of which the seller is responsible in damages. 967
32. in an action to recover for goods sold by sample and warranted to be the same in quality, material and in all other respects as the sample and the purchaser agrees to examine and inspect them, and each part thereof at once upon their arrival, and if they fail to comply with the warranty he shall give written notice in five days thereafter by registered letter to the owner, otherwise the warranty is waived, in which the purchaser pleaded that when the goods were shipped to him they were in such condition that the quality could not be tested within five days, and that they were worthless and of no value, and this was known to plaintiff when the goods were shipped. Held—1st. It was error in the court on the trial to instruct the jury that if the goods were of no value for the purpose for which they were sold and purchased at the time they were delivered to plaintiff, they should find for defendant, for if the goods were of value for any other purpose there was some consideration for the contract. 1085
- 2d. Where the purchaser was an experienced druggist and knew whether the goods bought could be examined within five days, he can not be relieved of a contract deliberately made on the ground that it would be inconvenient for him to examine them within five days. If the defects could not be determined in five days he should not have made the contract. Contracts must be enforced as made 1085
- 3d. If the plaintiff under cover of the contract and knowing that the goods could not be tested in five days, knowingly sent inferior goods for the purpose of perpetrating a fraud on the defendant they can not recover if the defendant within a reasonable time discovered the defect to the goods and offered to return them 1085
- 4th. If the defendant after discovering the defects in the goods continued to control and sell them before giving notice to and offering to return them, then he is liable, but if after the plaintiff refused to take them back the defendant inadvertently sold some of them not with the intention on his part to treat the goods as his own, he would be liable only for the goods so sold 1085
33. in making a contract for services to be rendered the whole correspondence between the parties with reference thereto is admissible in evidence on a trial for a breach of the contract. 1042

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84. in an action on a breach of contract for employment, which was made by J. K., as president of defendant company, where the evidence shows that J. K. was an officer and agent of the company, and authorized to make contracts with reference to its business, there was sufficient evidence to allow the case to go to the jury.....1042
85. on the trial of an action for damages for breach of contract for improperly discharging employe, who had a contract for twelve months' service at \$100 per month, the court properly instructed the jury that if they found for the plaintiff they should award him the sum of \$1,200, less any amount that he earned during the year, or that he might have earned by the exercise of such diligence during that time as an ordinarily diligent person usually exercised under similar circumstances and it was not error in the court to refuse to give an additional instruction asked by defendant as to the duty of the plaintiff to seek other employment, and thereby reduced the damages.....1042
86. the construction of words in a written contract is for the court generally; if ambiguous the meaning intended may be gathered by the aid of parol or other extrinsic evidence, or if used in a sense peculiar to some special calling or trade the custom may likewise be shown by parol, which has given the word its extraordinary meaning in the case.....1155
87. terms in contracts in which time is the essence are construed according to the common or general meaning of the words. This is because they come to be so frequently employed in a different sense from that of their former meaning that the changed meaning comes to be the common one. Of these changes the court must take notice as they do, judicially, of all matters of common knowledge.....1156
88. contracts to begin or end at an hour certain, without naming a standard for reckoning the hour, must be deemed to have intended the system in most common use. Or, if more than one standard was in use at the place where the contract was to be performed, and as both could not have been intended, it is admissible to prove the prevailing custom at the place of performance in the business of which the contract under consideration partook, that the court might determine which was probably in the minds of the parties.....1156
89. in determining whether the word "noon," as used in a written contract of insurance, meant 12 o'clock standard time, the following guide should be given to the jury: "If the jury believe from the evidence that at the time the policy of insurance was issued there existed in the place where the contract was made a custom or usage with reference to the meaning of the word noon, so well settled, uniformly acted upon, and of such continuance as to raise a presumption that plaintiffs and defendants knew of it, and entered into the contract of insurance sued on with reference to it, such usage will govern the jury in arriving at their conclusions".....1156
40. if a fire broke out in the insured building before the policy expired, and continued to burn thereafter till it was totally destroyed, the loss is one occurring within the insured period. It is all deemed one event and not severable. A damage begun is damage done where the culmination is the natural and unbroken sequence of the beginning, but where the fire did not break out in the insured building before noon of the day the policy expired, the company is not liable although it was inevitable, at the noon hour, that the building would be destroyed by the fire then raging which had broken out in another building1156
- CONVEYANCES—See Deeds; Lands; Deeds of Partition; Fraudulent Conveyances; Mortgages, 4, 5.**
1. where a father conveyed a house and lot to his daughter and delivered her a deed thereto, and later induced her to redeliver the deed to him, which he, with the understanding that he would convey other property to her in exchange therefor, and afterwards sold and conveyed said property to another, but did not convey to the daughter any property in lieu thereof, it is equitable that said daughter should be reimbursed out of her father's

CONVEYANCES—Continued.

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- estate for the value of the house and lot at the time she redelivered the deed to him 111
2. where property conveyed by deed by a mother to her daughter was afterwards devised by the mother to said daughter, the daughter could not take the property under both the deed and will, and the daughter having elected to take under the will, is thereby estopped to claim it under the deed 124
3. a conveyance made to appellants, by direction of appellee, of certain lots owned by appellee, upon a writing by which appellant agreed to let appellee have \$211.87 in money to redeem same, and that appellee should sell the lots by a named date and repay appellant the money, with 8 per cent. interest, and to pay appellant the money which the lots sold for up to the amount of his debt, and those he failed to sell was to belong to appellant, if the debt was not all paid at said date, is adjudged to be a mortgage, and appellee adjudged to be the owner of the unsold lots, with a lien thereon to appellant for the balance unpaid 230
4. where property was conveyed to Wilson and wife for life, with remainder to their child or children, but if no child or children be alive at their death, then to the heirs of Wilson, the children took a defeasible fee, conditioned upon their being alive at the death of the survivor of their parents; and if at that time no child of the marriage should be alive then the property is to descend to the collateral heirs of Wilson. Therefore, upon the death of Wilson, his widow and children could not convey the property 353

CO-OPERATIVE INSURANCE—See Insurance, Life, 2.

COPYING RECORD—

when in a petition for a rehearing it is shown that in copying the record the clerk omitted the word "no" before the word "credit," and so made the sense just the opposite of what was expressed in the original record, and the opinion is based on this matter, such opinion is withdrawn and a rehearing granted and the case continued for further consideration, with leave to file additional briefs 609

CORPORATIONS—See Building and Loan Associations; Constitutional Law; Fraud—

1. thirty six persons subscribe various sums for the purpose of organizing a telephone company, and appointed a committee of nine of their number to prepare articles of incorporation, five of whom agree on articles which the other four refuse to accept, and which the remaining subscribers also refuse to accept, and the five members proceed to organize a corporation under one name, while the other thirty-one subscribers also organize under another name, the latter holding the subscription list and money paid in, for which the corporation composed of the five members has brought this suit. Held—That the subscribers for the stock of a proposed corporation, before they are incorporated, are partners in the business which they have in hand, and a committee appointed to prepare articles of incorporation are merely agents of the larger body, and it is not obligatory on the larger body to accept the articles prepared by such agents, and the larger body had the right to reject the same, and adopt articles of their own, and having done so the larger body are entitled to the assets of the partnership 30
2. the question as to whether a trading partnership or corporation who subscribed the paper is bound thereon, because the undertaking was contrary to the charter, or not within the original scope of partnership, is not decided under the pleadings. If all the partners agreed to it or ratified it, and the association has thereby been induced to act upon it, between the copartners and the association it ought to be binding, and if a street railway induced the association to locate its fair at a certain point, where it could get a monopoly of carrying visitors to and from the fair, it would be liable 39.
3. in this action appellee seeks to recover against appellants the amount of judgments recovered by them against the Ashland and Catlettsburg Street Railway Co. which, after these judg-

CORPORATIONS—Continued.

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- ments were rendered and a return of no property found, was merged in appellant company. The fact that the former company was insolvent when the transfer was made is not a material inquiry. The rule is that where one corporation goes out of existence by being merged into another, the liabilities of the old corporation are enforceable against the new one, just as if no change had been made 75
4. legislation creating a corporation for draining swamp lands near a city, and thereby improving the health of the community, is a matter of public concern, and is not unconstitutional as special legislation. The fact that it is attended by some private benefit not enjoyed by the general public does not take from the work the quality of being for the public service 278
5. an amendment to the charter of a corporation organized to drain swamp lands, which recognized the "Pond Settlement in Jefferson county," as being the district to be drained, is sufficiently explicit to refute the claim of uncertainty as to the subject of the legislation 278
6. where the charter of a corporation organized to drain swamp lands provides for the appointment of commissioners, to assess a tax on certain adjacent lands, who were required to and did report their action to the Jefferson Chancery Court, which confirmed their assessment, a levy and collection of a tax so assessed is not a "taking of private property without due process of law," within the meaning of the Federal or State Constitutions, and the fact that the notice was by advertisement in the press and by posters instead of actual service of process, does not militate against the conclusiveness of the judgment of said court. 278
7. in an action by creditors of a defunct "investment company" against the stockholders to enforce payment of the balance due on their stock, alleging the insolvency of the corporation and for the appointment of a receiver, a failure to allege any indebtedness on the part of the corporation to the plaintiffs, or a failure to pay any supposed indebtedness due from the corporation to plaintiffs, and no proof that the stock was purchased with notice of its infirmity or in bad faith to defraud creditors, the petition of the plaintiffs was properly dismissed by the chancellor 820
8. under Kentucky Statutes, section 744, providing that "existing corporations transacting the business provided for in this act may * * * continue in business as though incorporated under this act," a title insurance company created by special act of the legislature prior to the adoption of the present Constitution, although acting under its old charter, is restricted to the exercise of powers specified in Kentucky Statutes, section 728, adopted March 19, 1894, and is not subject to assessment for franchise tax 346
9. under Kentucky Statutes, section 549, it is not necessary for a stockholder to sign a subscription in order to render himself liable to creditors for the full amount of unpaid subscription where he accepted the certificate of stock 657
10. under Kentucky Statutes, section 547, the liability of stockholders for unpaid subscriptions is not affected by the fact that their subscriptions were to be paid by the surrender of their old stock, but they should be held liable for the difference in the amount they actually paid and the amount of stock they received at its par value 657
11. where fraudulent representations are made to induce a subscription to the stock of a corporation it is not ground for the avoidance of the contract of subscription either as against the corporation or its assignee, after its insolvency and assignment for creditors, where there was laches in failing to discover it 657

COSTS—

1. under Kentucky Statutes, section 891, which provides that "on reversal of a judgment in the Court of Appeals the appellant shall recover of the appellee such costs as the judges in their discretion shall award," in view of this statute and the apparent unnecessary volume of the record, containing more than 1,000 pages, and the peculiar facts of the case, it is ordered that appellant pay one-half of the costs incurred in this appeal to the

COSTS—Continued.

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- clerks of the lower court and this court for the transcript and the copy of the record, and that he recover of appellee the remainder. 529
2. where attorneys for both appellant and appellee withdrew transcript of record from clerk's office of Court of Appeals, the custom having been uniform to charge for but one copy, this court is unwilling to change it. To charge for two copies where they have not been made has not been recognized by the legislature, and would be an undue addition to the cost of litigation, already very burdensome. 458

COUNTIES—See Roads and Passways, 1, 4.

COUNTY BOARD OF HEALTH—See Office and Officer—

1. in an action against the county by a county health officer for his services for one year in inspecting localities and persons thought to be infected with contagious diseases and for treating such diseases, an answer by the county denying, upon knowledge or information, that the plaintiff had been appointed health officer, or a member of the board of health, was a sufficient denial, as these boards are not required by statute to keep records of their proceedings. 86
2. the county board of health has not the power to delegate its duties to the county health officer in the matter of looking after epidemics of contagious diseases. It is to the county board and not to the health officer that is committed the duty of examining into these nuisances and conditions of filth and infection that tend to spread contagious diseases, and it must act as a board on each case or epidemic as it arises. 86
3. a petition for pay for services by a county health officer which fails to show that the patients were not able and willing to pay for the service rendered them, or that they were indigent persons or that any of them were treated in the county pest house or other place where they were confined, by order of the board of health, or that they were treated by order of the board of health, is demurrable. 86

COURTS—See Bill of Exceptions, 1, 2, 3; Change of Venue, 1, 2; Fiscal Court, 1, 5—

1. a special term of the circuit court provided for in Kentucky Statutes, section 964, may be called either by the order of the court made during the last preceding regular term, or by notice signed by the judge and posted at the courthouse door for ten days before the special term is held, and grand and petit juries may be summoned for, and criminal and penal cases tried at, such special terms, nor do we think it material whether the juries for the special term were ordered to be summoned before or after the beginning of the special term. 569
2. it was not error for the court to permit an attorney other than the regular attorney for the Commonwealth to state to the jury the nature of the charge against the defendant. 569

CRIMINAL LAW—See Bribery; Bloodhounds; Evidence, 1; Homicide, 1, 14; Indictments, 1, 7; Primary Elections, 4; Robbery; Shooting in Sudden Affray—

1. under section 506 of the Code, which applies to criminal trials as well as civil, a party introducing a witness may impeach him by showing that he has made statements different from his present testimony, but such evidence must be limited in its effect upon its impeachment of the witness, and in this prosecution the failure of the trial court to admonish the jury that testimony tending to prove that one of the prosecuting witnesses had made statements different upon the examining trial to those testified to by him upon the trial in the circuit court, should be considered solely as affecting his credibility and not as substantive testimony against the accused, was error. 50
2. upon the trial of appellee, charged with the burning of property of Hiram Cawood, it was error to peremptorily instruct the jury to find for the defendant, the proof showing that the property was in the name of his wife. 181
3. upon the trial of appellant the court permitted the prosecution to prove that some weeks after the killing he returned to the house where it occurred and indulged in conduct indicating that he

CRIMINAL LAW—Continued.

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- was being lashed by a guilty conscience; that he said he wanted to pray for those boys; that he had to kill them in his self-defense. Held—That the whole circumstances was immaterial, and should not have been admitted, yet it was not prejudicial to accused..... 187
8. where there was nothing in the testimony of appellant to show that he at any time abandoned the difficulty in good faith before he mortally wounded the deceased, he was not prejudiced by a qualification added to an instruction authorizing an acquittal upon the grounds of self-defense or apparent necessity..... 145
5. where there is any testimony to show the accused guilty this court will not reverse a case for lack of evidence..... 158
6. the defendant was not prejudiced by the fact that the court instructed the jury under the conspiracy count, as he was only found guilty of voluntary manslaughter..... 214
7. the fact that the trial court ordered a jury summoned from an adjoining county to try the case was not error, and, moreover, this court is without jurisdiction to review the decision of the trial court in the matter of selecting the jury, under Criminal Code, section 281..... 214
8. where the evidence upon the trial of appellant was to the effect that an outhouse of Mrs. Hunt was broken into and three chickens were stolen therefrom; that in order to get into the outhouse the door had to be unfastened and that it was securely fastened the night before the breaking into it after it was seen that all the chickens were there; that the chickens were found the following morning in the hands of a merchant who had bought them from Heisler who bought them from appellant the jury was authorized to conclude that appellant was guilty..... 355
9. an instruction which in substance told the jury that if they believed the house of Mrs. Hunt was feloniously broken into and chickens taken therefrom by a person other than appellant yet if they believed that at the time appellant was present aiding and abetting such other person in the commission of the crime they should find him guilty while inaptly worded was the law and was authorized by the evidence..... 356
10. upon the trial of appellant the Commonwealth proved by Felty that he had a conversation in the jail with appellant in which the latter told him he got the chickens from Worthington but did not know where the latter got them and that witness after this asked Heisler where appellant told him he got them and Heisler said that he told him from Worthington. Held—That this was incompetent but instead of being prejudicial to appellant was beneficial to him as it tended to contradict Heisler who testified that appellant told him the chickens were his..... 358
11. where a petition accompanied by the necessary affidavits were tendered and motion entered for change of venue before the jury was sworn it was error to overrule the motion on the ground that it came too late because the preparation for trial had begun. The trial had not begun until the jury was sworn and moreover the state of facts presented authorized the change of venue and until they were controverted the court did not have the discretion to refuse the application..... 396
12. as to whether or not there was any evidence conducing to show the guilt of appellant for this question see section 340 Criminal Code and note 20 and cases there cited..... 448
13. where one Fraverty testified upon the trial of this case that he was so near the parties at the time the shot was fired that blood spurted from the wound inflicted upon deceased upon his (witness') clothing and the appellant introduced testimony to show that this witness was not present at the time of the difficulty. Held—That the Commonwealth had the right in corroboration of its witness Flaverty to show that there was blood upon his clothing and where appellant's witness did not state what Flaverty said to him about it there was no error..... 448
14. where it appears that the Commonwealth's attorney did not connect appellant in any way with previous crimes in Bell county this language: "That more than a score of men perhaps had been killed in Middlesborough, Bell county, Kentucky, and

CRIMINAL LAW—Continued.

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nothing had been said about it because the people up there were afraid to talk about it' was not prejudicial to appellant	448
15. appellant's defense upon this prosecution was that the pistol with which deceased was killed was discharged accidentally and without knowledge upon his part that it was loaded, and it was error for the court to omit the giving of an instruction submitting the plea of self defense	527
16. the practical issue, sharply presented, upon this appeal of appellant, who went to Brown's house and when ordered away shot and killed the latter, was whether the appellant acted in his necessary, or apparently necessary, self defense, and under the evidence appellant's right of self-defense, even if his life was in peril, as he claimed when shot, depends upon the principle that if he brought about the peril by his own felonious act, he can not justify the taking of human life to extricate himself from it. The language of the instruction complained of got before the jury the idea that one himself beginning a felonious attack upon another, if bested in the fight, can not, when the battle turns against him, strike to save his own life so jeopardized. Appellant makes no claim to having withdrawn in good faith, nor is it true that his belief that he was about to be assaulted was by the instruction allowed to justify the shooting of appellant	547
17. the jury must understand, if they comprehend any part of their duty, that the law of the case was for their guidance, and the whole of it was continued in the court's written instructions, and that none of these instructions was paramount to the other, but must be read and considered as a consistent whole	548
18. the criticism of an instruction authorizing decedent's right to protect himself if he believed, and had reasonable grounds to believe, that appellant was then and there about to assault him, is not substantial. The pointing of a loaded gun at deceased, with threatening attitude by appellant, who was an intruder, was more than a simple assault, and deceased's belief was a proper element of his action if he did undertake to protect himself	548
19. under Kentucky Statutes, section 807, making it a felony for any person to "willfully and maliciously * * * do any act whereby an engine or car might be upset or thrown from the track," where a boy twenty years of age, in stealing a ride on a train, turned an angle cock which applied the air to the brake, which had the effect to stop the train, but the proof shows was calculated to bring it to a sudden stop and throw it from the track, where there was evidence tending to show that the boy did the act without knowledge of its probable consequences, and if this be true his act was not malicious, the court should have given an instruction to the jury submitting the question as indicated	620
20. on the trial of one for homicide the widow of the deceased is a competent witness to prove the dying declarations of her deceased husband made under a sense of impending death	677
21. a boy twelve years of age, while not able to define the legal obligation of an oath, but did know that by being sworn he was required to tell the truth and would be punished for it if he did not do so is a competent witness on the trial of one for homicide	677
22. whether one's religious training has been so developed that he comprehended his responsibility to God for lying is not material as affecting his competency as a witness in a court of justice. His disbelief or unbelief in deity may affect his credibility, but not his competency as a witness	677
23. under an indictment for shooting at random in a public highway the defendant may be found guilty where it is shown by the evidence that the highway in which the shooting occurred had been continuously used by the traveling public as a matter of right for more than fifteen years, although it may not have been formally dedicated and accepted by the county court as a public county road	684
24. an indictment is not bad because it charges the defendant with "murder" instead of "willful murder," as it is designated in section 1149, Kentucky Statutes. The statute does not create the crime of murder or manslaughter, but only fixes the punish-	

CRIMINAL LAW—Continued.	Page.
ment for the common-law offense. The word "willful" in the statute may be considered tautological as willfulness is an essential constituent of murder..	704
25. an instruction to the jury covering the offense of voluntary manslaughter, which uses the two expressions, "in sudden heat and passion," and "without previous malice," are not so antagonistic as that the existence of one excludes the other as a motive for crime, both being proper to make clear to the minds of the jury that to reduce homicide from murder to manslaughter there must not exist "malice aforethought"	704
26. the use of the expression in the instruction, "and which did then and there excite the passions of defendant beyond control," was not prejudicial to appellant's substantial rights, as requiring the jury to perform a psychological task in measuring the effect of the provocation. The law requires the jury to ascertain or measure the effect of the provocation upon the mind of the defendant in order to believe the killing was done in sudden heat and passion	704
27. an admonition by the court to the jury as to the effect and purpose of a contradictory statement made by a witness, "that it must not be considered for any other purpose except to impeach the witness," need not be in writing, but may be made orally...	704
28. the fact that the attorney for the Commonwealth, in order to show that the killing was unnecessary, said to the jury in his closing argument that "the appellant could have withdrawn into the house thus escaped from his brother's knife," and when objected to the court told the jury they must be governed by the instructions and not by the statement of counsel was sufficient, and it was not error in the court to refuse to give the instructions then tendered by appellant, to the effect that he was not bound to retreat	704
29. it was not error in the court to refuse to admit as evidence that appellant, while in Missouri, received letters from his father inviting him to his home in Kentucky, as all the evidence showed that defendant was there with his father's consent and approval.	704
30. in this case, where the actors were brothers, the scene of the tragedy their father's home, the witnesses the immediate family, the evidence being entirely contradictory, it was simply a question of which set of witnesses were to be believed.	704
31. upon the trial of appellant upon an indictment charging him with grand larceny, an instruction directing the jury to find him guilty if they believed from the evidence that he took and carried away property of the aggregate value of \$1,000, or property of the value of \$20, was erroneous because the jury were warranted in finding him guilty if the articles taken were of the value of \$20, although the property taken at no single instance was of as much value as \$20. To constitute grand larceny the value of the things taken must be \$20, and the taking must be done at one time.	743
32. the court should have given an instruction upon petit larceny because under the form of the indictment and under the evidence the jury might have found defendant guilty of the latter offense	744
33. where evidence was admitted solely as affecting the credibility of a witness the court should have so admonished the jury, instead of allowing it to go as substantive evidence of appellant's guilt.	744
34. an indictment which charges that the defendant, William Finn, alias Thomas Lowry, did unlawfully, feloniously and forcibly take, steal and carry away one diamond pin, the more exact description of same is unknown to the grand jury, then and there the personal property of W. R. Varian and of the value of \$35 and more, all of which was so feloniously taken, stolen and carried away from the person of said W. R. Varian, without his consent and against his will, by force and violence and putting him, the said W. R. Varian, in fear of some immediate danger to his person, etc., is a good indictment for robbery	771
35. a second count in the indictment which charges that on the 19th day of July, 1900, the said William Finn, alias Walter Harvey, was convicted of burglary in the State of Wisconsin, and on the 28th day of February, he, the said William Finn, alias Thos.	

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- Lowry, alias Harry Ramsey, was convicted of robbery in the State of Louisiana, is not good in that it is not direct and certain as required by section 124, Criminal Code, as regards not only the party charged and the offense charged, but the county in which the offense was committed, as well as the particular circumstances of the offense charged in so far as they are necessary to constitute a complete offense. 771
36. good pleading in an indictment, where a judgment of a court of another State is relied on, requires that the laws of the State under which the judgment was rendered be pleaded so far as to show the jurisdiction of the court to render the judgment relied on, and that the trial court in this State may know that the convictions were for felonies punishable by confinement in the penitentiary 771
37. courts of this State do not take cognizance of the statutes and jurisdictions of courts of other States unless pleaded, and they must be pleaded as other facts 771
38. where the undisputed evidence shows that the defendant deliberately and without apparent cause shot and killed a young girl, with whom he was in love and wanted to marry, but who had refused to marry him, and also at the same time mortally wounded his rival, who was with the girl, the only defense being as to his sanity at the time, the following instructions, given by the court, are held to be proper 785
39. "No. 7. The court further instructs the jury that the law presumes every man sane until the contrary is shown by the evidence, and before the defendant can be excused on the grounds of insanity the jury must believe from the evidence that the defendant at the time of the killing was without sufficient reason to know what he was doing, or that, as the result of mental unsoundness, he had not then sufficient will power to govern his action by reason of some insane impulse which he could not resist or control. 785
40. "No. 8. The court further instructs the jury that although they may believe from the evidence that the defendant at the time of the killing of Emma Watkins was without sufficient power to govern his action by reason of some impulse which he could not resist or control, yet if they further believe from the evidence that such lack of reason to know right from wrong, or such insufficient will power to govern his actions, or to control his impulses, arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit the defendant on the ground of insanity" 786
41. letters taken from the possession of defendant at the time of his arrest, which he admitted were given to him by the deceased, which tend to establish the cause of jealousy on his part, and tend to furnish a motive for the killing, are clearly admissible in evidence. 786
42. on the motion of defendant in a criminal prosecution for a change of venue the burden is on him to show that he can not get a fair trial in the county where the indictment was found. The motion is addressed to the sound discretion of the court, and this court will not interfere with its discretion unless it be made to appear with reasonable certainty that there was a manifest error on the part of that court in its decision of the question 788
43. where on a second trial of a defendant indicted for murder a witness who testified on the former trial was absent and the defendant filed an affidavit stating he can prove additional facts by the absent witness (reciting them) that are material to his defense and that can not be proved by any other witness, it was error in the court to refuse to grant the defendant a continuance because he would not consent for the stenographic report of the testimony of such witness, made on the former trial, to be used as his evidence on the trial then pending 788
44. the fact that it was shown on the motion for a new trial that two of the jurors had expressed opinions before the trial that the defendant was guilty of the charge and ought to be locked up or hanged, can not be reviewed by this court under section 281, Criminal Code, which provides that the decision of the lower court upon a motion for a new trial shall not be subject to exception 789

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45. a statement by a witness in regard to the reputation of a witness for defendant that one Spaulding had told him that such witness had sworn to a lie was incompetent, and should have been excluded by the court. 789
 46. a statement by the attorney for the Commonwealth in his closing argument to the jury that, "If you convict the defendant, in my opinion, a more damnable villain never entered the doors of the penitentiary," though rebuked by the court, who told the jury that it ought not to influence them, was especially improper, because outside the record, grossly abusive of the prisoner at the bar, and so highly inflammatory in spirit and utterance as to be calculated to excite the passions and prejudices of the jury. . . . 789
 47. where the proof showed that appellant struck and kicked the deceased, from the effects of which she in a few days thereafter died, in addition to an instruction upon the question of murder, manslaughter and self defense the court should have given an instruction upon involuntary manslaughter because the beating may have been done without the intention of producing death. . . 794
 48. hands and feet are not deadly weapons within the meaning of the law, and when death results unintentionally from their use in an assault the result is not murder, but involuntary manslaughter, and whether or not murder or involuntary manslaughter resulted was a question for the jury, and it was error to refuse to instruct as to involuntary manslaughter. 794
 49. on the trial of appellant, who was jointly indicted with another for murder, where there was no evidence that the accused sought or provoked the difficulty, it was error in the court, after giving the usual and proper instructions as to murder, manslaughter and self defense and defense of another, to add to the self defense instruction: "Unless you shall further believe from the evidence, beyond a reasonable doubt, that the defendant, Paul Carnes, first willfully and feloniously assaulted the deceased with a deadly weapon, a pistol, and in so doing thereby made the harm or danger, if any there was, towards him or his codefendant necessary or excusable on the part of deceased and those acting with him, if any, in which event you can not excuse the defendant upon the ground of self defense or apparent necessity." As the evidence conduced to show that appellant fired first the jury probably understood that the court meant by this instruction that if accused fired first, it was the assaulting referred to by the court in the instruction quoted, and that, therefore, the accused was deprived of the right of self-defense. The court should have omitted the qualification in the instruction named. 1205
 50. the court erred in permitting the attorney for the Commonwealth to repeatedly ask the appellant, against his objection, why he did not leave the store and go home when he found deceased there. As the court overruled the appellant's objection, it may have led the jury to believe that the court was of the opinion that appellant, by going home, could have avoided the difficulty and the jury may have been impressed with the idea that it was the legal duty of the appellant to have done so. 1205
- DAMAGES—See Contract, 19; Master and Servant; Telegram, 4, 9, 10—**
1. in this action to recover damages for the injury to his property by appellant's sawmill, the evidence showing that the chute that carried off the dust was so built as to deposit the saw dust within a few feet of appellee's lot; that finer particles of it invaded his house, injuring his furniture, clothing, etc., killed his garden; it was not improper to permit the plaintiff upon the trial to prove that other mills burnt their dust, as the tendency of this evidence was to show that there was another and a proper way to dispose of the saw dust. 103
 2. in this action to recover damages for the death of appellee's intestate it is not a defense that deceased was at work under an independent contractor, as the furnishing of the wheel, the bursting of which killed him, its shafting and power, were all under the supervision of appellant. 136
 3. in this action the evidence showing that the deceased told the foreman that his machine was out of level, and needed new ap-

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- pliances; that he made the repairs the night before the accident, and that when he went to oil it he took the precautions to keep the belt from running over on another pulley so it would not be started, show that he was conscious of the danger he was in, and this being true his death was the proximate result of his own negligence 198
4. it is the duty of the master to furnish the servant with reasonably safe machinery for his work. Not that such machinery may not be dangerous in its use, even when properly used, but it must be in reasonably fit condition for the use in which it is employed, and must be kept in reasonable repair. The servant is not bound to increase the hazard of his employment by working at machinery or with tools in unfit condition, but where he knows of the danger and conditions without complaint, or without bringing it to the master's attention, he assumes for the time the increased hazard in addition to the ordinary risks of his employment 198
5. as to Jefferson county, the fiscal court, the county judge and justices of the peace and jailer, the rule is that neither the county judge, the fiscal court, nor county officers are liable to a person injured from defects in the county highway, bridges or other structures which the county is, by law, required to maintain; that an elevator is a necessity in a five story building, and the fiscal court had jurisdiction to have it built for the comfort and convenience of holding the courts. 509
6. as the contract of the Fidelity and Casualty Co. was only to indemnify the county and fiscal court against loss, no action can be maintained against it by the plaintiff where neither the county nor the fiscal court are liable. 509
7. where a defendant sells a thing which he knows is dangerous and conceals the danger from the purchaser, a different question is presented. But this doctrine is not to be applied to the fall of an elevator which is charged to be due concurrently to its defectiveness and the unskillfulness and gross negligence of the operator in using it. 509
8. the evidence in this case showing that the injury to appellee resulted from a defective construction of appellant's gas box, and there being evidence that the injury was permanent, while it is difficult to determine the proper compensation which should have been awarded, the judgment will not be disturbed on the ground of its being excessive, it being the province of the jury to determine its extent 885
9. the mere fact that the court would not have fixed the damages as high as the jury did is no reason for setting the verdict aside and granting a new trial. To justify such a course it must be apparent that the action of the jury was influenced by passion or prejudice, and this fact does not appear here. 886
10. where a child eleven or twelve years old broke her leg in jumping from a pile of lumber and breaking into a sewer, which had been constructed in a public alleyway of a city without the consent of the city, by the owner of a lumber plant adjoining the alley, for his own convenience in drawing the surface water from his lot, which sewer was constructed of plank which had been allowed to become rotten, it was the duty of the owner of the plant to keep the sewer in safe condition, and such owner, and not the city, is liable in an action for damages for such injury 903
11. the fact that the sewer was constructed by a former owner of the plant for the use and convenience of the plant, and which was maintained by him during his ownership, will not excuse his vendee from liability, who continued to use the sewer and failed to thereafter keep it in repair, as he was liable for its repair, and the fact that it was kept in repair by the former owner, an agreement that he should keep it in repair was implied. 904
12. the fact that the child was playing in the alleyway when injured is no defense to her action for damages for the injury. In crowded cities the use of the public streets and alleys for purposes of recreation and pleasure by children and others may be regarded a public necessity, so long as such use does not impinge upon the rights of others to use them, and such users are entitled to have them in a reasonably safe condition 904

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13. an instruction to the jury that they could find punitive damages against appellant if they should believe from the evidence that the injury complained of was the result of gross negligence, was error, and should not be given when there was no evidence whatever of gross negligence, and while this court might be of the opinion that the verdict rendered was no more than would compensate the plaintiff for the pain endured and the impairment of her capacity for laboring and earning money as the result of the injury, we do not feel warranted in saying that some part of the verdict was not given by way of punishment. 904
14. evidence showing that appellant, who was hurt by being struck by a piece of timber as it was being moved by a derrick, stated upon the trial that he never paid any attention to the moving of the timber; that he expected to get out of the way before it reached him, it appearing that he had ample time to get out of the way from the time the lifting of the timber began until it reached him, he was guilty of such negligence as to authorize a peremptory instruction upon the trial in which he sought damages against appellee for the injury inflicted 948
15. in an action against a coal mining company by an administrator for the killing of his intestate by a falling "stump," an instruction upon contributory negligence should have been given. The work of taking out "stumps" in a coal mine is hazardous, only experienced men are put at such work, and they must exercise precaution; and whether the deceased used proper care was a question for the jury, which they might determine from the circumstances of the falling of the roof as well as the testimony of the witnesses 1117
16. an instruction that assumed that the mine was in a dangerous condition was objectionable 1117
17. statements of the section boss made upon the day of the accident were not competent as substantive evidence against appellant . . . 1117

DEBTOR AND CREDITOR—See Attachments.**DECEASED PERSONS—See Evidence, 2—**

1. declarations by a person, since deceased, and who was suffering from a physical injury, made to her physician, as to anything it was necessary for him to know in order to treat her injuries intelligently, are competent to be given in evidence as part of the *res gestæ* 224
2. if the patient is suffering it is necessary for the physician to know where the pain is and its character; also how the injury was inflicted, whether by a blow on the head or how she was otherwise hurt; but it was wholly immaterial to his understanding of the case whether she fell on a bridge or on ice, or elsewhere, and statements by her to her physician as to where she fell are incompetent. 224

DEED BY HUSBAND TO WIFE—See Husband and Wife—

where a husband made a deed conveying one-half of certain real estate to his wife and the other half to his stepdaughter, reserving a life estate therein in all of the property, but did not deliver the deed to either of the grantees, nor apprise either of them of its execution, but did subsequently give his wife a sealed envelope containing said deed with the request to hold it for him until he called for it, but without informing her of its contents, such acts did not divest the grantor of control or dominion over the deed, and was not an acceptance by the wife of the deed either for herself or for the other grantee. 111

DEEDS—See Infants, 6; Notice—

1. where a house and lot in this State was conveyed by a mother to her daughter, and the deed left by the grantor with her agent in this State for record in the county where the property was situated, and it was so recorded, the presumption arises that there was both a delivery and acceptance of the deed 124
2. a deed made by a son and heir to his undivided interest in land which had descended to him from his deceased father in which the son's wife did not join, does not divest the wife of her contingent right to dower in her husband's interest therein . . . 226
3. a deed made by a married woman of her interest in land descended to her from her deceased father, in which the husband did not join, is void, as a married woman can not alone convey her real estate. 227

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4. the deed of an "exceptancy" to land that a child may inherit from a parent, made while the parent is living is void 227
5. a father conveyed land to his daughter and her son, the daughter then having another child (who was a daughter), and thereafter when both children became of age the mother and son decided to convey one-third of the land to the daughter, who was then married, and the mother also had remarried, and in making deeds of partition the draftsman, in preparing the deeds, by mistake conveyed the mother's lot to her and her husband, and the daughter's lot to her and her husband. In an action on a mortgage executed by the husbands of the mother and daughter, respectively, on the land, in which their wives did not join, and in five years after the making of the deed of partition aforesaid, Held—It was error to enforce said mortgage where in a defense by the two wives it was alleged and proven that the conveyance to the husbands, respectively, was made by mistake, and the mortgagees knew of said mistake at the time of the execution of the mortgage..... 576
6. where a deed to a schoolhouse lot shows that it was made for the consideration of \$35, paid in hand, although it purports to convey the lot to the "trustees of a school for the use and purposes herein expressed and for no other use whatsoever," such deed shows that the grantor was not a donor of a charity. The conveyance was made for a valuable consideration and for a presumptively commensurable consideration, without any reserved reversion and in such case the property does not revert.... 617
7. a deed was made by Robert George and wife in 1835 to Jas. D. George for six tracts of land, containing 540 acres, in which the habendum clause contained the following reservation: "To have and to hold the said tract or parcel of land with its appurtenances unto the said Jas. D. George and his heirs forever, with the exception of all the coal banks, and the said Robt. George and wife holding the right to them, and the privilege of a way to the different banks of coal with a wagon and team." Held—In view of the entire language and the circumstances under which it was made, when the grantor reserved all the coal banks he referred to the veins of coal under the ground, and not merely to such as had been opened, as there had been little or no development of coal land at that time, and the purpose of the grantor was to reserve the coal under the land 804
8. a deed was executed by D. to N. for land in which D. retained a life interest, and said deed was delivered to G., with written directions signed by both grantor and grantee that G. should surrender it to the grantor whenever it should be demanded by him, and the grantor then had the right to destroy it; but if not so demanded by grantor in his lifetime it should then be filed by G. in the proper office for record. The grantor died leaving a will which was executed before the deed, and without having demanded the deed from G., or in any way undertaking to cancel it, and upon the death of grantor G. filed the deed for record in the proper office. Held—That the deed and written contract must be read together, and by same the grantor vested the fee in the grantees, reserving to himself a life estate, with power to cancel the deed in a certain way, and the deed not having been defeated in the manner prescribed, became absolute at his death. 1043
9. a deed made March 21, 1885, by Eli Hall and wife to their son, Joseph Hall, the granting clause of which reads as follows: "This indenture, made and entered into by Eli Hall and Polly Hall, of the first part, and Joseph Hall and his children, of the second part," all of Letcher county, Kentucky, for 600 acres of land. The habendum clause is as follows: "We, the party of the first part, doth bargain, sell and convey the above-named tract of land, and will warrant and defend the title of the same from us, and our heirs and assigns and from all others unto the said Joseph Hall and his children forever, etc." At the date of the conveyance Joseph Hall had some children living and others were subsequently born. Held—That Joseph Hall was entitled only to a life estate in the land, and his children born, and thereafter born, take the remainder in fee 1185

DEPOSITIONS—

while the Virginia officer in his certificate to the depositions does not certify that the witnesses were sworn, he does so state in the caption, and the whole deposition, including the caption, must be read, and when so read it sufficiently appears that the witnesses were sworn 254

DESCENT—See Wills, 3.

DEVICE—See Local Option, 9.

DEVISE—

where decedent devised so much to appellant, but such devise was not equal to the whole debt claimed by him, a demurrer was properly sustained to a plea of the devise. If the money was due by contract the deceased had no right to attach conditions to its payment as was done. Moreover, the will contains express provisions as to the payment of debts, and this fact negatives the idea that the bequest was intended as a payment 12

DISTILLERIES—See Local Option, 11.

DIVORCE—See Husband and Wife, 1, 11.

DIVORCE AND ALIMONY—See Husband and Wife, 1, 11—

1. while the action of the chancellor in granting the divorce in this case can not be revised, he should have adjudged appellant alimony. She was turned out without anything and without sufficient excuse. The appellee is worth \$3,500 after the payment of his debts and had capacity to earn money, while she has little or no such capacity. From the circumstances an allowance to her of \$1,000 would be reasonable, and this should be adjudged her .. 516

2. in an action divorcing the husband, on the ground of abandonment by the wife for one year, it appearing that the husband was in fault, the wife was entitled to alimony, and the husband having sold a part of his property and carried away the proceeds, leaving his wife in possession of real estate worth from \$4,500 to \$5,000, of the rental value of \$40 to \$45 per month for the support of herself and two minor children, the use of which the court adjudged to the wife as well as the custody and control of their two infant children, on appeal by the husband on the ground of excessive alimony and the custody of the children, the judgment of the lower court is affirmed, the court having reserved the right to modify the judgment as to care, custody and support of the children, and as to the title, use and control of the property. 533

3. where the husband died before a judgment of divorce and alimony that had been agreed upon between him and his wife was rendered, she owned a potential right of dower in his lands, and can not be barred of this by a verbal contract, and the contract relied upon in settlement of her claim being void as to the land, it was void as to all of his property, but the court, instead of adjudging a sale of the part of the land belonging to her and the payment of the proceeds to her, should have allotted dower to her for life. 998

4. where one conveyed land upon a condition which was not fulfilled and died with the legal title in him, a delivery of the deed by his widow can not be made without the consent of all of the parties to the transaction, because she can not, by her election, make a contract for them, and the purchaser, under such a contract, is entitled to a return of the money paid by him, with interest, and must be charged with a reasonable rent for the land while he had it in possession..... 998

DOMESTIC RELATIONS—See Master and Servant, 9, 12.

DOMICILE—See Infants, 1.

DRUGGISTS—

1. in an action by the administrator against a druggist for causing the death of his intestate by selling her strychnine for morphine, and which was administered to her by her nurse, without the knowledge of either herself or nurse that it was strychnine, it was error in the court to strike out of the petition the averment that the defendant, Mudd, who sold and delivered the strychnine, "wrapped it in a paper without any mark or label on the outside of the package, designating the name of the poison contained therein, or the name of any antidote therefor; that at the time he, Mudd, was not a registered pharmacist, nor did he have a certificate of registration from the Kentucky State Board of Pharmacists authorizing him to sell or dispense drugs, medicines

DRUGGISTS—Continued.

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| or poisons, nor was he at the time legally authorized by law to sell or dispense drugs, medicines or poisons; that at said time defendant Mudd did not make any inquiry as to the purpose for which said strychnine was to be used, nor did he satisfy himself that said poison was to be used for legitimate purposes" | 412 |
| 2. the failure to observe a statutory regulation in the sale of poisonous drugs is per se a neglect of duty as well as neglect of care, and, where special damage flows from it, there exists, prima facie, a case of actionable negligence and it is, therefore, a material and appropriate averment in setting out a cause of action to have charged a specific breach of the statute although defendants may have been otherwise negligent in the transaction so as to have been liable to the plaintiff therefor | 412. |
| 3. in an action by an administrator against druggists for causing the death of his intestate by selling her strychnine for morphine, it was error in the court to strike from the petition an allegation that "plaintiff's intestate was caused to suffer intense pain and anguish in consequence of having had the strychnine given to her." The proper practice was, by motion, to require the plaintiff to elect whether he would prosecute his action for his "intestate's death" or for her "pain and suffering" | 412. |
| 4. where death is caused by the negligent sale by a druggist of strychnine for morphine, which was negligently administered to the deceased by her nurse, it was error for the court to instruct the jury that "if they believed from the evidence that the decedent or her agents, or servants acting for or attending on her, negligently failed to open the package (containing the strychnine), or negligently failed to look at the label thereof, or negligently failed to discover the nature and warning of said label or negligently failed to examine the character of the drug purchased and administered to the decedent, then in law the decedent is chargeable with contributory negligence, and in that event the law is for the defendant, and the jury should so find" | 412. |
| 5. if decedent herself was so negligent in the matter, but for which the injury to her would not have occurred, her estate ought not to recover, under the rule of contributory negligence prevailing in this State, but the fact that her nurse or attendant was negligent in administering the strychnine to her, will not excuse the concurrent negligence of the druggist in furnishing the drug whereby the wrong drug was provided. Both the servant and the druggists in such case are joint tortfeasors, and both liable in damages | 412. |
| 6. the jury should have been instructed that if the defendant, Mudd, who was not a licensed pharmacist, sold to Allen Sutton, for his mother, strychnine, in quantity of five grains or more, without inquiring the purpose for which it was intended, and without entering in a book kept for that purpose the name and residence of the buyer, the name of the article, the quantity sold, and the purpose for which it was intended, and that Nannie Sutton came to her death by reason of such failure, if any there was, the law is for the plaintiff, and the jury should so find | 412 |
| 7. a druggist and his customer are not under the same degree of care in the furnishing and taking of poison. The latter's duty is to exercise ordinary care for his own safety, while the former is required to exercise the highest degree of care for the safety of the public dealing with him | 412 |

DYING DECLARATIONS—See Criminal Law, 20, 22.

EASEMENT—

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| 1. in an action by appellant claiming an easement by prescription over an adjacent private alley as an appurtenant to his lot, and charging that appellee had obstructed it by building a fence across it, an answer by appellee denying that appellant owned or had ever used the passway as a matter of right, or at all, and that as agent of the owners of the fee in the passway he had built the fence across it, presented a good defense to the action | 682 |
| 2. where appellant had erected a barbed wire fence along appellee's easement without his consent, under the provisions of section 1784, Kentucky Statutes, he was properly enjoined from maintaining such fence | 782 |

- EASEMENT—Continued.** Page.
8. the evidence clearly establishing the use of the passway in controversy by prescription, appellant has no cause to complain of the judgment fixing the width of the passway at eighteen feet... 783
- ELECTIONS—See Local Option, 2, 8, 4, 5, 6, 7, 8—**
1. in an election contest where the returns of a precinct were signed only by the clerk of the election, but on the trial the other officers testified to their accuracy and offered to sign them, this was not sufficient to justify the throwing out of the precinct. The officers should have been allowed to sign the returns, but the failure of the court to have this done worked no substantial prejudice to appellant... 588
2. while in some cases where men were allowed to vote on the table, signs were made in some way, by somebody on both sides, to those on the outside, indicating how such votes were cast, still this did not occur often, and the ends of justice would seem to be done by throwing out the vote cast on the table, where the voter was not sworn, and not throw out the precinct... 588
3. under Kentucky Statutes, section 1475, providing that where one is "so physically disabled as to be unable to mark his ballot and shall so declare on oath," the judges of the election must decide as to what is "sufficient physical disability" if the voter is sworn and states that he is physically unable to mark his ballot, and such vote must be counted although the judges may err in their judgment as to such disability. The question must be decided by them in the exercise of their discretion, and the voter is not to be disfranchised because they make a mistake... 588
4. the election law of October 24, 1900, Kentucky Statutes, section 1596a, subsection 2, provides that the sheriff of the county by virtue of his office shall be a member of the election board, * * * and it provided that "where there is no sheriff, or where from other causes the sheriff can not act the circuit clerk shall act in his place." By an act approved March 22, 1904, the words last above quoted were changed so as to read as follows: "In counties where there is no sheriff, and in counties containing cities of the second class, or where from any cause the sheriff can not act, the circuit clerk of the county shall be a member of the board instead of the sheriff and shall act in his place, and is given all the rights and powers that are given to sheriffs under this section." Section 59 of the Constitution provides that the general assembly shall not pass any local or special act "to provide for conducting elections." It also provides that in all cases where a general law can be made applicable no special law shall be enacted. Held—That the amended act of March 22, 1904, providing that "in counties containing cities of the second class the circuit clerk of the county shall be a member of the election board instead of the sheriff," is special legislation, and, therefore, unconstitutional and void... 1187
- EMINENT DOMAIN—See Railroads, 38.**
- EMOTIONAL INSANITY—See Homicide, 5.**
- ERRORS NOT EXCEPTED TO—See Practice—**
- this court can not consider any alleged improper remarks made by the trial judge to appellant's counsel in the hearing of the jury unless it is shown by the bill of exceptions to have been excepted to at the time... 193
- ESCHEAT—See Lands—**
1. in this action to recover lands on the ground that it had escheated to the Commonwealth, sections 1606 to 1623, Kentucky Statutes, do not give the right to maintain the action... 153
2. Constitution, section 192, and Kentucky Statutes, section 567, providing "that no corporation * * * shall hold any real estate in this State except such as may be proper and necessary for carrying on its legitimate business for a longer period than five years under penalty of escheat," an escheator can not maintain an action under section 1606, Kentucky Statutes, to have the title to a tract of land owned by a foreign corporation in Ballard county to vest in the Commonwealth, as it is only to land mentioned in said section 1606 that the escheator has authority to maintain an action to escheat... 170
- ESTATES—See Assignee, 1; Wills, 31, 36.**

ESTOPPEL—See Actions, 7; Contracts; Constructive Trust; Land, 7, 31; Liens, 8; Passways, 2—

1. an owner of land whose grantors procured the charter authorizing the drainage of swamp lands and the assessment of the adjacent lands therefor, is stopped to deny the validity of the law under which the assessment is made. 278
2. in such case the law must imply a request for the ten-year payment, whether it was made or not, and the debtor by his acquiescence therein is estopped to deny it. 286
3. pleas of res judicata and estoppel considered by the court under the facts in the record, and held to have been properly overruled by the court 298

EVIDENCE—See Accounts, 2, 5; Bill of Exceptions, 1; Contracts, 4, 8, 18; Criminal Law, 1, 2, 21, 45; Homicide, 1, 2, 12; Lands, 1, 11, 12, 16, 36; Life Insurance, 18; Pleading, 5; Street Railway, 12—

1. upon the trial of appellant upon motion of the Commonwealth's attorney the court permitted the jury in charge of the sheriff to go upon the premises where the tragedy occurred, the judge, the accused and his counsel all being present. When at the scene one of the jurors requested the court to have the accused point out to them the particular spot where he had testified he had hidden his pistol. The judge having some doubt about this took the accused and his counsel aside, and no objection being made, permitted the accused to point out to the jury the spot. Upon the return of the jury objection was made by appellant for the first time as to what had taken place. Held—This was not error, and no reason appears why the court should have not tried the whole case at the place where the tragedy occurred if it had suited his convenience. 8
2. where the clothing of the deceased had been carried out of the State by his widow, it was competent to prove the condition of the clothing just after the homicide occurred. The witnesses testified to physical facts of which they were cognizant 8
3. evidence to the effect that notches were cut upon appellant's pistol was immaterial except as he had admitted that they were put there to indicate the number of men he had killed. Had there been doubt as to its identity, then evidence of such marks would have been admissible. There was no evidence that appellant had ever fired his pistol at any other person, and the admission of evidence as to marks upon it does not seem to have been prejudicial 188
4. the testimony of the physician who examined the wounds of deceased, to the effect that the wound in the head tended to hasten the death of deceased, was immaterial as the appellant admitted that he killed deceased and the physician had already stated that a knife wound in left breast was a fatal wound. 145
5. where the evidence shows a total failure of proof to sustain plaintiff's action, he was not damaged by the failure of the court to award him a jury to try the action 489
6. the evidence upon this appeal examined and held to support the judgment, which is, therefore, affirmed. It was the province of the jury to pass upon the evidence, and if it was at all it was not so flagrantly against the weight of the evidence as to authorize the granting of a new trial. 747

EXEMPTIONS—See Homestead, 1; Taxation, 5.

EX PARTE SETTLEMENT—

- an ex parte settlement made by commissioners after the sheriff's term of office had expired, and after he had left the State, and of which he had no notice, though filed in the county clerk's office and recorded, can not be treated as a confirmed settlement made under the statute 67

FAILURE TO DELIVER TICKET—

- a railroad ticket from St. Louis, Mo., to Greenville, Ky., was paid for at Greenville, and a telegram sent to the agent at St. Louis to furnish R. Head such ticket, the object being to get R. Head to reach Greenville in time for his father's funeral; and another telegram was sent to R. Head, by his guardian, to call at "Illinois Central" for the ticket. R. Head called at the city office in St. Louis, which the agent said was the right place for the ticket to be, and after waiting two days found it at the Union

FAILURE TO DELIVER TICKET.—

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Station'' and reached home after his father's burial. Held—That in an action for damages by R. Head for delay in getting the ticket the measure of damages is simply a reasonable compensation for the time lost and any expense incurred by reason thereof. 270

FEDERAL CORPORATION—Insurance, Life, 22.**FEDERAL COURTS—**

1. the circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases, and so long as they keep within the jurisdiction assigned to them their general powers are adequate to the trial of any case. 1121
2. in order to work a transfer of jurisdiction from the State to the Federal courts pursuant to section 641, United States Revised Statutes, three things are essential: First, it must appear that the defendant has a right that he is entitled to have enforced; second, such right must appear to be secured to him by a law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, that is, a right secured to him by the equal protection of the law's clause of the fourteenth amendment; and, third it must appear that the defendant is denied such right, or can not enforce it in the State courts having jurisdiction of the prosecution against him within the meaning of section 641 1121
3. the defendant has the right to have the jurors from which the jury is to be empaneled selected from persons possessing the statutory qualifications without discrimination against those of them who are members of the same political party as defendant, because of their belonging to such party, and that this right is secured to him by the equal protection of the laws as guaranteed by the fourteenth amendment. 1121
4. the defendant is entitled to have his case removed from the State to the Federal court if he is denied, or can not enforce, the rights guaranteed to him by the fourteenth amendment. 1121
5. no reply having been filed by the Commonwealth of Kentucky to the petition for a removal, and no issue having been taken with the defendant as to its allegations, they must be taken as true except as they may be contradicted by the transcript of the record of the trial in the lower court. 1121
6. a refusal to hear evidence offered by a defendant in a criminal prosecution that he has been illegally discriminated against in the selection of jurors, is a violation of the fourteenth amendment and a denial of the equal protection of the laws 1121
7. this defendant can not enforce his right to the equal protection of the laws in the Court of Appeals of Kentucky, if denied in the circuit court, because of a legislative provision embodied in section 281 of Kentucky Criminal Code, to the effect that decisions of the trial court upon challenges to the panel and for cause, upon notice to set aside an indictment and upon motions for a new trial, shall not be subject to exception 1121
8. the legislature has provided that the Court of Appeals of Kentucky shall not have jurisdiction to review challenges to the jurors in criminal prosecutions for any cause whatsoever, and that the action of the circuit court is final in regard thereto . . . 1121
9. the Court of Appeals was correct in its ruling declining to pass upon the Federal question raised by the defendant in regard to the selection of jurors from which were selected the jury that tried him. It has not denied him the equal protection of the laws because it had no jurisdiction to pass on the question 1121
10. the question as to who was governor of Kentucky on the 10th of March, 1900, and as to the validity of the Taylor pardon, is a local one, and having been determined by the Kentucky Court of Appeals that Beckham was then governor, and that the pardon was invalid, this court is concluded by the judgment of that court. 1121
11. by virtue of the second paragraph of the petition the removal proceedings have worked a transfer of jurisdiction within the meaning of section 641, United States Revised Statutes. 1121

FINAL ORDERS—See Appeals, 12; Local Option, 2.

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FINDING OF CHANCELLOR—

1. while the finding of a chancellor upon a judgment of fact is not given the same weight as the verdict of a properly instructed jury, still some weight is given to it, and it will not be disturbed on the facts where under all the evidence the mind is left in doubt as to its truth..... 668
2. where appellee had a man to count the staves in controversy, who kept an account of the count of staves in a book which he testified was correct, and appellants being acquainted with the arrangement, employed the same man to make the count, no other count being produced, the chancellor was authorized to uphold this count to hold that the book was the best evidence of the staves delivered..... 668
3. the facts in this case examined and held insufficient to disturb the finding of the chancellor..... 692

FISCAL COURTS—

1. the fiscal court has no authority to allow road overseers \$50 per year, or any compensation for their services as overseers, and an order of said court making such allowance is void... 35
2. the fiscal court of a county can not fix the compensation of a county health officer in advance of rendering the service as it can not then be known what service he may be required to render. 37
3. the fiscal affairs of a county are under the control of the fiscal court, and the county judge has no authority to make any contract for the county unless specially authorized to do so by statute, and there is no statute authorizing him to employ counsel for the county or to contract with attorneys for their fees... 319
4. under sections 724, 731 of the Civil Code, regulating appeals from fiscal courts to the circuit court, such cases are to be tried anew when appealed to the circuit court as if no judgment had been rendered, and no bill of exceptions is necessary..... 850
5. the fiscal court is one of limited jurisdiction and authority, and has no power to make an assessment of the property of the county for taxation, and has no control over the county assessor, and such court has no authority to employ a surveyor or to purchase plats of land made by such surveyor in order to enable the county assessor to fix the boundary of lands to be assessed for taxation in said county..... 850

FORCIBLE ENTRY—

1. when an amendment does not change, but only perfects, the cause of action it should be filed... 417
2. where a writ of forcible entry was sued out after two years from the time the forcible entry complained of was committed, upon the trial of the traverse a peremptory instruction by the court to find for the defendants was proper..... 796
3. an agreement to arbitrate a controversy as to the possession of land, no change whatever in the possession taking place, was not a surrender of possession, and this being true appellants had not the actual possession of the property, and, therefore, there was no forcible entry..... 796
4. where in a forcible detainer proceeding the defendant appealed from a judgment of the circuit court awarding a writ of restitution against him, by executing a supersedeas bond under section 748 of the Civil Code, instead of a traverse bond under section 463 of the Code, the covenant of such supersedeas bond does not cover an attorney's fee as part of the costs recoverable thereon... 928
5. where a supersedeas bond has been executed by the appellant with insufficient surety, and on the motion of appellee a new bond is required to be executed by appellant with sufficient surety pending the appeal, the new bond is not limited in its operation to the time elapsing between the date of the execution and the day upon which the property was returned to the owner, but relates back and covers the period between the execution of the first bond, the surety of which was adjudged insufficient, and the date of the return of the property to the owner... 929
6. where in a written lease between a landlord and tenant for the rent of a distillery, both of whom were experienced distillers, fixing the annual rental at \$1,000, in an action on the super-

FORCIBLE ENTRY—Continued.

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sedas bond for the damages in detaining the property, by the lessor against the lessee, the measure of damages for the rent is at the rate of \$1,000 per year for the time it was so detained, and as appellant was entitled to recover whatever damages accrued to the property during the period covered by the supersedeas bond, due to the negligence of the party detaining it, such party is liable for the blowing down of the smoke stacks if it resulted from his failure to properly secure it, and for other damages of a similar kind which accrued because of his failure to take such care of it as a prudent owner would of his property as well as for all property taken by theft, which he could, by diligence, have prevented by repairing the house or employing a watchman to protect it 929

FOREIGN CORPORATIONS—

1. Kentucky Statutes, sections 4077 to 4091, inclusive, prescribe an elaborate system for the taxation of the franchises of all corporations, whether foreign or native, doing business in this State, and sections 4090 and 4091 are applicable to foreign corporations alone. These show conclusively the legislative intent to tax the franchises as foreign corporations, and not as naturalized corporations. 1084
2. the cardinal principle of ad valorem taxation in Kentucky is that all property not specifically exempt therefrom by the Constitution, whether real or personal, tangible or intangible, and whether owned by individuals or corporations, must, for the benefit of each taxing jurisdiction in which it is liable, be taxed once and no more 1084

FOREIGN WILL—

where a will was made and duly probated in another State and subsequently presented for ancillary probate in this State in the county where land devised therein is situated, the judgment of the court admitting it to probate can not be collaterally attacked 124

FORMER APPEAL—

1. all questions of law settled upon a former appeal are res judicata upon a second appeal of the same case. 289
2. the judgment of sale recites that it was made by agreement of all the stockholders, both in their individual and corporate capacity, and from its language the corporation entered its appearance, and is bound by the order of sale 289
3. the additional evidence taken after the rendition of the former opinion in this case, together with the evidence in the former record, is sufficient to show that the land in controversy is covered and included in the Pickett and Marshall patent, establishing the contention of appellees. 299

FRANCHISES—See Corporations, 1.**FRAUD OR MISTAKE—See Contracts, 81, 82; Railroads, 44—**

where an action for fraud or mistake is brought after five years from the making of the mistake or the perpetration of the fraud, the plaintiff must allege and prove that he discovered it within five years before the bringing of the suit, and must allege and prove facts showing that he could not, by reasonable diligence, have discovered it sooner. 581

FRAUD—See Deeds, 1; Master and Servant—

1. in this action upon a note executed by appellant for shares of stock in a chair company, in which plaintiff alleges fraud and misrepresentation in its purchase, evidence examined, and Held—That there was neither fraud nor misrepresentation in said sale. 404
2. even if there had been misrepresentation in the sale, the fact that appellant was elected a director and president of the chair company, and after knowing all about its financial condition, continued to pay the interest on the note executed therefor, was an acquiescence in, and an affirmation of, the purchase 404

FRAUDULENT CONVEYANCES—

it appearing that Morgan the day before judgment herein was rendered against him conveyed twenty five acres of land to his sons for the recited consideration of \$40; that the land was worth five times that amount, and that the sons were unmarried and lived with him and that this land was the only property he had that was subject to execution, the conveyance was properly adjudged fraudulent and the deed cancelled 572

GATES—See Roads and Passways, 2.

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GIFTS—

1. where appellant delivered a note to her daughter without any assignment of it, it is not reasonable to suppose that she made an absolute gift of it. Had that been her intention she would have endorsed it 942
2. in this action to recover of appellee the value of a note which appellant claims she left with her for collection the claim of appellee that it was a gift to her is not sustained by the evidence, and the fact that there was no assignment of the note endorsed upon it is presumptive of the fact that it was not a gift, but placed with the appellee for collection as appellant contends 942

GUARANTY—See Actions, 2—

1. in an action by plaintiff, alleging that he was induced by defendant to invest money in a company in which defendant represented that he was a stockholder, and that it was a safe, legitimate and prosperous business, and that he, defendant, would guarantee plaintiff a profit of 20 per cent. on February 1, thereafter, and in which he invested \$467.50, and that defendant has failed to pay plaintiff any part of the money advanced, or one cent of the profits thereon, and has wholly failed to keep and perform any part of his promise, obligation and guaranty with plaintiff, and in which he seeks to recover the sum of \$561. Held —That a demurrer to the petition was properly sustained 978
2. the petition contains no allegation of a breach, the warranty of which is the basis of the action, no allegation that the company did not return to plaintiff the money he invested in it with 20 per cent. profit on or before February 1, 1902, and further, it fails to allege that the guaranty sued on was in writing, which is required under subsection 4 of section 470, Kentucky Statutes, and known as the statute of frauds 979

GUARDIAN AD LITEM—See Attorneys, 1.

GUARDIANS—See Office and Officer, 2, 8.

GUARDIAN AND WARD—

1. where a ward had an estate sufficient to support it there was no necessity for the father to contribute to its support... 1080
2. under the provisions of section 2032, Kentucky Statutes, it is the duty of the guardian to maintain and educate the ward out of its own estate... 1080

HEARSAY—See Life Insurance, 18.

HEIRS—See Slaves.

HOMESTEADS—See Husband and Wife, 4; Lands—

1. under Kentucky Statutes, section 1707, providing that "the homestead shall be for the use of the widow * * * and the unmarried infant children of the husband, * * * but the termination of the widow's occupancy shall not affect the children," * * * where an infant who occupies a homestead under said act marries, it thereby becomes a member of another or new family, and its right to the homestead ceases... 191
2. a homestead right exists when the claimant is in occupancy of it as a housekeeper in good faith at the time the attempt is made to subject it by execution to the payment of a debt, although at the time the debt was contracted the claimant was unmarried and did not then live on the land or claim it as a homestead ... 1171
3. where a wife owned a homestead before her marriage, which she inherited, and she and her husband rented and lived on an adjoining place and used the wife's land in connection therewith, by cultivating part of it and using the balance for pasture purposes, the wife is entitled to a homestead therein, and such homestead of the wife continues after her death for the benefit of the surviving husband ... 1171

HOMICIDE—See Change of Venue, 8, 4; Criminal Law, 15, 19; Druggists, 4, 6—

1. it was not error for the court to overrule the motion for a continuance where it appeared that one of the persons named in the affidavit was beyond the jurisdiction of the court and the other in the county, and his attendance could be procured which was afterwards done. While section 120 of the Criminal Code requires that the names of the witnesses before the grand jury shall be placed on the indictment, there is no rule of law which

HOMICIDE—Continued.**Page.**

- prevents the Commonwealth from calling additional witnesses upon the trial of the case 8
2. on the trial of one for homicide, where the evidence shows that deceased accosted defendant with an insulting remark, and invited him to "come out and take his medicine," whereupon defendant went into his house, got a pistol and returned, when he and deceased engaged in a shooting match till deceased threw down his gun, picked up an axe and continued the fight with it, defendant retreating and shooting as he went, the evidence justified the submission to the jury the question of a mutual and willing combat, as was done by the trial court. 115
3. that the defendant retreated during the conflict seems certain, but a retreat is not necessarily an abandonment. It may be only a falling back on a better position. In order to excuse one who begins a conflict the fight must be abandoned in good faith and in fact. It must be something more than a mental determination to quit. It ought to apprise the other party that his assailant has quit the fight and has relieved him of the necessity for defense which had been imposed on him by the assailant's conduct 115
4. in a prosecution against one for murder in killing a man who had debauched the defendant's wife and caused their separation, it is competent for the defendant to testify that his wife told him immediately before the shooting that deceased had threatened his life, and would kill him rather than let her return and live with him 876
5. if the fact be that deceased had violated the sanctity of defendant's home, estranged his wife's affections, debauched her person, and threatened his life if he interfere with a continuance of his illicit relations, forcing his presence on them for that purpose, it may well be supposed that the passion of the husband was aroused to an uncontrollable extent; and whether it was such as to have created an emotional insanity so as for the time to dethrone the reason of the outraged husband, or whether it merely reduced the homicide to manslaughter, was a question which, under the circumstances, should have been submitted to the jury. 877
6. on the trial of one for murder in the killing of a man who had debauched his wife it was error in the court to admit evidence that the defendant had committed adulterous acts himself, or that he had shot another man, or that he had said that deceased was the third man he had shot. 877
7. on the trial of one for murder it was error in the court to allow the attorney for the Commonwealth, against the objection of the defendant, to refer to an affidavit admitted as evidence for the defendant, as the "supposed testimony of the absent witnesses, but was not in fact their testimony, but merely an affidavit filed on behalf of the defendant" 877
8. on the trial of defendant for the assassination of James Cockrell, by shooting him from the window of the upper story of the courthouse while deceased was standing on the street below, the defense being an alibi, it was error in the court to allow a witness for the Commonwealth to state in his testimony that he, witness, was in the office of P., and that when the shooting occurred P. went to the front window of his office, and while looking out of the window and apparently at those doing the shooting, called out the name "Curtis Jett." This evidence was incompetent as hearsay. The witness himself did not see Curtis Jett, but was allowed to state that P. said he saw him. The fact that the court required the witness to eliminate the statement "he called the name of Curtis Jett," and substitute therefor "he called attention to Curtis Jett," does not alter the incompetency of the testimony 608
9. where defendant had been tried with another defendant in the same county within less than a month prior to this trial for another murder, in which both the defendants were convicted and their punishment fixed at a life sentence in the penitentiary, and public opinion was greatly inflamed because the death penalty was not inflicted, and it was shown that on this last trial two of defendant's counsel, on whom he mainly relied in his de-

HOMICIDE—Continued.

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- fense, were necessarily absent, and who were acquainted with defendant's witnesses, while the remaining counsel was a stranger to them, the defendant having been in jail for four months by change of venue, 100 miles from his home, and where his witnesses lived, the court erred in overruling his motion for a continuance and forcing him to trial under these exceptional circumstances 608
10. where it is shown by the evidence that the deceased had enmity against four persons who were jointly indicted for killing him, all growing out of the same transaction, proof of threats made by deceased against all or any one of the four was competent on a separate trial of any one of them for the killing of deceased, whether communicated to defendants or not, especially as bearing on the question of whether deceased was the aggressor and assailant at the time he was killed 1090
11. on a separate trial of defendant, C. H. Wheeler, who was jointly indicted with his father and two others for killing deceased, where the evidence shows that deceased was killed by some one of the four acting together, it was error in the court to instruct the jury that "if you believe from the evidence, beyond a reasonable doubt, that W. P. K., M. K. and L. W., with the consent and acquiescence of and aided and abetted by defendant, C. H. W., were armed with deadly weapons and sought deceased with intent to kill him, or doing him some other great bodily harm, or first attacked or assaulted him with such intent, then defendant can not avail himself of his plea of self-defense," as it in effect advised the jury that if defendant at any time aided or abetted his codefendants to seek deceased, armed and with the intention of killing him, he was thereby deprived of the right to defend himself or them from danger, real or apparent, at the hands of deceased, though neither defendant nor his codefendants may have made an attempt to carry out the intention of killing deceased, or were first attacked by him 1090
12. the court in lieu of the instruction given should on a retrial instruct the jury that if they believe from the evidence, beyond a reasonable doubt, that appellant or his codefendants, or any of them, commenced the difficulty with deceased by making the first demonstration to shoot, or if he or they and deceased met, armed, determined on a conflict, and on meeting, the combat was engaged in by mutual consent, then, in either event, appellant could not rely on the right of self-defense, nor act in defense of his codefendants 1090
13. where it was shown on the trial of accused for the killing of two brothers on August 29, for which he was indicted by special grand jury on August 31, and his trial had on September 10, by his affidavit for a continuance, that he was too poor to employ counsel, and by reason of a severe wound in the head inflicted in the affray by one of the brothers, from which he was suffering as to be unable to communicate with the counsel appointed to defend him, so as to properly prepare his defense, and by reason of the great excitement in the community because of the double homicide, feeling ran high against him and he was in danger of mob violence, which in a great measure prevented his preparation for trial, his motion for a continuance should have been sustained 1168
14. where on the trial of accused for the killing of two brothers there was proof to the effect that the accused was assaulted by them, one striking him on the head with a jug, felling him to the ground before he shot, and that the assault was concerted by the brothers, the court in defining defendant's right to act in self-defense should not have limited it to danger, real or apparent, at the hands of one of them, but the court should have told the jury that if they believe from the evidence that accused was first assaulted by the two acting in concert, and that there was about to be inflicted on him immediate death or great bodily harm at their hands, or at the hands of either of them, that the accused had the right to use such force as was necessary, or as to him, in the exercise of a reasonable judgment, appeared to be necessary to repel the assault or threatened danger, real or to him apparent even to the taking of the lives of his assailants 1168

HOUSEBREAKING—See Criminal Law, 15, 17.

HUSBAND AND WIFE—See Deeds by Husband to Wife, 1; Divorce and Alimony, 1, 4; Sale of Lands, 1, 8—

Page

1. in an action by the husband against his wife, in which he obtained a divorce on the ground of her lewd and lascivious conduct, and in which she filed answer denying the allegations of the petition and filed a cross petition asking a divorce from him for cruel and inhuman treatment, the wife is entitled to her costs, including a reasonable attorney fee to be paid by the husband, unless it is shown that she has ample estate out of which to pay her costs and attorneys, although the wife was in fault on the merits of the suit for divorce 120
2. a judgment allotting alimony to the wife in land should be only an estate in the wife for her life 435
3. in an action by a judgment creditor against a debtor and his wife to set aside a deed made to the wife for land alleged to have been paid for by the husband, and to subject it to the payment of the husband's debts, where the evidence conduced to show that the wife had not a great while before the conveyance received from her father's estate money or property equal to the consideration paid for the land, fraud will not be presumed in making the conveyance in the absence of evidence to the contrary 467
4. in an action by a creditor of the husband to set aside a deed made to his wife, which is shown to have been paid for by property of the husband which at the time was exempt to the husband under the statutes, and it is also shown that the land so conveyed is occupied by the husband and wife as a homestead, and is of less value than \$1,000, it can not be subjected to the payment of the husband's debts, and the deed to the wife was not fraudulent.... 468
5. under Civil Code, section 34, subsection 4, which provides that "if a husband deserts his wife she may bring or defend for him any action which he might bring or defend," in an action by the judgment creditors of a nonresident husband to subject his homestead to the payment of their judgments the wife may intervene, alleging that the land was the home of her husband, who had deserted her and her children, and will be allowed to defend for him and establish her homestead... 555
6. under Civil Code, section 410, providing that before judgment is rendered against a defendant constructively summoned, and who has not appeared, a bond shall be executed with good security, approved by the court, to the effect that if the defendant shall procure a vacation or modification of the judgment * * * restoration shall be adjudged," it was error to sell the homestead of the husband, who was before the court only by constructive process, without the execution of the refunding bond .. 555
7. under Kentucky Statutes, section 1907, a voluntary conveyance of land by the husband to his wife without valuable consideration is void as to all debts owing by the husband at the time of such conveyance, but no evidence being shown of a fraudulent intent of the husband to defeat his subsequent debts, such conveyance was not fraudulent as to his subsequent debts .. 689
8. a married woman is not bound by a compromise of her suit made by her husband, to which she was not a party, without her knowledge or consent, and a sale of her land made under a judgment so obtained to which she objected is not valid, and should be set aside... 766
9. in an action by the wife for a divorce and alimony, where the evidence shows that their differences resulted mainly from troubles arising in attempting to raise two families of children together (both parents having children by former marriages) and that the wife was more to blame in these matters than the husband; that he was old and in bad health and needed her attention and services and desired her to remain with him that he had very little property and was a pensioner, she was not entitled to alimony, and a judgment allowing her \$60 per annum is set aside 776
10. in an action by the husband against his wife for a divorce on the ground of "living separate and apart without any cohabitation for five consecutive years next before the application," an allegation in the petition that the wife "had been previously ad-

HUSBAND AND WIFE—Continued.

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- judged a lunatic, and is now an incurable lunatic and confined in a sanitarium in New York, where she now resides, and that for five consecutive years next before she was adjudged a lunatic they lived separate and apart and without any cohabitation, and since that time they have continued to live separate and apart and without any cohabitation." Held—That if while she was sane she and her husband lived apart without any cohabitation for five consecutive years, a cause of action for divorce accrued to him, and this cause of action is not destroyed by the fact that she subsequently became insane 1120
11. under our statute the allegations of the petition are not to be taken as true, but must be proved, and the wife's committee may make for her any defense which she could make for herself 1120

IMPEACHING WITNESS—

1. where in an attempt to impeach the character of a witness for the Commonwealth some statements were allowed to be made by witnesses on both sides as to the character of the witness for sobriety, paying his debts, attending church and Sunday school, etc., while incompetent, was not prejudicial to appellant 561
2. where a statement was made to the jury by a sister of deceased, "that deceased had information that defendant and others were going to kill him," was immediately excluded from the consideration of the jury by the court, and they were told to disregard it, we have no right to presume that the defendant was prejudiced thereby 561

IMPLIED LIABILITY—See Auditor, 4.

IMPROPER QUESTIONS—See Criminal Law, 50.

INDEMNITY—See Contracts—

an action was brought by the Kentucky Live Stock Breeders' Association and the Citizens National Bank, which had advanced money to the association, against the subscribers to the following paper: "The Kentucky State Fair to be held by the Live Stock Breeders' Association during the week beginning September —, 1903, for the purpose of having the above described fair in or near the city of Owensboro, and of providing a fund to cover possible loss in giving said fair, the undersigned hereby subscribe the sums set opposite their names on condition that not less than — are subscribed. The loss, if any, be divided among the subscribers to the fund in proportion that each subscription bears to the whole amount subscribed." Held—That to the extent that the receipts of the association holding the fair at that point failed to pay the expenses thereof there was a deficit which in business parlance represented "a loss" 89

INDEMNITY BOND—

an indemnity bond conditioned that the surety "will make good and reimburse to the employer any pecuniary loss sustained by him of money, securities or other personal property in the possession of the employe in the discharge of the duties of his office, amounting to larceny or embezzlement," does not make the surety liable for money advanced by the employer to the employe to enable him to prosecute his work, expecting him to be charged with it all in his final settlement, or for money that the employer paid to his employe's creditors, but is responsible for money collected by the employe on contracts for the employer 248

INDEMNIFYING BONDS—

where a sheriff levied an execution on personal property in the possession of the execution debtor, which belonged to another, but before sale required an indemnifying bond from the execution creditor, the owner of the property may recover its value from the surety on such bond, unless it be shown that the execution debtor had been in possession of such property for five years prior to the levy and sale 876

INDEPENDENT CONTRACTOR—See Landlord and Tenant, 2.

INDICTMENTS—See Criminal Law, 1, 31, 49; Local Option, 11; Railroads, 14—

1. where an indictment charged in substance that appellee had created and maintained a nuisance by unlawfully, wrongfully and injuriously cutting down and felling a large tree in the public road, leaving it there for a period of three months, it properly charged a nuisance 29

INDICTMENTS—Continued.

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2. an indictment against one for breaking into a smokehouse and stealing therefrom, which fails to charge that the smokehouse belonged to or was used with a dwelling house, is insufficient to sustain a charge of felony under Kentucky Statutes, section 1162, which provides that "if any person * * * shall feloniously break any dwelling house, or any part thereof, or any outhouse belonging to or used with any dwelling house, and feloniously carry away anything of value, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years" 113
3. where appellee swapped horses with another, it being agreed that he was to receive \$7.50 to boot, and after the exchange of horses had been made appellee handed the other party a \$10 Confederate bill, with the remark, "give me \$2.50; here is a \$10 bill," he was guilty of the crime denounced by section 1208, Kentucky Statutes, and a demurrer to the indictment against him should have been overruled 265
4. a proposition to sell an article for \$10, without designating the currency in which the price is to be paid, implies that the seller is to get lawful money or currency of the United States, and the use of a worthless bill, pretending that it is valid, and with intent to defraud, is a false token under the statute 365
5. an indictment found on July 20, 1904, for selling liquor without license, which alleges that the offense was committed on July 18, 1904, and that a former indictment for said offense, filed November 18, 1903, had been stolen and could not be found, is inconsistent and uncertain, and as the dates named neutralize each other, there is nothing in the indictment to show that the offense charged was committed within twelve months before the finding of the last indictment or within twelve months before the finding of the one that was stolen 278
6. an indictment which charged in substance that an order for the payment of money was altered by erasing certain words, which directed that a certain sum should be withheld, so as to collect the entire amount, is sufficient to charge forgery because it enabled him who made the erasure to obtain money by his wrongful act 739
7. it is not necessary that an entire instrument should be forged to make the crime of forgery complete. This crime may be committed by the alteration of an instrument, by erasure or addition, with intent to prejudice the rights of another 739

INDUSTRIAL INSURANCE—See Insurance.

INFANTS—

1. where, after the death of her husband in Kentucky, the widow moved from Kentucky to Tennessee and took her infant child with her, intending to make Tennessee her future home, and died there after having so resided for about three years, her domicile was the domicile of her infant child, and said infant having reached the age of fourteen years had the right, under the laws of the State of Tennessee, to choose a guardian in said State, and such guardian is entitled to recover the personal estate of said infant from a guardian previously appointed in the State of Kentucky 675
2. in an action by the father against his infant child to set aside a deed made by him to them, he stated in his petition, which was sworn to, that he was divorced from their mother and her place of residence was unknown, but failed to state whether or not they had a statutory guardian. Upon this affidavit the circuit clerk, under section 745 of the Civil Code, appointed a practicing attorney at the bar, upon whom service of process was had for the two infants. Held—That under the facts stated the affidavit and the action of the clerk were only defective and not void and the judgment rendered therein was not void 1048
3. this court has no jurisdiction to correct the records of a circuit court 1048
4. in an action by a father against two of his infant children to set aside a deed made by him to them, the father was an incompetent witness to testify for himself concerning any verbal statement of or any transaction with his said infant children, who were at the time of the transaction under fourteen years of age.. 1048

INFANTS—Continued.

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5. favor and affection is a sufficient and valid consideration to uphold a deed from a parent to his child. 1048
6. the fact that the father in his petition alleged that he had the deed made and recorded in the proper office was positive evidence of his intention to part with and pass the title to the land to his children. It did not require the actual manual delivery of the deed to them to make it a legal conveyance. The children being infants at the time, and the conveyance being beneficial to them equity implied an acceptance thereof on their part, but they had the right to reject the conveyance when they became of age within a reasonable time 1048

INJUNCTIONS—See Contracts, 28; Nuisance, 1, 2; Primary Elections, 8, 4—

1. in an action to enjoin a railroad company from constructing a viaduct in a street in front of plaintiff's property, where an injunction granted by the clerk was dissolved by the circuit court, it was not error in this court to permit the plaintiff to amend her petition, charging that the viaduct was a permanent obstruction and praying for damages to her property caused thereby. 184
2. section 747, Civil Code of Practice, pertaining to the suspending, modifying or continuing of an injunction during the pendency of an appeal, limits the application to this court to revise the action of the circuit court as to continuing the injunction enforced pending the appeal to "twenty days after the entry of such order," and when such motion is made within twenty days after the entry of the order it comes too late 740

INSANITY—See Criminal Law, 38; Land, 36, 37; Wills, 28.

INSTRUCTIONS—See Contracts, 32; Criminal Law, 1, 82, 83; Damages, 15, 16; Druggists, 4; Evidence, 43; Homicide, 12; Land, 20; Life Insurance, 18; Malicious Shooting, 1; New Trial, 3; Practice, 4; Telegrams, 5—

1. in an action upon a contract to sell patent medicines when the defense was that the written contract did not correctly reflect the contract between the parties, an instruction was erroneous which excluded from the consideration of the jury all evidence that conduced to support the contention of the defense as to the mistake in the writing 1
2. upon the trial of appellee upon an indictment charging him with feloniously striking and wounding an officer with a deadly weapon, it appearing that appellee was resisting arrest by the officer, an instruction to the effect that if the jury believed beyond a reasonable doubt that the accused had committed a public offense in the presence of the officer and knew the officer to be the marshal of the town where the offense was committed, and the officer attempted to arrest him, it was his duty to submit to the arrest; and if he refused to do so and assaulted the officer, the latter had the right to repel the assault and compel the defendant to submit to the arrest, correctly stated the law, and should have been given by the lower court 14
3. an instruction telling the jury that they should find for plaintiff such sum in damages as would compensate him for injury sustained by deposit of sawmill dust upon his premises, in injuring his trees, garden, furniture, etc., was not only right as far as it went, but it might have gone further and defined that committed, and the officer attempted to arrest him, it was his duty to submit to the arrest; and if he refused to do so and assaulted the officer, the latter had the right to repel the assault and compel the defendant to submit to the arrest, correctly stated the law, and should have been given by the lower court 14
3. an instruction telling the jury that they should find for plaintiff such sum in damages as would compensate him for injury sustained by deposit of sawmill dust upon his premises, in injuring his trees, garden, furniture, etc., was not only right as far as it went, but it might have gone further and defined that plaintiff was not only entitled to the use of his property, but that he had the right to enjoy it in peace and comfort 103
4. where upon motion and grounds for a new trial no complaint was made of instructions given by the court, they will be regarded upon appeal as the correct exposition of the law 216

INSTRUCTIONS—Continued.

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5. the court did not err in failing to instruct or admonish the jury that they should consider evidence of previous threats made by the defendant only for the purpose of showing the motive or state of defendant's mind at the time of the killing 220
6. in this action against appellant for the killing of stock the court properly instructed the jury that while it is the duty of the engineer to keep a lookout ahead of the train to see if the track is clear of obstructions, yet he is not required to keep his eyes constantly on the track in front of him, but only that he should exercise reasonable care in the discharge of his duty 252
7. the rule in this State is that if there is any evidence the question is for the jury, and in cases like this, where the circumstances showed that the stock might, by the exercise of ordinary care, have been seen in time to avoid a collision, and warranted such finding of the jury, this court has uniformly held that a peremptory instruction should not be given 252

INSURANCE—See Agents; Contracts, 5, 40; Criminal Law; Fire, 52; Life, 52, 53; Indemnity—

1. in his action to recover upon a policy of insurance, where it is apparent that the agent undertook to facilitate the transfer of the policy to appellant, and for this purpose mailed him a blank application for the consent of the company, and that appellant failed to sign and forward the necessary application, and pending the negotiations the property burned, the court correctly awarded a peremptory instruction to find for appellee 99
2. in this action for the recovery of insurance upon appellee's lumber there is some conflict in the evidence as to whether or not what is known as the "clear space clause" was abrogated before the loss, but the question was submitted to a jury, who found for appellee, and the preponderance of the evidence appears to sustain the verdict on this point 105
3. the testimony in this action conduces to show that the policy was cancelled; that appellee's agent agreed to its cancellation, and the money returnable under a clause of the policy relating to its cancellation was by consent of appellee's agent to be applied to premiums on another policy to be issued by another company upon the same property. There was sufficient evidence to authorize the submission of the case to the jury 151

INSURANCE, FIRE—

1. where L. was conducting a store in the trade name of M. and had taken out a policy of insurance for \$2 500 on his stock of goods in that name, there being no fraudulent concealment of the ownership and interest of L. therein, such policy is a valid contract of insurance. 461
2. although L. and M. were not partners, M. held the title to the property as an indemnity against liability for merchandise bought on his credit by L., which was enforceable as between them, and it appearing that M. was bound for merchandise bills to the amount of \$1,000, he had a material interest in the goods and their preservation. The value of the insured stock being \$2,000 in excess of the direct interest of M., he held such excess as pledgee in trust for the beneficial owner, and these were insurable interests 461
3. appellant had a policy on a building in which baled rags were stored, which are extra hazardous, and allowed a rebate on the risk by reason of information given by Wood, the secretary of the insured, that the rags had been removed. The policy provided that "this entire policy shall be void if the insured shall conceal or misrepresent in writing, or otherwise, any material fact concerning the insurance or the subject-matter thereof, or if the hazard be increased by any means within the control or knowledge of insured." This information, though false, was believed by the informer to be true. He did not profess to have any personal knowledge as to the removal of the rags but upon inquiry of the insurer informed the inquirer of his course in learning whether the rags had been removed, which answer he believed to be true. Held—That such answer was not a concealment or misrepresentation 852

INSURANCE, FIRE—Continued.

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4. if Wood, the agent of insured, knew that rags were stored in the building and concealed it from the insurer, such a fact would have been binding on the insured, but the knowledge of Wood's agent, who was not the agent of Wood's principal, is not imputable to the latter 858
5. the fact that the rags were stored in the building by O'Brien, who was the tenant of insured, although in violation of the tenant's rightful use of the premises, does not affect the policy if the insured was ignorant of it, although it was a matter which he might have controlled had he known it, or although he knew of it, yet if it was a thing beyond his control the policy is not affected by it..... 858
6. the fact that the risk was increased after the issuing of the policy, by the storing of rags without the consent of the insurer, yet if the extra hazardous condition was removed before there was a fire, then the condition remained precisely as when the contract was made, and while the liability of the insurer was suspended during the time of the existence of the condition, if the fire had then occurred insurer would not have been liable. But if before loss, and during the time covered by the policy, the original condition was restored, the liability of the insured was restored also and it was thereafter liable for the loss..... 858

INSURANCE, LIFE—

1. under a contract by a water company to furnish a city an ample supply of water for all purposes, an instruction to the jury that if they believe from the evidence that the failure of the defendant to furnish an ample supply of water at the time of the burning of the property was due to accidental cause, not the result of defendant's negligence, and which it could not by the use of ordinary diligence have foreseen and prevented, the law is for the defendant. was proper..... 421
2. under section 679, Kentucky Statutes, where the application for the certificate of insurance is not attached to or does not accompany the policy, it can not be received in or considered as part of the contract in a controversy between the parties interested in the certificate 469
3. where policies of insurance were taken out on the life of the insured by persons claiming to be his creditors and who paid the premiums, and on the death of the insured the policies were paid by the company to the beneficiaries named therein under the belief that they were in fact creditors of the insured, the company is not liable to the administrator of the insured for the sums so paid, although the parties to whom the money was paid were not in fact creditors of, and had no insurable interest in, the life of the insured 818
4. where the beneficiaries named in a life insurance policy were not in fact creditors of the insured and procured the policies by falsely representing themselves to be such creditors, the transaction was a speculation upon the hazard of a human life, and a gambling scheme, and the policies are void as against public policy, and no cause of action can be maintained on them by the administrator of the insured 818
5. where an insurance policy is taken out upon the life of another without his consent or knowledge it is void, but in such case, where one in good faith paid the premium on such a policy, he would be entitled to recover the premiums so paid 818
6. where a life insurance policy provides that any indebtedness of the assured to the company will be deducted from the face of the policy, a note owing to the company by the assured should be credited on the sum payable by the company 825
7. under a policy of insurance, which provides that after it has been in force for three full years should it lapse and not be surrendered, the full amount thereof at date of lapse any indebtedness being repaid, within three months will be extended without request or demand therefor, where the yearly premiums are to be paid in quarterly installments, in advance, a payment of the premiums for two years and for two quarters of the third year will not have the effect to continue the policy in force, where the insured died shortly after the expiration of the third year.... 872

INSURANCE, LIFE—Continued.

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8. so much of section 679, Kentucky Statutes, as provides that the policy, or certificate, application, constitution, by-laws or rules shall be plainly printed, and no portion thereof shall be in type smaller than brevier, applies only to co-operative companies. ... 872
9. in an action for a paid up policy by the husband and wife on a policy issued December 16, 1889, on the life of the husband, payable to his wife at his death, in consideration of an annual premium of \$189 for twenty years, which contained this clause: "After three full annual payments have been paid upon this policy the company will, upon legal surrender thereof or within six months thereafter, issue a nonparticipating policy for paid-up insurance; * * * when the husband paid four annual premiums, but failed to pay the fifth, due December 16, 1893, but did not demand a paid up policy until December 7, 1894, to which the company responded that the policy had lapsed, and as an application for a paid-up policy was not made within six months, the policy became forfeited according to its printed terms, and was of no value." Held—That though the action was not brought until eight years after the default occurred, the demand having been made within five years after such default, the action for the issuance of the paid-up policy may be brought on the written contract at any time within fifteen years after the cause of action accrued ... 586
10. in an action for a paid-up policy, where there was no demand by the company for a surrender of the policy, and there being a demand for a paid-up policy which was refused on the ground that the policy was no longer in force, it was not incumbent on the policy holder to tender the policy to the company before suit ... 586
11. S. took out a life policy for \$5,000 in appellant company on the twenty payment plan, payable to his wife, the annual premium being \$208.90, on which he paid nine annual payments and defaulted, and died four years and eleven days after making the first default. The policy under its terms gave the insured, after making three annual payments, the right to surrender his policy and demand a paid-up policy within twelve months after making default, which insured failed to obtain. The beneficiary within five years after the first default demanded that such paid-up policy be issued to her for \$2,150, which appellant refused and offered her the "legal reserve," amounting to \$1,190, which she refused. Held—That she is entitled to recover the value of the paid-up policy, \$2,150, as though it had been applied for by the insured within twelve months after the first default in the payment of the premium ... 846
12. where one applied for insurance on the 26th day of November, and died suddenly on the 29th, three days later, and suit was brought to recover the insurance, alleging that the applicant had paid the premium when the application was made, and there was no receipt relied on and the oral contract relied on was denied by the company, a peremptory instruction to find for the company was proper ... 898
13. appellant upon the trial of this action offered to prove by a witness that her deceased husband had told her that he had applied for insurance and that he had paid for it by giving the agent credit upon an account he had against the agent, and that the agent had told him he was fully insured, was properly excluded, for to have admitted it would have been to allow appellant to make evidence for herself. The evidence was only a narration of a previous transaction and was in no sense *res gestæ*. ... 898
14. so also was properly excluded evidence offered by deceased's son to the effect that deceased told him soon after leaving the agent that he had taken the insurance and had agreed to credit the agent upon his account for the premium, and directed the son to make the credit on the book kept by him, and that he forgot to make such credit. The conversation did not occur at the time of the transaction with the agent and the latter was not present, and was clearly incompetent. ... 898
15. where in an original certificate of insurance there was no provision concerning suicide, but the application contained a provision by which the applicant agreed to be controlled by all the

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- rules and regulations of the order then in force, or that might thereafter be enacted, where a by-law was subsequently adopted by the company, under the provisions of section 679 of Kentucky Statutes, requiring all contracts pertaining to such policies and all by-laws, rules and regulations, or copy thereof, to be attached to the policy or it shall not be considered as a part thereof, while it did not affect the previous contract in so far as its obligations had been fixed, we see no reason why the statute, although passed since the original contract was made, should not apply to alterations or changes of such contracts 1201
16. such alterations are in a sense new contracts, although it had been previously provided that they might be entered into. When the new matter became attached to the original contract as an obligation of the parties, a police regulation of the State required certain prerequisite formalities before it became their act. This did not impair the obligation of the old contract, but dealt alone with the attempt to alter that contract. Such new matter could not have been added at all, as was done, except for the provisions in the old certificate that let it in. That provision gave to the insurer the right to alter the terms or conditions of the original agreements of the parties at any time in the future by the adoption of a new rule or regulation of the society affecting it. The new law, leaving the old contract precisely as it was found, laid hold of the parties and said in effect, when you make alterations of this contract, as you may do by the adoption of by-laws or rules, the sovereign power of the State requires that a copy of such by-laws shall be endorsed on or attached to the certificate or policy of insurance. But it will not do to tender such copy years after it should have been done and after the liability of the insurer has been completed under the original contract 1201
17. a pleading that the contract was an Illinois contract, made and to be performed in that State, and that the statute of this State could have no extra-territorial force there, was properly rejected. The statute applies to persons insured in this State by companies doing business in this State. It had no right to come in this State to do an insurance business except upon such terms as this State might impose. 1202
18. the fact that appellant is a "Federal corporation," having been organized in the District of Columbia under an act of congress, is no defense. No matter where created, by its presence in Kentucky as an insurance corporation its contracts are to be construed and enforced by the courts of Kentucky when it is sued in our courts 1202
19. a life policy was issued by appellant for \$10,000 on the life of W. P. Gatlin, in which insured's daughter, Gray A. Gatlin, was named as beneficiary. When the policy was produced after the death of insured it contained the additional name of Geo. O. Gatlin, a son of insured, as one of the beneficiaries, which latter named there was evidence tending to show was in the handwriting of the insured. Both the son and daughter were infants, and by their guardian brought this suit on the policy. The company pleaded the alteration in bar of the action. Held—If the application was in fact accepted by the company, and the policy issued with Gray A. Gatlin as the sole beneficiary, her rights then became fixed, and neither the insured nor the company could affect her rights except as provided in the policy, which provided that the insured might change the beneficiary with the consent of the company 670
20. on the trial of the action the court should have told the jury that they should find for the plaintiff, Gray A. Gatlin, alone, if the alteration of the contract was made by the insured after the policy was delivered and accepted, and without the consent of the company, but that they should find in favor of both the plaintiffs if the alteration was made before the delivery and acceptance of the policy, or with the consent of the company 670
21. where it is pleaded that insured had made false statements in his application for insurance as to his habits as to drinking whisky, the court should have set out in an instruction the questions and answers contained in the application in reference thereto, and

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should have told the jury that they should find for the plaintiffs if the answers were substantially true, but otherwise they should find for defendant, although there was no intention to mislead or deceive the company, and that the answers were not substantially true if the assured drank materially more than as stated .. 670

INSURANCE INDEMNITY—

1. in an action on a policy of employees' indemnity insurance, which provides that the employee should be over twelve years of age, it is not necessary that the petition should allege that the person injured was over twelve years of age 658
2. a condition in a policy of employees' indemnity insurance that no action shall be maintained thereon unless it is brought within thirty days after payment of loss by the insured, is contrary to public policy and is void 658
3. the age of a member of a family may be proven by proof of declarations of other members since deceased 658
4. under a prayer for general relief interest may be allowed on a claim from the filing of the suit, although not specially prayed for in the petition 658
5. where the indemnity insurance company did not defend the suit of the insured against the appellee and appellee had to defend it, the court properly held the insurance company liable for the costs of the action upon its policy of indemnity 658

INTERESTS—See Sheriffs, 1, 6, 8—

1. the money collected by the sheriff upon taxes and penalties due the county, and taxes and penalties collectable, but not collected, are treated as a debt due by the sheriff to the county on January 1, after they become due, and upon their total amount the sheriff is liable to the county for interest at 6 per cent. from that date until paid, which interest is in addition to the 6 per cent. penalty upon the gross sum due and unpaid on January 1 67
2. while it is proper to charge the sheriff with interest on the penalty due the county by taxpayers who fail to pay their taxes by December 1 of the year in which such tax is due, there should be no interest computed on the additional penalty due by the sheriff to the county for his failure to pay over all the taxes collected or collectable on January 1 thereafter, said penalty against the sheriff, although a liability for which he is bound on his bond, is not a debt upon which interest can be computed 67
3. from the evidence it appears that \$475 of payments was interest paid by the borrower, and as to it he was relegated by the statute for his remedy for double penalty for usury paid, and the evidence failing to support the bank's contention that any further part of the payments credited by the judgment appealed from was paid by the debtor as interest, without this specific appropriation, the lender had no authority to apply it except as was done by the court below 288

INTOXICATING LIQUORS—See Local Option, 1; Ordinances, 4—

1. section 3704, Kentucky Statutes, which is part of the charter of towns of the sixth class, provides that the granting of a license to sell spirituous, vinous or malt liquors shall be under the exclusive control of the board of trustees of such town, and where one has obtained a license from the board of trustees he is not required to have a license from the county court, but should pay or tender to the county court clerk the license tax due the State, and the refusal of the clerk to accept the money tendered made the clerk liable to the State therefor, but such refusal did not subject the defendant to prosecution for selling such liquors without a license 122
2. an instruction to the effect that a sale of whisky on a boat in Barren river at any point where the river is the boundary of Barren county is a sale in that county, is authorized by section 20 of the Criminal Code, and an instruction in substance advising the jury that defendant was guilty if he was interested in the whisky sold, and had a clerk or partner at the boat where it was sold, making sales in quantitles of less than five gallons, and that such sales were made with his approval, correctly states the law. 690

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3. an indictment which charges that the defendants unlawfully and willfully sold by retail a beverage liquid mixture, or decoction, which causes or produces intoxication, in territory in which the sale of spirituous, vinous or malt liquors is prohibited in accordance with the local option law, is good under Kentucky Statutes, section 2557a, which prohibits the sale of "any beverage, liquid mixture or decoction of any kind which produces or causes intoxication," in such territory, and it is not necessary to name in the indictment the mixture or decoction that was sold 712

JOINT ACTION—

1. under Civil Code, section 26, persons severally liable upon the same contract may be included in the same action at the plaintiff's option 40
2. where a joint action for personal injuries was filed against a foreign corporation and three of its resident employes, alleging that the injuries were caused by the joint and concurring negligence of the company and its codefendants, as its agents and employes, in the operation of a railroad train, on which plaintiff was a passenger, a petition by the corporation for removal of the cause to the United States Circuit Court, which alleges that its codefendants were joined with it, for the sole and fraudulent purpose of preventing a removal of the action from the State court, and that all the statements in the petition as to such codefendants are untrue, amounts to nothing more than a conclusion of the pleader, and does not state a single fact from which the court might determine that the cause of action is separable.. 807

JUDICIAL DISTRICTS—

1. section 132 of the Constitution provides that "the general assembly, when deemed necessary, may establish additional (judicial) districts, but the whole number of districts, exclusive of counties having a population of 150,000, shall not exceed at any one time one for every 60,000 of population of the State, according to the last enumeration." The last Federal census shows that the State had in 1900 a population of 2,147,174. This would have entitled the State to as many as thirty-one judicial districts, outside of the county of Jefferson, which had a population of 232,549. Section 128 of the Constitution provides that "the general assembly, having due regard to the territory, business and population, shall divide the State into a sufficient number of judicial districts to carry into effect the provisions of the Constitution concerning circuit courts." Held—That the act of the general assembly of 1904, creating the Thirty-first Judicial District, composed of the counties of Floyd, Knott and Magoffin, was constitutional. 241
2. the inhibition in the Constitution is not against the size of the districts at all except where single counties may constitute a district, and the fact that the Thirty-first District contained only about 36,293 population does not affect the validity of the act creating it, as the population of the entire State by the last census was such as to empower the legislature to create an additional district. 241
3. any one elected to the office of Commonwealth's attorney takes it subject to the constitutional right of the legislature to make new districts as the necessities and population may require, and those affected by its exercise must yield to it as one of the conditions fixed by the Constitution upon which they took their office 241

JUDICIAL KNOWLEDGE—See Railroads, 64.

JUDICIAL NOTICE—See Contracts, 32.

JUDICIAL SALES—See Practice, 3—

1. where a sale of real estate is made by the commissioner of the court under a decree of the court, the purchaser is only a preferred bidder until his bid is accepted by the court by confirming the sale, and when the purchaser refused to execute bond and the sale was reported to the court, which decided not to confirm it, but treated it as though it had not been made, and ordered a resale thereof, if upon a resale the land shall sell for less than was offered by the first purchaser, he can not be held liable for the deficiency 4

JUDICIAL SALES—Continued.

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2. under Kentucky Statutes, section 14a, providing "that in addition to notices now required by law to be posted, all public sales of any kind of property when sold under execution, judgment or decree shall, unless otherwise agreed upon by the parties to such execution, judgment or decree, be advertised in some newspaper published in the county of the sale." * * * Held—That the word "parties" in this section includes infants as well as adults, and in a decretal sale of the land of an infant, its guardian has the right, with the approval of the chancellor, to agree to dispense with the newspaper advertisement of the sale of such land, and such agreement is binding on the infant 239
3. while the rule of caveat emptor applies in all its strictness to judicial sales, it is not thought that when a purchaser, before confirmation, shows a failure of title in some material particular a court of equity may not relieve him of his bid where it was made under a clear misapprehension of fact or law inducing the bidding. 610
4. under Civil Code, section 490, providing for the sale of real property held jointly by two or more persons, if the property be in possession and can not be divided without injuring its value, such sale may be made where there are vested estates jointly held, though one of the parties is a life tenant and the remaindermen are infants. 632

JUDGMENTS—See Practice, 1—

1. where the entry of a judgment is ambiguous or so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and other proceedings, and if with this light thrown upon the entry its obscurity is dispelled and its intended significance made apparent, the judgment will be upheld and carried into effect as it was intended 347
2. a judgment in an action upon certain coupons of a bond is not a bar to a recovery in an action on other coupons of the same bond, as each coupon is a separate promise and gives rise to a separate cause of action thereon. 31
3. the Code of Practice provides that a judgment shall not be reversed for any error of law not affecting the substantial rights of the adverse party, and as the appellant in this action obtained credit upon the trial in the lower court for everything he claimed, it is immaterial to him whether the claim was upon the equity or ordinary side of the docket. 741

JURISDICTION—See Appeals, 12; Damages, 5; Ordinances, 5; Partnership, 3; Practice, 3; Railroads, 9, 47; Telegrams, 6; Writ of Prohibition, 1, 2, 3, 4—

1. where Manders took his wife to Virginia temporarily on a visit, where she became insane and was committed to an asylum in that State, but he kept his residence in Kentucky, keeping her estate here, an action by the asylum for keeping her could only be maintained in this State, and, therefore, the limitation provided for by the Kentucky Statutes in such cases must govern, for a Virginia statute of limitation could not be applied to an action that could not be enforced in that State. 254
2. in an action by McKenna on an apportionment warrant against Craig and the city of Covington for \$186, and to enforce a lien on Craig's property and for judgment against the city if the property is not liable, in which the court dismissed the petition against Craig, a judgment for McKenna against the city for the debt is a personal judgment, of which this court has no jurisdiction. 784

JURY—See Actions, 2, 10; Railroads, 18, 17.**JURY TRIAL—See Constitutional Law.****LABOR PENALTY—See Municipal Corporations, 2, 3.****LANDLORD AND TENANT—**

1. where the owner of a one-story building, which was leased for and occupied for printing a newspaper, employed an independent contractor, without the consent of the tenant, to put a second story thereon, the tenant is entitled to recover from the landlord the damage done to type, stationery, etc., by reason of its exposure to the rain, dirt and grit in the construction of the second story; that on the trial of the case the fact as to whether the tenant

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consented to the erection of the second story was a question for the jury, as was also the extent of the damage done to the tenant's property thereby..... 887

2. in an action by a tenant to recover from his landlord damages done to his property by an independent contractor, in putting a second story on the building occupied by the tenant without the tenant's consent, a demurrer to a cross petition of the landlord against the contractor was properly sustained, as such action can not be properly litigated in the claim of the tenant against the landlord. 888.

3. where a tenant's lease on premises has expired, and the landlord agrees that he may continue in possession and use of the premises as tenant by the month, but to have one month's notice before being required to quit, he is not a tenant at will or by sufferance, but a tenant from month to month, which tenancy may be terminated by the landlord giving him one month's previous notice, which notice may be verbal..... 880.

LANDS—See Action to Settle an Estate; Adverse Possession; Conveyance by Deed, 1; Conveyance by Father to Daughter, 1; Lease, 1, 26, 5; Limitation, 4; Divorce and Alimony; Owner of Adjoining Tracts, 1, 12; Passway, 1, 8; Railroads, 33, 48, 57—

1. it appearing that the land in controversy was within a boundary known as the "forge line" or "three mile circle," which was embraced in a large body of land conveyed in 1849 by several claimants to Samuel C. Jackson and others, and that appellant owns it, it was error for the chancellor to dismiss his petition in which he sought to recover same..... 148.

2. appellee claims through John Clem, who testified that Mason, who gave him fifty acres of land outside of the "forge circle," explained to him that he owned no land in the circle, and the fifty acres must be selected outside, and that when he sold to Vaughn he explained to him that he only sold him so much of the land as lay outside of the circle, and that Vaughn fully understood this when he purchased the land. This occupation was not adverse to appellant's title and can not be included in the time required by appellee to make up his title by prescription..... 148.

3. in this action to recover for the value of timber cut, the question of title being in issue the evidence of certain witnesses read as depositions as to the location and boundary of the land was insufficient to overthrow the location of the land as determined by the actual calls of the patent... 164

4. the lot in controversy was properly adjudged to appellees, it having been shown they have the title and that appellants have neither pleaded nor shown one. 250.

5. in this case it appears that appellant announced in open court that she would not accept the money awarded her for her land, and this being true a tender was unnecessary, and appellee was excused when the money was deposited by it in open court 251

6. in an action to determine the location of a division line between two parties who claim the land from the same source, it is not incumbent on the plaintiff to show that he derived title from the Commonwealth 277

7. S., who was a widower without children, but had reared a foster daughter who married O., induced O. to give up his trade and move to S.'s farm under a written contract stipulating that O. was to cultivate and control the farm, pay the taxes, and have all the proceeds thereof, with the right to sell it, and have all the proceeds of the sale in excess of \$4,000, which S. reserved to himself. Held—That under the contract S. held the legal title to the land in trust for O. after paying himself \$4,000 out of it .. 307.

8. after making some improvements O. sold the farm for \$5,500, with the consent of S., who made the deed, and invested the proceeds in a Kansas farm, which he afterwards sold and invested the proceeds in another Kentucky farm, in both of which farms the legal title was taken to S. Held—That this did not destroy or annul the original equitable trust between the parties, the oral agreement for the two last trades being nothing more than a

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- recognition of the trust created by the original written contract. The trust followed the property, and may be enforced as long as the subject of the trust can be traced and identified 807
9. the fact that O. before the death of S. procured a divorce from his wife, by her fault, and left the farm and went back to his former trade, was not an abandonment of his equitable trust in the property, and the further fact that on the death of S. he by his will devised the divorced wife of O. \$4,000, and made no other devise except \$200 for tombstones, was a recognition of his obligation to O. under the original contract 807
10. S. contracted to sell the last farm to C. for \$7,000, on which C. paid \$411 to S. In an action by O. to recover the proceeds of this sale in excess of \$4,000 Held—That he was entitled to recover the excess of the purchase money over \$4,000, less \$411 paid to S. 808
11. in a controversy involving the title to unoccupied and uninclosed land an allegation of ownership which is denied will not authorize a recovery in the absence of the title papers being filed or other evidence showing title 828
12. where two parties claim title to a tract of land under the same grantor, one by deed and the other by title bond, neither of which is filed or proven, and neither the pleading nor the evidence tend to establish a title by prescription in either of the parties, it is incumbent on the plaintiff to exhibit a superior paper title in order to a recovery 828
13. in an action to enforce a purchase-money lien on a dwelling house and lot and two adjoining lots, the pleading described all three of the lots, and the judgment directed the sale of the dwelling house and the two vacant lots adjoining, but in giving the boundary the decree omitted the boundary of the dwelling house lot. The commissioner sold all three of the lots, but in his deed to the purchaser he gave the boundary of the vacant lots and omitted the boundary of the dwelling house lot. Held—That in an action by the former owner to recover the dwelling house that the purchaser at such sale was entitled to hold the entire property 847
14. where a right of way has been granted by a land owner for the building of a turnpike thereon, an agreement by the turnpike company to allow telephone poles and wires to be erected thereon being for a public purpose, is not an additional servitude on the land, for which the original owner can maintain an injunction or recover compensation from the telephone company 894
15. where a river is a boundary between counties and between two adjoining tracts of land the shifting of the channel of the river, after the counties were made, cutting off a strip of one of the tracts, leaving it beyond the thread of the stream, does not effect the ownership of the land, and does not affect the boundary of the counties, which remains where it was before the channel was changed 417
16. the evidence in this case establishes the fact that appellee made the deed herein from fright and to avoid a liability, and not in settlement of any claim appellants had against her 481
17. while a court of equity will not ordinarily aid a grantor to escape from the consequences of his own fraud, this rule has no application where the grantor is the dupe of the grantee and his weakness has been imposed upon by undue advantage 481
18. persons who are not surveyors may testify as to measurements of a lot made by them with a tape line 455
19. evidence that a deed has been changed is not competent unless it is shown to have been changed since its delivery 456
20. where lot No. 14 on a town plat is conceded to belong to the plaintiff, and the boundary alone was in controversy, the instructions should have been that if the defendant was over the line and held any part of said lot, they should find for plaintiff otherwise, they should find for defendant 456
21. in this action the evidence examined and held that appellees claim of adverse possession will not avail him, as he was not in the actual possession of the land, and had he been, appellants were infants, against whom the statute did not run. Moreover, it appears that before he purchased the land from Vincent he knew of the equitable claim of appellants, and was, therefore, not an innocent purchaser 489

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22. where two surveys have a corner and division line in common it is impossible that appellee's vendor could have owned any land between the two surveys. If there was a conflict in the surveys the elder title would prevail	489
23. where one entered upon and improved land upon a verbal agreement by the other party to convey land to him for his improvement, he is entitled to a lien on that part of the land which he improved for the value of his improvement	494
24. a lien for improving land, under a verbal contract to convey, can not be defeated on the ground that the land so improved is a part of the homestead of the contracting party	494
25. the court did not err in refusing to transfer this action to the ordinary docket, the claim being an equitable one	494
26. H. O. Hutton devised to his son a farm, describing it, with the provision that if the son should not live until his youngest child should reach the age of sixteen years, it should become a home for his wife and children until that period arrived. Held—The son could not have disposed of the farm in the lifetime of his wife so as to have affected her interest, or that of the children, and her death did not cause the children to lose their interest. All that the appellant can do is to convey subject to the interest of the children which the testator intended they should enjoy upon the happening of a contingency	504
27. where appellee and his brother jointly owned a tract of land and upon his brother's death his undivided interest was ordered sold to pay his debts, and at the request of appellee was bought by appellant at said sale for appellee's benefit, and after the time for redemption had expired appellant, against the objection of appellee, caused a deed to be made to himself for the land, in an action by appellee against appellant to set aside said deed, alleging that appellant held the title in trust for him, he having all the time been in the actual possession thereof, the court properly decreed the relief sought upon the repayment by appellee to appellant of the money he had paid in the purchase thereof	586
28. it was error to award judgment against appellant and enforcing a lien upon his land, there being not the slightest pretext that he had any lien for the payment of the debt sued on, no fact being recited in the pleadings that authorized such lien	571
29. where the husband took possession of a tract of land under a title bond, and held it adversely and continuously for thirty years, the fact that his widow after his death procured a patent for it from the Commonwealth does not affect the interest of the husband's children therein, who claim as his heirs subject to the widow's life estate; and a sale of said land by the widow passed to the purchaser only the use of same during the life of the widow	678
30. a purchaser of land from a widow who has only a life estate therein is not entitled to recover for improvements made thereon and make the heirs responsible therefor	678
31. in an action by the administrator and heirs of a deceased vendor of land to enforce against the vendee a lien for the unpaid purchase money due thereon, to which the defendant pleads a counterclaim for failure to get possession of part of the land purchased, evidence considered and held that defendant failed to sustain his plea, and is estopped by the admissions and averments of his answer to rely on the statute of limitations of fifteen years as a bar to the action	680
32. as Oberdorfer, a creditor of Margaret McGrath, in this action to settle her estate, did not set up his tax claim, the presumption is that he purchased the property for the protection of his claim as mortgagee, and as the sale was made within two years after the tax sale, his rights were barred before the expiration of the two years allowed for redemption, and the fee simple vested in him at no time under the statute; and a judgment barring his right is equally conclusive upon his wife because if the title did not vest in him she had no potential right of dower	723
33. where parties own adjoining tracts of land and without knowing the exact location of the dividing line between them verbally agree upon and fix a certain drain as such dividing line, and thereafter for many years continue to reside on and claim their	

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- respective lands up to such agreed line, such agreement is enforceable in equity, although the period of fifteen years has not elapsed since such agreed line was established 815
84. where it is apparent on the face of the papers that a patent was intended for 175 acres of land and not for 2,110, and this may be shown by reversing the calls, the actual intention of the parties making the survey should control 818
85. a petition for the recovery of land by persons claiming it as heirs of T., who is alleged to have been a lunatic at the time it was sold and conveyed by him to the defendants and their vendors, while it may not be sufficient to support an action in ejectment, is not demurrable, where the allegations, if true, would entitle the plaintiffs, under their prayer for all proper relief, to a cancellation of the deed, which would result in the restitution of the land, to be followed by an accounting for its detention on equitable principles 822
86. all deeds made by lunatics are not void, but voidable only. The fact that plaintiff's ancestor was properly adjudged to be a person of unsound mind, though conclusive evidence that such was his condition at the time of the inquest, is only prima facie evidence of his condition at the time he sold and conveyed the land, and being a mere presumption it may be rebutted by parol evidence 822
87. though it may appear that T. was of unsound mind at the time he conveyed the land to V., that fact can not divest V.'s grantee, or other subsequent purchasers, of their title to the land unless they had at the time of the conveyance to them respectively, notice that T. was of unsound mind at the time he sold and conveyed the land to V. 822
88. as the patent under which appellants claim title is superior to the patent under which appellees claim title, the title of the former is superior if it includes the land in controversy, but to compare the patent and survey the calls of the survey is duplicated in the patent, but it must be presumed that the patent was intended to follow the survey, and the repeating of the call in the patent is a clerical error 831
89. the proof shows that appellee Middleton settled upon the land in 1868, acquiring it under a title bond from the patentee, and that he and his co-appellee have been living upon and claiming it ever since, and appellant Hensley always acquiesced in the construction Middleton placed upon his deed, and where Hensley conveyed to Frost as being all of the land deeded to me by James Brittain to the foot of Black Mountain, containing 400 acres, the court only adjudged Middleton the land to the Frost line, the land in controversy being north of Black mountain, and this view of the chancellor seems to be correct 831
40. where there are erroneous calls and an omitted line in a survey of land, they should be corrected by the plat and the patent established. In ascertaining a boundary of a tract of land where there is an apparent lap of an adjoining tract, they should be corrected by the original plat and patent established, that the intention of the parties in making the survey may be effectuated, and the mere mistakes of the officer in transcribing the field notes should not be allowed to frustrate this intention if there is evidence by which they may correct it 840
41. in this action to enforce lien for unpaid purchase money for land the defense interposed was that the conveyance was without reservation, and that after accepting the deed it was ascertained that certain mineral rights in a former conveyance had been reserved and a counterclaim for their value was pleaded. Appellee admitted the defect of title, but pleaded that he had put appellant Joiner in possession, and that he had not been disturbed or evicted; that the land was conveyed to him by deed of general warranty, and that his vendor held by such deed, and that in these deeds there was no reservation of mineral rights; that he had no notice of such a claim for mineral rights, and offered to rescind the sale, and on final hearing the court adjudged a rescission of it. Held—The appellant is in no position to complain of the judgment. There was no fraud in the transaction, and no allegation of insolvency on the part of the grantor 844

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42. the rule is that where the vendee has accepted a deed he can not, when sued for the price, defend on the ground that the grantor's title was defective, unless the grantor is insolvent or a nonresident, or has been evicted by a paramount title. In such cases he must look to the warranty for such damages as he may sustain. 844
43. one who pleads and relies upon the ownership of a tract of land, by having it cleared and fenced and attached to another tract on which he resides, and by showing that he has so held and claimed it continuously and adversely for more than fifteen years, is entitled to recover it independent of any other title. 1011
44. in an action involving title to land, which was tried by the chancellor, where there was a missing deed necessary to make out a chain of title, the evidence of the existence of which deed was conflicting, we must give some weight to the finding of the chancellor. Our rule is not to disturb the chancellor's finding on a disputed question of fact where the evidence is conflicting and leaves the mind in doubt as to the truth 1108
45. where a deed made by the appellee company was read on the trial without objection or exception, an objection that it does not show that it was acknowledged by the officers of the company can not be taken for the first time in this court 1108
46. in an action to recover balance of purchase money for a tract of land, the defense being that the purchasers bought the land and all that was on it, and the seller pleading in a reply that some of the timber had been branded as sold timber, and that while it was by mistake omitted from the deed, still the purchasers were aware of the fact that it had been sold and that the deed of sale was of record, the facts of the sale being such as to prevent a court of equity from enforcing the sale, it will be rescinded, and the purchasers will be adjudged in a lien for the purchase money and interest and be charged reasonable rent for the land while they held it 1115
47. under a lease of land for twenty years, with the privilege to bore for oil and other minerals, in which the lessor was to have a royalty of one-tenth of the product, the lessee agreeing to begin work within eighteen months, and a failure of lessee to complete one well to render the lease void, there was an implied condition that the lessee was not only to begin work, but to prosecute it with reasonable diligence after it was begun, and where the lessee began work within the eighteen months, and, failing to find oil, moved his machinery from the land, it was an abandonment of the contract, and the lease thereby became void 1138
48. the fact that the lessee re-entered the land against the objection of the lessor and was permitted to bore the well deeper, and, finding no oil, again moved his machinery from the land, while the acquiescence of the lessor would estop him from complaining of the re-entry if the lessee had then found oil, but when the lessee again abandoned the property the lessor was not estopped to deny his right to return a second time. 1138
49. in this action the evidence considered and held that the appellee, Mrs. Clay, is entitled to one-sixth of the land in controversy as an heir, and the appellee, D. M. Clay, is entitled to one-sixth as a purchaser from John Eakins, who was also an heir, there being six children, and the land was the property of the father at the time of his death. 1139
50. one who induces another to buy land and improve it is thereby estopped to assert a claim to it against such purchaser or his vendee. 1169
- LEASE—**See Contracts, 16; Lands; Lubricating Oils, 1; Passways, 1. 8—
where premises are leased for a drug store for five years, under a contract providing "that in the event the owner should desire to remodel the building so far as it would necessitate the tenant removing from the building, he is to receive a certain reduction of the rent, with the right to re-occupy the premises after the building is remodeled at the same rental until expiration of the lease," such tenant is entitled to hold the premises where they have been damaged by fire without his fault, where the damage is not such as to render them untenable, and such lessee may elect to retain them unless the lessor will agree that he shall re-occupy them after they are remodeled as specified in the written contract. 558

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- LEINS**—See Contracts, 21; Lands, 41, 42, 43; Mortgages, 1, 2; Partnerships, 7, 8; Railroads, 48—
1. the lien provided for in section 2557, Kentucky Statutes, only affects the property of one who knowingly rents his property for the illegal sale of liquor, and in this action the property belonging to the seller, the demurrer to the petition was properly sustained in an action to enforce a lien upon it for the payment of fines assessed against him for the illegal sale of liquor 85
 2. sections 2500 and 2501, Kentucky Statutes, providing for the grazing of stock for compensation, provides that the lien shall not continue for a longer period than ten days after the removal of the stock from the premises with consent, and that in case of such removal the lien shall not be valid against a purchaser without notice. The statute thus recognizes the right of the keeper to retain possession of the property. Where a defendant did not detain stock without right, and they were taken from him under an order of delivery, they were properly ordered returned to him, to be held until his bill for grazing them was paid 295
 3. where a verdict is not copied in the record this court can not determine whether it was in proper form or not 295
 4. where appellant took no step in the prosecution of its action for taxes after filing it for more than fifteen years, and in the meantime appellee in good faith became a lender for value and without notice of the pendency of the suit or claim of appellant for taxes, a lis pendens did not exist in favor of the city at the time the interests of appellee intervened 896
 5. the rule is that a party claiming the benefit arising from the lis pendens must, in order to entitle himself to it against the bona fide purchaser, show that the suit had been prosecuted with reasonable diligence 896
 6. a lien created by deed continues in full force until released of record, discharged by payment of the lien debt, or barred by the statute of limitations. Although more than fifteen years have elapsed since the maturity of a purchase-money lien note the lien still exists if there has been payments on the note keeping it alive; and renewing the purchase-money lien note from time to time has the same effect 1144
 7. where usury is included in the renewal of a lien note such usury may be required by the payor to be deducted in the settlement of the note 1144
 8. where an executor of an estate, which was liable as surety on a note, causes the owner of the note to refrain from suing on it, or to postpone the filing of it before the commissioner within seven years from its maturity, he is thereby estopped to rely on the statute of limitations in favor of sureties as a bar to the collection of the note 1145
- LIMITATION**—See Actions, 6; Forceful Entry, 2; Fraud or Mistake, 1; Fraudulent Conveyances, 4; Indictment, 5; Lands, 4; Liens, 1, 6; Life Insurance, 3, 16; Local Option; Passways, 1, 2; Real Estate, 2; Railroads, 39, 40; Street Improvement, 3, 64—
1. limitation can not be relied on by one holding land as a joint tenant against his co-tenants 227
 2. appellee having paid appellant's taxes in December, 1897, this action to recover the amount of the money paid for her was not barred on April 2, 1902, when it was instituted 291
 3. the plea of the statute of limitations as to the first item in this action must prevail, the period provided for by statute having elapsed and no reason sufficient to stay it having been shown. In the matter of the set-off relied upon in an amended answer it is apparent from a careful reading of the record that the due bills referred to were mere memorandums of money loaned and were settled in adjusting the accounts between the parties, and, therefore, the chancellor's finding will not be disturbed 854
 4. an unreleased lien on land for purchase money must be deemed to be barred by limitation against a decedent's estate after fifteen years 610
- LOCAL OPTION**—See Actions; Intoxicating Liquors, 1, 3—
1. the fact that an order of a county court directing the holding of a local option election recited that the petition for the election was

LOCAL OPTION—Continued—

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- signed by more than twenty five per cent. of the legal voters residing and living within the magisterial district in which the election was held, instead of following the language of the statute requiring a number of names to the petition equal to twenty-five per cent. of the votes of each precinct cast at the last general election, etc., did not render the election void where it appeared the petitioners represented more than twenty-five per cent. of the votes cast at the last election, and that at the election 64 votes were cast in favor of the sale of whisky and 849 were cast against it; and where a case was made out for the violation of the local option law, it was error for the lower court to peremptorily instruct the jury to find for the defendant. 16
2. where the contest board in a local option election considered the evidence and made an order adjudging that "the election be set aside, cancelled and held for naught; that no election was held, and that neither party is entitled to have any fact certified concerning said election," said judgment was a final order, from which an appeal lies to the circuit court 909
3. an affidavit filed by the appellees on an appeal from the contest board to the circuit court in a local option election contest, stating that "the appellees in nowise question the integrity of the presiding judge, and without imputing to him any personal hostility to appellees, but that he can not, and will not, afford them a fair and impartial trial of the matters of law and facts involved in the appeal because he has a pronounced bias to the sale and traffic in intoxicating liquors." is not sufficient to disqualify the said judge from setting on the trial of the case. 909
4. under section 2655, Kentucky Statutes, special officers are required to be appointed to hold local option elections, who shall be appointed by the election commissioners of the county in which the election is held 910
5. where the election officers have a doubt of the qualification of a voter, they may require him to make the affidavit required by section 1477a, Kentucky Statutes, and until the voter either qualifies or offers to do so by making the required affidavit he is not a rejected voter, and neither the voter nor any other person can justly complain that he was not allowed to vote 910
6. one who was born on June 9, 1883, was entitled to vote at an election held on June 8, 1904. In law a man is twenty-one years old on the day preceding his twenty-first birthday 910
7. a proposition "whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned within the corporate limits of the town of Calhoun, McLean county, Kentucky, and that the provision of this law and prohibition shall apply to druggists," submitted to be voted on under the local option law in this State, is an entirety, intended, if adopted, to prohibit the sale of intoxicating liquors by druggists within said town. 910
8. while there is no authority for the use of a device or emblem upon the ballot in a local option election, the fact that such emblems were used by both sides in such an election, and that the one used by those favoring prohibition was an open book, with the words "Holy Bible" printed across it, ought not to be allowed to defeat the voters' will where it was fairly expressed and otherwise held in conformity to law 910
9. the local prohibition law commonly called the "Five Counties' Act," approved April 4, 1884, forbids the sale of liquor by retail in Laurel county it results, therefore, that in Laurel county the act of March 10, 1894, as amended, which constitutes chapter 81, Kentucky Statutes, must be construed as part of the act of 1884, regulating and controlling the former in the matter of procedure, the quantity of liquor to be sold, and the punishment. In other words, the act of 1884 is operative in Laurel county without the necessity of a vote by the people. Of the existence of the act of 1884 and the operation of the act of 1894 this court will take judicial notice 918
10. under subsection 4 of section 2757b, Kentucky Statutes, which is a part of the general local option act of 1894, as amended in 1902, providing that "all the shipments of spirituous, vinous or malt liquor to be paid for on delivery, commonly called C. O. D. ship-

LOCAL OPTION—Continued—**Page.**

- ments, into any county, city, town, district or precinct where said act is in force, shall be unlawful, and shall be deemed sales of such liquors at the place where the money is paid, or the goods delivered." Where intoxicating liquors are made and sold by a distiller in this State in quantities less than five gallons and sent to Cincinnati, O., to be shipped to the purchaser C. O. D., in a town where the local option law is in force, such shipment being for the purpose of imparting to it the quality of interstate commerce, is a mere device to evade the laws of this State, and is no protection to the seller, and for every such sale the parties so engaged are liable to the penalties prescribed by the local option law in this State 918
11. the local option law being in force in Laurel county under a special act of the legislature known as the "Five Counties' Act," which provides that "all shipments of spirituous, vinous and malt liquors to be paid for on delivery, commonly called 'C. O. D. shipments,' into any county * * * where said act is in force shall be unlawful, and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered, the carrier or agent selling or delivering such goods shall be liable jointly with the vendor thereof," where a package containing four quart bottles of whisky was shipped from Cincinnati to Laurel county by the Adams Express Co., to be delivered to M., "C. O. D.," and which was known to the agent of the company to contain whisky, and which agent of the company in Laurel county agreed to hold for a week until M. could pay for it, and then delivered it and received the price, the express company did not at the time of delivery sustain to that package, or to the consignor and consignee, the relation of common carrier, but merely that of a bailee or warehouseman, and for that reason could not claim protection in the transaction by the law of interstate commerce, but it was a sale wholly made in this State by the bailee after it was received from another State. 1096

LOST RECORDS—See Practice, 5.**LUBRICATING OILS—**

- an indictment returned May 10, 1904, for a sale of lubricating oil made April 7, 1894, without having procured license to sell such oils from wagons, is not a bar to an indictment found September 28, 1904, for a sale made in June, 1904, and as the court upon the trial of the latter offense confined the inquiry of the jury to a sale occurring in June, 1904, this necessarily limited their scope of inquiry to a time not covered by the former indictment. 1181

LUNATICS—See Actions, 9—

1. a motion to dismiss an action by an asylum for the keeping a lunatic for want of demand upon the committee before suit brought was properly overruled, as this was waived by filing a demurrer to the petition 254
2. although the proceedings in the county court committing a lunatic to the asylum were void by reason of the absence of such lunatic at the inquest, the asylum may, by action against the trustee of the lunatic on a quantum meruit recover for her board while confined in the asylum. 649
3. in such action the lower court properly sustained a demurrer to all of the claim created more than five years prior to the commencement of the action 649
4. a creditor of a lunatic can subject an estate devised to her to the payment of its debt to the same extent that the lunatic could subject such estate to her own use 649
5. under a devise by the father of a lunatic to a trustee for the benefit of the lunatic with power to pay her only the income of the devise during her life for her comfort and support, unless in case of necessity the trustee may see fit and proper to expend more, she could have maintained an action against the trustee for the whole of the estate if her necessities required it. 649

MALICIOUS SHOOTING—

- in a prosecution against one charged with maliciously shooting another with a pistol with intent to kill, it is error in the court in giving an instruction on self-defense to qualify it by adding thereto: "Unless you believe from the evidence that the defend-

MALICIOUS SHOOTING—Continued.	Page.
ant brought on the difficulty," without explaining to the jury how or by what means the difficulty was brought on by the defendant.....	888
MARRIAGE—See Slaves, 1.	
MARRIED WOMEN—	
1. since the enactment of section 2128, Kentucky Statutes, married women have the same power to create liens upon their own property for its improvement as unmarried women or men.....	140
2. even though the property upon which material was furnished for the building of a house was the property of a wife, and she did not enter into a written contract with reference to its improvement, still where she accepted the material the law implies a promise to pay.....	140
MASTER AND SERVANT—	
1. where an employe was killed by the falling of a defective scaffold erected by the master and used by the servant in the building of a depot, there being conflicting evidence as to the servant's knowledge at the time of its defective condition, it was a question for the jury to determine whether the servant was guilty of contributory negligence in using it, under proper instructions of the court.....	198
2. where a servant of a railroad company was put to work in a building where the floor had been removed, leaving nothing but the "sleepers" on which to stand and do the work, and in doing which he was compelled to turn a heavy boiler plate without assistance, and in doing so he slipped off the sleeper and was ruptured, a verdict for \$1,250 damages will not be disturbed. . .	805
3. the question whether the danger in doing the work was so obvious to the servant that none but a reckless person would have undertaken it, having been submitted to the jury under proper instructions, their finding in favor of the plaintiff is conclusive. . .	805
4. where a servant of a railroad company was injured in being required to work in a dangerous place, and after his recovery was induced to sign a release of his claim for damages in consideration of \$1 and a promise of continued employment by the company, and was discharged the next day, the fact as to whether the release was obtained by fraud and without consideration was a question for the jury under proper instructions of the court . .	805
5. in an action by a servant against the master for damages for injury sustained in mining coal, where it appears that the servant had full control of the room of the mine in which he was injured, working there alone at his own will, setting up props to support the roof when and where he pleased, and failed to allege or prove any duty on the master to inspect or keep the roof of the mine in safe condition, or that he did not know it was dangerous, he can not recover for an injury by some slate falling on him while so engaged at work.....	885
6. in an action for the death of appellee's intestate by negligence, where the evidence is conflicting and the case was fairly presented to two juries, who reached the same conclusion, the verdict will not be disturbed	428
7. in an action by a servant against his master for an injury by falling on a circular saw, where it is shown by the evidence that the injury was caused either by the servant falling on some loose scraps which he had negligently thrown on the floor, or by standing in the scrap box where he had no business to be, and no act of negligence is shown by the master, a peremptory instruction to find for the defendant was proper	580
8. in an action by appellant against appellee for damages alleged to have been sustained by injuries to him by sulphuric acid escaping from carboys which he was transporting and injuring him, instructions by the court submitting the duty of appellee to furnish appellant a reasonably safe place to work, and reasonable material with which to work, and that it was also its duty to apprise appellant of the dangerous nature of the thing he was handling, and that if the carboys were defectively stopped and this fact was known to appellee, or could have been known by the exercise of ordinary care, and that such defect was not known to appellant and he was not informed of it, the jury should find for the plaintiff, fairly embraced the law of the case. . .	825

MASTER AND SERVANT—Continued—

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9. appellee was not required to insure the safety of the condition of the material with which its servant was put to work; it was merely required to exercise care and to take ordinary precautions to protect its servants from injury... 825
10. in an action by a servant against the master for injuries by the falling of a defective scaffold furnished by the master, for use in painting a building. Held—That while it was the duty of the master to furnish the servant with safe scaffolding, it was likewise the duty of the servant to use ordinary care to inspect the same so as to discover its defects and avoid being injured, and a failure to do so will prevent a recovery... 1012
11. if, however, the scaffold was defective and so constructed as that its defective condition was not known, and could not by ordinary care have been discovered by the servant, and by reason thereof it fell and injured him, the master is liable in damages for the injury... 1012
12. an instruction, No. 4, "should the jury believe from the evidence that at the time of the accident plaintiff knew, or by the exercise of ordinary observation and diligence in his line of service might have discovered or known, that the scaffolding was carelessly constructed, if such be the case, but failed to so inform or protect himself from danger, whereby he was precipitated to the ground and injured, they should find for the defendant," held to be proper... 1012
13. in an action by an employe to recover damages for an injury received in falling from a ladder because it was too short to enable him to do the work with safety, which was clearly patent to him when he ascended it, a demurrer to plaintiff's petition was properly sustained... 1089

MATERIALMEN—See Contracts, 21.**MISCONDUCT OF COUNCIL—See Criminal Law, 28, 46; Claim and Delivery, 2, 3; Railroads 23, 37.****MORTGAGES—**

1. where two mortgages were executed on land by the owner to two different parties on different dates, if the junior mortgage be first put to record in the county court clerk's office, without notice or knowledge by the mortgagee of the prior mortgagee, such junior mortgage thereby acquires priority over the senior mortgage subsequently recorded... 728
2. in a controversy between the two mortgagees as to whether or not the junior mortgagee at the time he accepted his mortgage had knowledge of the prior mortgage, where the evidence is conflicting some weight should be given by this court to the chancellor's acquaintance with the parties and witnesses... 728
3. in an action by B. against V. to recover a house and lot which B. had conveyed to V. for \$141, and which V. had agreed to reconvey to B. at the same price, on which B. agreed to pay 8 per cent. interest, a part of which was paid, but which V. subsequently sold and conveyed to G. for \$150, Held—That the transaction between B. and V. was a mortgage, and that V. should be charged with what he received from B., including the \$150 he got for the property from G., and credited by the purchase price, with 8 per cent. interest and the balance was payable to B... 927
4. a father conveyed to his son 200 acres of land, including farming implements, teams, wagons, cattle and growing crop, "to be taken at the estimated price of \$10,000, and the undertaking and agreement of the party of the second part to pay to the party of the first part the value of his interest and ownership in his estate, real and personal, as heir, devisee, legatee and distributee of certain named deceased persons." Held—That a deed of conveyance by the son to his father of all the estate, real and personal, legal and equitable, vested and contingent, to which the son as heir and distributee, legatee or devisee aforesaid is or may be entitled in law or equity," while in the form of a deed was only a mortgage to secure the purchase price of \$10,000 for the 200 acres of land, etc., conveyed by the father to his son... 980
5. where appellee conveyed to appellant a tract of land for \$1,500 paid in hand and at the same time a writing was given by appellant to appellee agreeing to reconvey the land to appellee for

MORTGAGES—Continued.

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\$2,000, payable in one year, and if not so paid in a year said writing to be void. Held—That the transaction was simply a lending of money, and the deed was executed in place of a mortgage and the other writing was a disguise to conceal the real transaction and to secure a usurious rate of interest, and in such case the deed will be held to be a mortgage and redemption allowed, notwithstanding the form in which the parties have put the contract. 1076

MUNICIPAL CORPORATIONS—

1. a city ordinance requiring resident attorneys at law, physicians, surgeons, oculists and opticians practicing their profession in the city to pay an occupation tax of \$10 per annum is not unreasonable, and is not invalid, because no license is required of such as are temporarily in the city on specific professional business. 481
2. section 142 of the Constitution provides "that the jurisdiction of justices of the peace shall be co-extensive with the county, and equal and uniform throughout the State." Section 143 provides "that a police court may be established in each city and town in this State, * * * with such criminal jurisdiction as justices of the peace have." Section 1093, Kentucky Statutes, provides "that justices shall have jurisdiction exclusive of circuit courts in all penal actions the punishment of which is limited to a fine not exceeding \$20, and concurrent with circuit courts of all penal cases the punishment of which is limited to a fine not exceeding \$100, or imprisonment not exceeding fifty days, or both." It will thus be seen that the Constitution does not place any limitation upon the jurisdiction that may be granted to justices of the peace by the general assembly, but does limit the jurisdiction that may be given police and city courts to whatever jurisdiction has been given the justice's courts, and as the general assembly has seen proper to limit the jurisdiction of justices to offenses where the penalty does not exceed \$100 fine and fifty days in jail, therefore, the jurisdiction of police and city courts is within the same limits, and section 3148, and that part of section 3147, Kentucky Statutes, which gives to police and city courts jurisdiction in excess of the penalty stated, are void, being in violation of the State Constitution. 717
3. the language in section 3151, Kentucky Statutes: "Persons committed by said (police) court for default of surety for good behavior or to keep the peace and all others whom the city is bound to maintain when committed to jail," does not refer to persons convicted of crime, but includes idiots, insane persons and inebriates, and as to these persons, not in jail because of their conviction of offense, they can not be compelled to labor, for such would be involuntary servitude and in violation of both State and Federal Constitutions. 718
4. under subsections 23 and 25 of section 8058, Kentucky Statutes, cities of the second class have full and complete power to enact any and all ordinances, and fix fines and penalties to maintain the peace, good government and general welfare of the city, the only limitation being that the penalties for a violation of the ordinances shall not be less than that imposed by the statute, and not to exceed the jurisdiction of the police court as fixed by the statutes and Constitution, and not in conflict therewith. 718
5. so much of the charter of cities of the second class which deny a right to a trial by a jury where the penalty is \$25 or less, is not unconstitutional, and neither is it in violation of the State or Federal Constitutions to inflict labor penalties on persons convicted of misdemeanors. 718

MUNICIPAL TAXES—

under sections 8003 and 8005, Kentucky Statutes, not only a lien may be enforced, but a personal judgment may be rendered under either section against the owner of the property or against the trustee, personal representative or agent in his fiduciary capacity for taxes due the city, and which became due more than five years before the filing of the petition. 875

NEGLIGENCE—See Actions, 15; Contracts, 25; Damages, 4, 5, 6, 7, 8, 9, 10; Druggists, 1, 7; Joint Action, 1; Master and Servant, 1, 2, 3, 4.

NEW TRIAL—

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1. the basis for a new trial in the lower court in this action was the affidavit of Landrum as to what he would testify, which was that he was a passenger upon the train upon which appellee was injured and saw appellee when she got on the train and when she left; that she was then feeble and that the collision by which she claims to have been hurt was not unusual or violent. Appellee and her physician both testified to the contrary, and the affidavit of Landrum, therefore, did not authorize the court to grant a new trial. Moreover, his name was furnished by appellee to appellant's claim agent by him as having been a passenger at the time, yet he was not summoned as a witness 713
2. It is well settled that a new trial should not be granted upon the ground of newly-discovered evidence unless it be of a decisive character, and especially should this rule apply where the proposed evidence is in parol and relates to a point in litigation upon the former trial... .. 714
3. where a petition for a new trial shows, if the facts relied on are true, that with the slightest diligence those facts could have been ascertained before the trial, and where a homestead is sought to be reached and there is no allegations showing an abandonment of such homestead, a demurrer was properly sustained to the petition... .. 827
4. where an action for a new trial is brought by the defendant after the expiration of the term at which a default judgment was rendered on the ground of accident and surprise, it was as necessary for the plaintiff to establish his defense by proof, as a condition to obtaining a new trial, as it was to allege it, and failing to do so his position was properly dismissed 961

NONRESIDENTS—See Attorneys.**NOON—**See Contracts, 39.**NOTE—**See Assignment; Surety—

- where one assigns and delivers a note to his surety to be applied to the payment of a note owing by the pledgor on which the pledgee is surety, the pledgee is thereby charged with the duty of collecting the note in a reasonable time and applying the proceeds as directed, and if at the time of the delivery of the note the payors were solvent and thereafter became insolvent, the pledgee is liable to the pledgor for the amount of the note... .. 298

NOTICE—See Auditor, 2; Primary Elections, 5; Pleading, 14; Recording Deed; Schools, 10—**NOTICE—**

- the fact that the deed conveying the mineral rights had been recorded does not alter the question, because if the case turned upon that question either appellees would lose or Bright would lose, and in either event appellant would be the gainer, and it would be violative of equity to enter a decree to the effect that the appellees should have discovered that the conveyance to Bright had been made, or that the index to the record should have put them upon notice, and, therefore, adjudge specific performance 885

NUISANCES—

1. while we are not prepared to say as a matter of law that picnics, beer gardens, howling alleys and the like are per se nuisances, yet they may be so conducted as to become hurtful to the health and destructive of the comfort of the community in which they may be exercised, and when this happens the hurtful thing must be abated, for no one can have the legal right to do that which destroys his neighbor's property or health... .. 781
2. where private citizens suffer peculiar injury from nuisances apart from that of the general public they may maintain their action in equity to abate it, although the public, through the attorney general, may also have the right to proceed in the name of the Commonwealth to abate the nuisance 781

OCCUPATION TAX—See Municipal Corporations, 1, 2.**OFFICE AND OFFICER—**See Auditor; Bribery, County Board of Health; Primary Elections, 1, 2, 3, 4; Roads and Passways, 1, 2; Schools, 3—

1. the assessors of cities of the third class are by the provisions of the charter elected by the council, and under the provisions of

OFFICE AND OFFICER—Continued.

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- section 3249 may be removed by the council at pleasure; and the fact that section 3254 provides for impeachment of other officers only accentuates and makes clear that those offices elected by the council are not intended to be removed by impeachment 109.
2. this proceeding for a rule to compel a county treasurer to pay into court money that he had collected from the sheriff, which money has upon a former appeal been held a trust fund for the benefit of the taxpayers, was properly refused where the proceeding was in rem, and was only an effort to obtain a personal judgment against the sheriff and his sureties. The treasurer received the money from the sheriff on an admitted debt owing the county by him, and the money not being in lien, and the deposit not having been stayed by garnishee process, the payment was not illegal. 454
3. where the sheriff of a county resigns his office the sureties on his bond for the collection of taxes are not authorized to nominate and require the county judge to appoint a person to collect such taxes in the place of the sheriff who has resigned; such right applies where the sheriff dies, but not when he resigns his office. 764
4. where a county judge accepts as surety upon a guardian's bond of an infant a person he knows to be insufficient as surety under the statute, he is liable on his official bond for whatever damage accrued to the infant by reason of this insufficiency 806.
5. to ascertain such deficiency the guardian should be charged with any balance of his ward's money remaining in his hands at the end of a year, which ought to have been invested or loaned out, and should be charged with interest upon interest in biennial rests during the period he so held it without investment. Where the mother of the infant is unable to support him from her own small estate she should be allowed a reasonable sum for his maintenance during his years of helpless infancy, but should not be allowed to charge where his labor for her was equal to the value of his maintenance. 806.
6. so much of the act of March 21, 1902, amending section 358, Kentucky Statutes, as provides that no allowance shall be made to any county judge or magistrate or police judge, or other officials authorized by law to hold examining courts, does not apply to such officials who were in office at the time of the passage of said act 813.
7. section 161 of the statutes provides that the compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office 813.
8. an action can not be maintained by citizen and taxpayer to oust members of the city council from office on the ground that they had failed to take the oaths of office. Such action must be in the name of some person entitled to the office, or by the Commonwealth, and when by the latter must be brought by or upon information of the attorney general 1080.

OMITTED PROPERTY—See Taxation, 15.

OPTION—See Contracts, 6.

ORDINANCES—See Street Improvement, 7, 8, 9; Taxation, 19, 22—

1. under Kentucky Statutes, section 3059, part of the charter of cities of the second class, providing that "no ordinance shall embrace more than one subject and that shall be expressed in the title," an ordinance passed by the council of the city of Newport for the furnishing of the city with light, heat and power, by means of either gas, hot water or steam, relates to at least three subjects, and is, therefore, invalid 212.
2. under Kentucky Statutes, section 3638, part of charter of cities of the fourth class, which provides that "an ordinance shall be signed by the mayor, attested by the clerk, and published at least once in a newspaper in said city, * * * and shall be in force from and after the publication thereof," it appearing that the mayor of cities of the fourth class has no veto power, the council is the legislative body of the city, and an ordinance of such city is valid when passed by a vote of at least three members of the council and published, although it may not have been signed or approved by the mayor 695.
3. an ordinance of a city of the fourth class takes effect upon its passage by the vote of at least three members of the council and its publication, and it is not material at what date it was made

ORDINANCES—Continued.**Page.**

- up and regularly approved by the council. The will of the council can not be defeated by the tardiness of the clerk in making out the record on the books of the city council 695
4. an ordinance of a city of the fourth class making it unlawful for any physician to make or give a prescription for any spirituous, vinous or malt liquors in said city to enable him to purchase same, unless such person is sick, or such liquor is required as a medicine, and fixing a fine of from \$25 to \$100 for its violation, is not void because it undertakes to punish the physician for giving a prescription where he makes an honest mistake as to the whisky being required as a medicine. The rule is that a statute will not make an act criminal unless the offender's intent concurred with his act, and whether he acted in good faith or not is a question for the jury 695
5. the criminal jurisdiction of the Court of Appeals is governed by the Criminal Code of Practice. An appeal may be taken by the Commonwealth if a fine exceeding \$50 might have been inflicted. 695
6. under Kentucky Statutes, section 8145, providing for the election of a city jailer by the voters of cities of the second class, and fixing his compensation at not less than \$1,500, nor more than \$2,500 per annum and allowing him a deputy jailer, an ordinance of a second class city fixing the salary of the city jailer at \$1,320 per annum in full of all payments for cooks or other help, which the city jailer may see fit to employ, is invalid to the extent that it allows him less than \$1,500 per annum, and denies him a deputy jailer 867
7. an ordinance of a second class city which provides that the jailer shall perform the duties of janitor of the city hall and the building adjacent thereto, in which is located the offices of the city engineer and the city street inspector is valid under section 8145, Kentucky Statutes, which provides that the jailer "shall perform such duties as the general council may by ordinance prescribe". 867
8. under an ordinance of a city of the fifth class, that "any person who shall within the city limits without license so to do sell or otherwise dispose of any spirituous, vinous or malt liquors, shall be fined not less than \$20 nor more than \$100," and a further ordinance providing that "license to sell spirituous, vinous or malt liquors in the city shall be \$500 per annum, to be taken out either annually or semi-annually and paid for in advance," a wholesale dealer in such liquors who sold and delivered to a saloonkeeper in said city a quantity of beer in a wholesale lot, which was not drunk on the premises of the seller, is subject to the fine prescribed in said ordinance, whether the ordinance be regarded as an occupation tax, one for revenue purely, or whether as a police regulation incidentally affording revenue 984
- OWNER OF ADJOINING TRACTS—See Lands, 4, 5, 6—**
1. appellant owned two adjoining tracts of land, and by reason of the mountainous condition of the country the only practicable way to the upper tract was through the lower tract. Appellee bought the upper tract at sheriff's sale, under execution, and brought this suit in the circuit court to restrain appellant from interfering with his right to use a natural and reasonable route over the lower to the upper tract, which the lower court granted. Held—That the circuit court had jurisdiction as this was not a proceeding to condemn a private passway, and the sale by the sheriff's deed passed the same easements over the servient estate as if the sale had been made by the owner 272
2. the fact that the purchaser did not reside on the tract bought at the sheriff's sale does not affect his rights under his title, as the sale made by a sheriff of a part of the owner's tenement for debt is an involuntary conveyance by the owner of such parcel, and the sheriff's deed includes easements and quasi easements appurtenant to the land sold 272
- PAROL EVIDENCE—See Bill of Exceptions, 1, 2—**
- the rule is well settled that parol evidence is inadmissible to show the actual location of a patent, and that course and distance must give way to marks found on the ground, or the actual location of the patent. 164

PARTIES TO ACTION—See Attachments, 4, 8—	Page.
an action for damages to Rupert Head, an infant, for failure to deliver him a railroad ticket, ordered by a telegraph, should have been brought in his name, by his statutory guardian, Fred Head, and not in the name of Fred Head, statutory guardian of Rupert Head, suing for the use and benefit of Rupert Head.....	270
PARTNERSHIP—	
1. in this action to recover the amount alleged to be due upon a contract of sale of an interest in a partnership between the parties, the instructions fairly presenting the law applicable to the case, and there being evidence upon which the jury was authorized to find a verdict for appellee, the verdict and judgment in his favor will not be disturbed.....	262
2. one partner can not maintain an action at law against his copartner on a claim growing out of the partnership transaction until the business and accounts are finally settled, therefore, it was erroneous in this action for the trial court to render judgment in favor of appellee upon the claim sued on	451
3. where the question as to whether there was a partnership is in controversy, this court has jurisdiction of the appeal though appellant's claim was less than \$100.....	452
4. Seeley, being a surviving partner, brought suit against Robinson for a debt due the firm, and before the commissioner's report of indebtedness was confirmed the latter made a deed to Jones of his entire interest in his father's estate his father being deceased (partner of Seeley,) but paid the lawyers, who had a lien upon the judgment, their fee. Having done this he was entitled to credit to that extent upon the judgment which had been assigned by Seeley.....	702
5. the surviving partner holds the assets of the firm as the trustee of an express trust, and the assignee of such partner takes no greater rights than such partner, knowing that Seeley held the judgment as surviving partner.....	702
6. in an action by G. against H. to settle a partnership agreement, in which it was agreed that H. should take charge of five tracts of land belonging to G., clear them up, fence them and cultivate them, the old land to be sown in grass and clover, each to pay one half of the labor required, and each to furnish one-half the stock, tools and teams, H. to have the entire charge of the farms and hands and stock, to receive and pay out the money, the contract to continue for five years, and the profits to be equally divided, to which H. filed a counterclaim for damages, alleging that G. did not furnish his one-half of the stock to consume the provender raised, which was allowed to go to waste, evidence considered, and, Held—That while H. is indebted to G. on the settlement in the sum of \$105, he is entitled to damages for G.'s failure to furnish stock to consume the provender raised, which was the main source of the profits of the partnership, and there being \$1,079 of the firm assets in the hands of the court, H. is adjudged the whole of said sum in damages, and also to be relieved of his indebtedness to G. in the \$105 due on settlement of the partnership, each party to pay one-half of the cost of the suit for settlement, and H. to recover his cost on his counterclaim for damages	970
7. where two men form a partnership as insurance agents, one quite young and inexperienced and the other older and a well-known active business man, with an established insurance business, the fact that the older man was elected city assessor at a salary of \$2,400 a year, which was beneficial to the firm in procuring business, and by reason of his duties as assessor the younger partner was required to do most of the office work, would not justify the court, in a settlement of the partnership, to allow the younger partner a salary in addition to his half of the profits of the firm.....	1197
8. here in the business of the partnership an option was taken by one of the partners in the name of the firm, on the sale of which a profit was made, such profit was properly adjudged to belong to the firm	1197
9. in a settlement of a partnership business one-half of the attorney's fees paid out by either partner in the firm business should be charged to the other partner, also any other expense necessarily	

- PARTNERSHIP—Continued.** Page.
 paid out by either in the firm business should be paid by the firm, and one-half of any dividends collected by either on stock owned by the firm should be accounted for to the other member of the firm 1198
- PASSWAYS—See Easements, 1, 8; Lands, 14; Turnpikes—**
1. the continued use of a passway as a matter of right for fifteen years unexplained, will create a presumption of grant, and when the passway has been used for more than a quarter of a century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but that after such great length of time the burden is on the other party to show that the use was only permissive. 7
 2. while the continuous and uninterrupted use of a passway for fifteen years creates a presumption that the use was a matter of right, and adverse, such presumption may be overcome by proof that the use was permissive... 839
 8. where the owner of land over which a passway runs erected gates and kept them in repair for his own use, and as a favor to his neighbors allowed them to use the gates and the passway, such use was permissive merely 839
 4. where the weight of the evidence shows that appellant and his vendors have had the use of a passway over an adjoining tract of land as a matter of right adversely to the claimant of the land and all others, continuously for more than fifteen years, he is entitled to a mandatory injunction for the removal of all obstructions to his free use thereof..... 403
 5. a temporary or even permanent change in a part of a passway by the owner of the land over which it runs without the consent of the one entitled to its use, or with the understanding that he is to continue its use as changed, gives him the same right to its use as changed as he had before the change 403
 6. in an action for the obstruction of a passway claimed as a matter of right by prescription, the question of the convenience or necessity thereof to the plaintiff can not be considered, but only its adverse use as an easement for more than fifteen years 403
 7. a grant of way over one's premises will be understood to be a general way for all purposes, and where a right of way is granted or reserved without limit of use, it may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted 613
 8. where the public has continued for any and every purpose suitable to their needs, in hauling and traveling, without let or hindrance, to use a passway for more than fifteen years, its public use can not be restricted even though one has accepted a deed containing an easement of a private grant of the way, for if the public then owned the right of way it was not appellee's to grant, nor could any member of the public exclude himself by estoppel from using a public highway that every other member of the public had the right to use..... 613
- PATENTS—See Lands, 1, 2, 3.**
- PAYMENTS—See Contracts, 6—**
 while there are rules of law that determine the application of payments of debtor and creditor, it may be a question of fact to be found by the jury as to the debt upon which the payment was made. It is the business of the court to direct the jury how the payment should be applied upon a state of facts which it may find to exist..... 217
- PENAL ACTION—**
 section 4224, Kentucky Statutes, provides a different class of retailers of oil from peddlers, of which it has been held that "the unit of taxation is the wagon used in the business of transporting oil for sale," and in a penal action by the Commonwealth, under section 11 of the Criminal Code, to recover of the Standard Oil Co. a penalty for retailing oil without a license so to do, where the language shows that it was brought under section 4224, Kentucky Statutes, a demurrer thereto should have been overruled.. 1116
- PEREMPTORY INSTRUCTION—See Damages, 14; Railroads, 85—**
 the giving of a peremptory instruction to find for the defendant is improper where there is any evidence to support a verdict for the plaintiff..... 193

PERSONAL INJURIES —See Actions, 3, 7.	Page.
PERSONAL REPRESENTATIVE —See Service of Process.	
PHYSICANS —See Ordinances, 4.	
PLEADING —See Actions, 1; Appeals, 3; Lands, 48; Life Insurance, 21; Railroads, 7, 10; Schools and School Districts; Street Railways, 10, 11, 12; Trespass, 1—	
1. In these actions there is a variance between the proof and pleadings. The petition alleged a sale of land to one, and the proof showed a sale to another. The judgment was, therefore, unauthorized. Where a judgment sought to be opened had been obtained by one, he was a necessary party to the petition for a new trial. If there is a defect of parties that question must be raised by demurrer, and it not being raised is waived	154
2. upon the return of this case appellant offered to file amended petitions in two of the cases which were involved upon the first appeal, in which it sought to relinquish all claim to usurious interest. The court refused to permit them to be filed, but allowed them to be tendered and made a part of the record so as to obviate the necessity of a bill of exceptions. Held—The trial court ruled correctly in refusing to permit the amendments as tendered to be filed after the return of the case from this court	263
3. in a petition by a nonresident defendant, sued jointly with resident defendants, for the removal of the action from the State court to the United States Circuit Court, a denial therein of the alleged negligence of its codefendants, and an allegation of the purpose of the plaintiff in joining its agents and servants as defendants with it, was for the fraudulent and wrongful purpose of defeating the jurisdiction of the United States Circuit Court, are conclusions of the pleader, and do not state a single jurisdictional fact	397
4. an allegation in a petition that a conveyance was made without a valuable consideration states merely the pleader's conclusion of the law, and is bad on demurrer	542
5. the verdict appealed from appears to be sustained by the evidence. Under our form of practice, while the pleadings are addressed to the court, either party may introduce those of the opposite party as evidence	573
6. an amended pleading tendered during the progress of a trial, or offered at the conclusion of the evidence to conform to it, is essentially different from a motion for a new trial, as the former presupposes the pending of a trial and the latter that the trial has ended	938
7. where a case has progressed on definite issues to final judgment, an appeal taken, those issues adjudicated by the appellate court, and the case remanded with mandate to enter a conformable judgment, an offer by either party to file an amended pleading containing charges or denials different from or in conflict with the issues on which the cause was originally tried, it would be a necessary requirement of the party so offering that he show to the court by accompanying affidavits why the matter contained in the tendered amendment had been delayed until that time	938
8. where a pleading is tendered by defendants, accompanied by affidavits purporting to be a motion for a new trial, no judgment having previously been entered, such affidavits may be considered by the court in determining whether such pleading should be filed as an amended answer	938
9. while great latitude is and should be allowed in the interpretation of the provisions of the Code, section 134, on amendments to pleadings, this section does not go to the length of authorizing, after trial, judgment, appeal and remanding, an amendment which tenders an issue directly opposed to the issues upon which the case had been tried	938
10. in an action by plaintiffs claiming title by patents to a large survey of land, which was adversely claimed by defendants under conflicting patents and surveys, which lands the defendants by their answer alleged were vacant and unappropriated lands, and the issues tried, appealed and remanded, with the directions for a conformable judgment, an amended answer tendered by defendants setting up a new defense of adverse possession of the	

- PLEADING—Continued.** Page.
- lands in controversy, which facts were known to the defendants before the former trial and judgment, such amendment was properly rejected by the lower court 938
11. under section 134, Civil Code, the court may at any time in furtherance of justice and on such terms as may be proper, permit a pleading of proceedings to be amended by inserting other allegations material to the case 1100
12. in an action for damages on a guaranty in the sale of machinery to be operated by appellant's boiler the appellant was bound to know the capacity of its boiler and the power it would furnish to operate the machinery..... 1100
13. where there are no averments in the answer to the effect that the agent who sold the machinery had authority to make any guaranty of it, it was not shown to be within the apparent scope of his authority to make such guaranty..... 1100
14. in an action on an alleged guaranty of machinery sold, an amended answer alleging the breaking of a cylinder by reason of defective material, occurring pending the action, no action would lie unless notice was given and a reasonable time to repair the defects. 1100
- PLEDGE—See Fire Insurance, 4.**
- POISONOUS MEDICINES—See Druggists, 1, 7.**
- POLITICAL PARTIES—See Primary Elections, 1, 2, 3, 4, 5, 6, 7, 8, 9—**
 circuit courts have no power to intervene by writs of certiorari in the governing authorities of political parties in the settlement of contests over nominations, because they are not inferior courts in the sense in which these terms are used in the common law authorities in defining the writ 1041
- POOL TABLES—**
 the revenue law of this State, which became effective March 29, 1902, does not include the statute requiring the payment of a license tax to keep pool tables, and, therefore, the latter statute was repealed by the enactment of the present revenue law. It follows, therefore, that a license for pool tables is no longer required..... 735
- PRACTICE—See Actions, 3, 4, 14; Affidavit for Continuance; Appeals, 1, 18; Attorney at Law; Construction of Statutes; Construction of Writing; Errors not Excepted to; Instructions; Judicial Districts, 1, 8; Jurisdiction, 1, 2; Pleading; Res Judicata; Setting Aside Verdict—**
1. the fact that one of the judgments appealed from has been reversed does not affect this appeal. The case must be tried here as presented in the lower court, and sections 757 and 758, relied on by appellant, have no application here as they relate to new matter to be set up in this court..... 75
2. where appellant had been absent in South America and in England during the period of the litigation, and the letters of his attorneys had failed to reach him; apprising him of its condition and status, and reached this country just a few weeks after the submission, when he found papers and memoranda which were of vital importance to him in his case the ends of substantial justice require that the submission should be set aside, and that he be allowed time to take proof to enable him to prepare his case 102
3. where a judgment enforcing a lien upon land was rendered, the foundation for the action being a judgment from a magistrate's court, an allegation in the answer of no knowledge or information sufficient to form a belief as to whether there was such a judgment did not make an issue, and in the absence of a denial of such a judgment the court was authorized to render judgment upon it. Such a judgment was a public record, and if it did not exist a denial of its existence should have been made in positive language 945
4. although there was an irregularity in an appraisal of land directed to be sold, yet where no exceptions to the report of the appraiser were filed until long after its confirmation and after the purchaser had paid the purchase price, it was too late to have the case redocketed for the purpose of setting the sale aside for the error named. 945
5. where the record in an action was lost and a substituted petition, which was in the nature of a reformed petition, was filed, after

PRACTICE—Continued.

Issue was joined the record was found when the plaintiff moved to dismiss the so-called substituted petition. Held—The court properly overruled the motion as the petition showed on its face that it was a reformed petition

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PREVIOUS CONVICTION—See Criminal Law, 35, 36, 37.

PRIMARY ELECTIONS—

1. the remedy of one claiming a nomination by a party of which he is being deprived, is to appeal to the authorities of his party and not to the clerks of the county courts, nor to the courts. 751
2. though it be conceded that a primary election was void in which one precinct of the county was deprived of an opportunity to vote by not having ballots furnished it, and if it be further conceded that there was no authority for completing the election in the missing precinct on a subsequent day, these facts are matters which pertain to the duty of the party governing authority, and lie back of its certificate of nominations. When the certificate is filed substantially in the form and manner prescribed by the statute it is not within the province of the county clerk to go behind it 751
3. while the clerk of the circuit court may, in the absence of the circuit judge from the county, grant a preliminary restraining order, without notice, upon a showing that irreparable injury would be sustained by the party moving, before he could give notice, such clerk has no jurisdiction in any event to grant a mandatory injunction. 752
4. in an indictment against a county clerk for knowingly and willfully refusing and failing to have the names of certain nominees printed upon the official ballot in the manner provided by the election law of this State, if his refusal was in obedience to an order of injunction made by the circuit clerk, and in an honest belief that such order was valid, then his omission was not willful, but if the proceedings for the injunction were not begun in good faith, but were the result of a collusion between the defendant and any other persons to wrongfully deprive the nominees of their legal right to have their names appear on the ballots as such nominees, then he could not justify his official action by his fraudulent conduct, and in such case the question of the good faith of the defendant should have been submitted to the jury 752
5. under section 1596a, subsection 12, Kentucky Statutes, primary election contests for members of the general assembly are governed by the former law, approved June 30, 1892, which requires only a fifteen days' notice of the contest. 1064
6. under the rule of the common law that no man may be a judge in his own case, and, if he acts, the judgment is void, a brother of one of the parties to an election contest is not qualified to sit as one of the committeemen in the trial of a primary election contest 1064
7. the fact that the seats of one or more members of the committee are contested does not disqualify them from acting in other contested cases, so long as they are members of the committee. If the contests are decided against them, then their powers cease, but until then their powers are not affected by a contest. 1064
8. the fact that certain members of the committee are friends of one of the parties to the contest and induced voters to vote for him in the primary, in the absence of any statute disqualifying them, are not disqualified on common law principles, as they act under oath, and are responsible if they do not act honestly and faithfully. 1064
9. this court has no authority to require the committee to recount the vote. They are the governing authority, and may determine the form and manner of the proceedings in the case. While the court may require them to act, the court can not control their discretion. This must be exercised under their oath and according to their honest judgment 1064
10. under section 1568, Kentucky Statutes, in reference to primary elections, in case of a tie vote or contest the committee has the power to hear and determine who is entitled to the nomination, but in case of a tie the question does not arise until, upon a

PRIMARY ELECTIONS—Continued.**Page.**

- count of the vote, it is ascertained that two candidates have received an equal number of the votes, and then under section 1551 it must be settled by the casting of lots as provided in section 1556a, subsection 11, for, under section 1551, the primary election must be held and conducted in the same manner and under the same requirements as the regular State election, and this includes not only the receiving of the votes, but the counting of them and the ascertaining of the result 1069
11. a contest can not arise in a primary election until it is instituted by the candidate defeated on the face of the returns. When it is instituted by him the proceedings must be in the same form and manner as the governing authority shall determine upon, but until it is instituted there is nothing for them to act upon . . . 1069
12. the governing authority of the party is given exclusive jurisdiction to determine the contest. The court can not review or correct the decision of the committee on the merits of the contest, but the court may require the committee to act, or it may restrain them from acting when they have no jurisdiction 1070
13. the time within which notice of a contest must be given is a matter not to be determined by the committee. By the statute in this State, for over fifty years contests for county offices have been required to be instituted within ten days after the final action of the canvassing board, and under the present statute the time limit is the same, and contests in primary elections being by section 1563, to be decided by the governing authority of the party holding the election, the grounds of the contest should be filed before it and notice given the contestee within ten days after the canvassing of the returns, otherwise the committee was without jurisdiction to proceed 1070
14. under section 1563, Kentucky Statutes, which provides that "in all cases of a tie vote or contest in primary elections the committee or governing authority holding such primary shall have the power to hear and determine such contest and decide who shall be entitled to the nomination," it is essential that notice of such contest be given to enable the committee to try the contest. The courts have no jurisdiction, directly or indirectly, to review the action of the committee or governing authority 1089

PRINCIPAL AND AGENT—See Attachments, 5; Life Insurance, 4.**PRIVATE CITIZEN—See Bribery.****PRIVATE CORPORATIONS—**

1. a statute authorizing the formation of private corporations for mining, manufacturing, mechanical, quarrying and other industrial pursuits, and "for any other lawful business," is sufficiently broad to include the incorporation of the National Bond and Security Co. for the purposes indicated by its title 358
2. where an incorporated investment company, in placing its bonds on the market, printed on the back thereof the terms and conditions on which they are issued and upon which the "entire scheme" of the company is based, it can not be said to be doing an unlawful business because it was bottomed on a scheme that did not "finance out" but prove to be unprofitable 358

PROCESS—See Husband and Wife, 6

- a nonresident of this State, who has been appointed as administratrix of a decedent in this State, can not claim to be exempt from service of process on her in this State in an action against her as such administratrix, on the ground that she is in this State in obedience to a subpoena as a witness to testify on a trial 996

PROHIBITION—See Writ of Prohibition.**PROOF—See Lands, 19****PUBLIC RECORDS—See Appeals, 9.****QUESTION FOR JURY—See Landlord and Tenant, 1.****RAILROADS—See Actions, 1—**

1. there is no rule of law declaring what constitutes operating expenses of a railroad company. It is a matter of evidence, and determinable like any other fact, and where the witnesses differ in their testimony as to this matter, the preponderance on the point as to what constitutes operating expenses must control 21
2. the verdict and judgment in this action for \$2,000 for damages against appellant for the killing of appellee's intestate will not

RAILROADS—Continued.

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- be disturbed where the evidence shows that deceased was either on the crossing or near it, so near as for all practical purposes to be on it; that it was about dusk; that deceased stopped on a spur so as to allow a freight train to pass when the engine with the tender towards him, backing toward the public crossing, ran over him. If signals were given the noise occasioned by the passing train; its exhausting its steam; the ringing of its bell, were well calculated to drown whatever sounds were made in the way of warnings by those in charge of the engine which ran over deceased. Upon this state of case the court below was authorized to refuse an instruction asked by appellant, based upon the idea that deceased was a trespasser 91
3. where a viaduct was constructed by a railroad ten or twelve feet high in the center of a street, twenty-one feet from plaintiffs' dwelling, which was worth \$1,250, a verdict allowing \$425 damages is not so excessive as to authorize this court to disturb it where the proofs show that the ingress and egress to and from the property was seriously impaired 184
4. where there was no evidence that the presence of one who was injured by being struck by a moving train was discovered by those in charge of the train in time to avert the danger to him by the exercise of ordinary care, under the well-settled rule that he was a trespasser, the company was under no obligation to maintain a lookout for him, and is not responsible to him unless his danger was perceived and there was after this a failure to use ordinary care for his safety 142
5. an indictment which charges the defendant with having "willfully and unlawfully failed to furnish for the transportation of white and colored passengers on its line of railroad a separate coach, each compartment divided by a good and substantial wooden partition, with a door therein, and each bearing in some conspicuous place, in plain letters, appropriate words indicating the race for which it was set apart," is a good indictment, under Kentucky Statutes, section 795, known as the Separate Coach Act 176
6. on the trial of the defendant for a violation of the separate coach act (Kentucky Statutes, section 795,) the court should have instructed the jury that if they believe from the evidence that the operation of defendant's train February 19, 1903, without a separate coach or compartment car marked and provided with notices as set out in instruction No. 1, was caused by an unavoidable accident or casualty, which defendant, by ordinary prudence, could not reasonably have anticipated or guarded against, they should find the defendant not guilty 177
7. in an action for damages for being put off of a train at the wrong station, and having to walk in the night through the sleet and cold to her station, it was competent for the defendant company to prove by one Wilson and his wife that they invited the plaintiff to stay with them all night at the station where she was put off, as she is not entitled to recover for injuries she could reasonably have avoided, or enhance the damages by her own imprudent conduct 201
8. in this action by appellee against appellant for damages caused by appellant's servants in moving its cars, his statements while testifying to the jury that his physicians had advised him that an operation was necessary and would have to be performed, and in relating a dream that his hand would have to be amputated, and proof by other witnesses of what he had told them several months after his injury of the suffering he had undergone, were incompetent for any purpose. The testimony as to what the physician stated would have been competent had it been testified to by the physician, but coming from appellee it was mere hearsay, and the testimony as to the dream can not be justified upon any ground, nor should others have been permitted to relate conversations had with him in which he related the nature and extent of his sufferings 257
9. where statements of counsel are made outside of the record and were otherwise improper and calculated to inflame and excite the passions of the jury, and thereby induce them to disregard the

RAILROADS—Continued.

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| evidence and go to an extreme and unjustifiable length in arriving at a verdict, it was error in the trial court not to admonish the jury to disregard them | 257 |
| 10. where an examination of the railroad track the morning after stock were killed by the train showed that they ran on the track for 800 yards, it can not be presumed in the absence of proof that the horses left the track and then returned to it, and in view of the fact that the horses were not seen until they were struck and that the train ran out of the fog before it reached the point where the horses began running on the track, there was sufficient evidence to go to the jury, as the law presumes the killing was due to negligence of the railroad company. The fact that the engineer did not see the horses until after he had struck them, the jury was authorized to conclude that he was guilty of a want of care in not keeping a lookout. | 298 |
| 11. where the evidence shows that a brakeman abused a passenger in a caboose on a freight train, and threatened to "knock a lung out of him," the court properly refused to give a peremptory instruction to the jury to find for the defendant | 329 |
| 12. on the trial of an action by a passenger against a railroad company for damages for abusive, insulting and threatening language used towards him while a passenger on the train, it was incompetent to admit evidence of statements made by the brakeman of the occurrence some days after it happened, as such statements were no part of the res gestæ and were prejudicial to the defendant | 339 |
| 13. the pleadings support the judgment rendered in this action, and the only question presented is whether the court erred in refusing a peremptory instruction which was asked by appellant. Upon the facts it was manifest that the question was for the jury to determine whether proper care was exercised for the protection of the passengers, and the jury having found in favor of appellee, and it not appearing excessive, the verdict will not be disturbed. | 351 |
| 14. where defendant's servants in charge of its switchyard saw a drunken man helped off the train, and shortly thereafter found him lying in a drunken stupor between the tracks in the switchyard, in the night time, from which they aroused him, although he was a trespasser they owed him duty to either safely conduct him from the yard, or in subsequently moving their engine in the yard to keep a lookout so as to avoid injuring him, and in such case where the man was run over and killed in moving the engine in the yard, in an action by his administratrix against the company for negligently causing his death, the trial court properly refused to give the jury a peremptory instruction to find for the defendant | 388 |
| 15. appellee having purchased a ticket to a station on appellants' line, contracted to take passage on a train scheduled to stop at that point, and in this action to recover damages against appellant for not taking on its fast train, which was not scheduled to stop at the station on its line for which he had purchased a ticket, a nonsuit was properly ordered by the trial court | 484 |
| 16. upon the trial of this action for damages against appellant the statement of the attorney for appellee, to the effect that appellant was not required to go into trial without its absent witness, but had the right to file an affidavit as to what its witness would testify, and that in default of this affidavit he had a right to conclude that the testimony of this witness would have been in favor of appellee. Held—That as the court instructed the jury to disregard this statement of counsel it must be presumed that the jury obeyed the orders of the court, and that no injury accrued to appellant by reason of this occurrence. | 449 |
| 17. the statement of counsel for appellee to the effect that it was the duty of the conductor to assist appellee in alighting from the car, while unwarranted, was not prejudicial, because at most it was but a mere expression of opinion, and had no weight in influencing the verdict of the jury. | 450 |
| 18. it is the duty of those operating trains through towns to keep a lookout for persons upon streets and especially at street cross- | |

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| ings, and it is negligence in the company to have its agents or servants throwing substances from a train into the streets as it passes along or across them | 459 |
| 19. it is not contributory negligence for a boy thirteen years of age to stand in a street near a railroad crossing while a freight train is passing, at a place where there is no danger of being struck by the train, and he is not required to anticipate that persons connected with the train will throw freight from the train as it passed across the street, that might strike or injure him | 459 |
| 20. it is a matter of common knowledge that property is transported on freight trains, and where the evidence excludes the idea that a brakeman intentionally hurled a cake of ice from a passing freight train that struck and injured a boy standing in a street near a railroad crossing, the presumption is that the ice was being carried as freight and was thrown out at its destination by the servant while acting within the scope of his employment. | 459 |
| 21. a petition which alleged that "an agent and servant of a railroad company, with gross negligence and carelessness, placed a torpedo on the sidewalk where it was found, or with gross negligence and carelessness placed it on the railroad track so that it could easily be removed or brushed away, and suffered it to be removed to the place where it was found; that one of these statements is true, but he does not know which one is true; that the agent or servant who placed it upon the sidewalk had been and was then charged by the defendant with the duty of safely keeping it; that he knew of its dangerous character; that if he placed it upon the track he had been and was then duly intrusted with its safe keeping, and that the plaintiff, a boy eleven years old, picked said torpedo up from the street in a populous part of the city and in childish curiosity struck it with a hammer, causing it to explode and put out his eye, stated a cause of action, and a demurrer thereto was improperly sustained. | 465 |
| 22. the defendant being a corporate entity it could only have the custody and control of the torpedoes through the instrumentality of agents or servants. The demurrer admits that the agent and servant was charged with safe keeping of the torpedo, and use of the same at the time it was placed upon the track upon the street, therefore, it was the act of the defendant in so placing it. | 465 |
| 23. where a master substitutes another in the care and control of forces or explosives calculated to endanger life, he is responsible for the negligent acts of such other, the same as if acting himself. | 465 |
| 24. where it was alleged in the petition that the agent and servant had the care and custody of the torpedo, it was not necessary to allege that the act of the servant was within the scope of his employment. | 465 |
| 25. it is shown by this record that the Louisville & Nashville R. R. Co. owns and operates a line of railroad from Louisville to Lexington, a part of which runs through Shelby county, from Anchorage to Christiansburg, a distance of 27.60 miles one of the most prosperous, fertile and thickly settled portions of the State; only 19.10 miles of this distance is operated for local public traffic, the remaining 8½ miles being entirely without such accommodation: that the public along said line has applied to said company for such local accommodation for its traffic, both passenger and freight, which has been refused, and that the railroad commission of this State, upon proper application to it, has directed and ordered that additional facilities be afforded to the public, which have also been refused and ignored by said company. In an action by the Commonwealth of Kentucky v. L. & N. R. R. Co. to compel it to grant such additional facilities. Held—That the citizens of Shelbyville and Christiansburg, and those of the communities contiguous thereto, are entitled to better facilities for the transportation of passengers and freight between the places named than have been afforded them, and that the powers of the court were properly invoked in their behalf. | 497 |
| 26. the fact that the appellee, L. & N. R. R. Co., has made a contract with the C & O. R. R. Co., leasing its road to said company under certain restrictions and privileges as to running of trains | |

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- over that part of the line in controversy, does not relieve it from affording the facilities necessary for the needs of the public..... 497
27. the fact that the C. & O. R. R. Co., as lessee of the L. & N. R. R., runs a train daily over said line of railroad, does not meet the requirements of the law and of the public, when such trains do not stop at the way stations or afford local accommodations. It is to accommodate the entire public that both through and local trains are operated by railroad companies..... 497
28. railroads are creatures of the law, invested with certain powers, to promote the public interest, for which reason they may be required to conduct their affairs in furtherance of the public objects of their creation, and it is because of this public character that courts assume jurisdiction to enforce the public duties required of them..... 497
29. a railroad company can not be permitted to escape the performance of any duty or obligation imposed by its charter or by the general laws of the State by transferring its road, or any part thereof to a lease, or upon the ground that its own operation thereof will occasion loss to it..... 498
30. under Civil Code, section 73, providing that "an action against a carrier for an injury to a passenger or to other person or his property must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff, or his property, is injured, or in which he resides, if he resides in a county into which the carrier passes," a personal representative who resides in Hardin county, into which county the carrier passes, may bring an action in said county against the carrier for negligently causing the death of her intestate, though he was killed in Grayson county, and at the time of his death resided in Jefferson county..... 596
31. while plaintiff's intestate was guilty of negligence in taking his engine on the main track of the railroad in violation of the rules of the company at a station where there was at the time no telegraph operator, in order to supply his engine with water, and when he knew a fast through passenger train was then due to pass said station, and which was entitled to the right of way, it does not necessarily follow that he cut himself off from all right of protection, considering the steps and precaution he took to notify the approaching train of his situation..... 596
32. advertisements or professed tests of air brakes in the back of a book of instructions with reference to the use and operation of such brakes were incompetent as evidence in the case as they seem not to have been prepared and issued by the defendant company..... 596
33. where in an action for the condemnation of a right of way appellees filed exceptions to the commissioner's report and introduced proof, the burden was upon them and they were entitled to the concluding argument. Had they introduced no proof, manifestly they would have been defeated. Therefore, the burden was upon them..... 716
34. courts must take judicial notice of legislative acts incorporating railroads..... 716
35. a peremptory instruction should never be given where there is any evidence, however slight, tending to support the plaintiff's cause of action..... 730
36. evidence of an offer by the plaintiff to compromise her claim for damages for an injury received by her while a passenger on defendant's railroad train is incompetent..... 730
37. a statement made by plaintiff's counsel in his argument to the jury in an action against a railroad company for damages by a passenger, alleging negligence in defendant's servants in the operation of its train, to the effect that the statistics furnished by the interstate commerce commission show that during last year 60,000 persons were killed and crippled upon the railroads of the United States, can not be said to be improper when made in reply to a statement of counsel for the railroad company that "the railroads employ careful and competent engineers; that it is to their interest to do so to preserve its property and protect its passengers, and if they were not careful and competent men they would not be retained"..... 730

RAILROADS—Continued.

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38. where the evidence shows that a woman passenger who had just boarded a crowded car and was trying to find a seat was thrown down by another car suddenly and violently striking the one she was in, and injured about her hip and back so as to render her unconscious for a time, and causing her great suffering, which had continued down to the time of the trial, a verdict of \$750 in damages can not be held to be excessive..... 730
39. upon the trial of this action, which was an action for damages for an alleged closing of appellee's passway, an instruction which directed the jury, if they found that by uniting the time that appellee had used the passway with that with which it had been used by her husband, it had been used for fifteen years before it was obstructed by appellant, they would find for her in such sum as would compensate her for such trouble, annoyance and inconvenience resulting from the maintenance of the fence, was misleading, and they should have been instructed that the measure of damages was the diminution of the value of the use of her house and land during the time the obstruction was continued, and that such recovery was limited to that measure 748
40. evidence offered upon the trial by appellee of the rental value of the property should have been allowed, for by it the jury might have been able to determine how far the value of the use of the property had been diminished by the obstruction..... 748
41. upon the trial in the lower court in this action against appellant for damages for obstructing appellee's passway, the statement of her attorney that "a more deliberate and barefaced attempt to steal this defenseless widow's passway was never seen," and again, that "after keeping it (the passway) for nine months, they sneaked back and fixed gates," and again, "a more high-handed stealing of a widow's passway was never perpetrated," was improper and calculated to prejudice the jury, and should not have been allowed. 748
42. as the place where it is charged no depot was provided is a village it obviously is embraced in the category of "other stations" mentioned in the statute (section 772, Kentucky Statutes), and as there is no allegation that the railroad commission had required appellee to have a passenger station at the place mentioned in the indictment, the company was guilty of no offense in failing to provide such station 763
43. where an employe of a railroad company was injured by falling from a hand car while in such employment, and by a compromise with said company in writing agreed, in satisfaction of his claim for damages, to accept \$100 in money and the payment of his physician's bill for treating him for his injuries, he can not in an action thereafter brought, recover damages for such injuries where such writing is relied on as a defense, in the absence of an allegation of fraud or mistake in the execution of such writing.. 772
44. where a writing purports to be a compromise and settlement of a claim for damages, the presumption is that all matters pertaining thereto are embraced therein, and parol evidence is not admissible to vary its terms in the absence of a charge of fraud or mistake in its execution 773
45. in an action against a railroad company for the negligent killing of plaintiff's intestate at a private crossing of the railroad track, where there was evidence tending to show that deceased could not see the train until she reached the crossing, and that persons using said crossing depended on hearing the approaching train whistle at a public crossing three-fourths of a mile from the private crossing, and that the train that killed her was traveling at the rate of fifty miles an hour and did not whistle or ring its bell at said public crossing on that occasion, nor at the private crossing, it was error in the court to give the jury a peremptory instruction to find for the defendant 778
46. by section 6, Kentucky Statutes, a corporation and its agents and servants causing the death of a person are jointly liable therefor. Where a petition is filed in a State court against a nonresident corporation and two of its agents who are residents of this State, alleging facts showing their joint liability for negligently caus-

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ing the death of plaintiff's intestate, such cause of action is not removable to the Federal court on the petition of the nonresident corporation, alleging that the other two defendants were united as codefendants "solely for the purpose of preventing the petitioner from exercising the right guaranteed to it by the Constitution and laws of the United States, of removing this suit to the Circuit Court of the United States for the District of Kentucky"

801

47. where an action is properly brought in a State court the Federal court does not thereby acquire jurisdiction of the action, and although the plaintiff in the case should appear in the Federal court and try the case, any judgment rendered therein is void. The Federal court having no jurisdiction it can not be acquired or conferred by consent, and its orders and judgments are no bar to a trial of the action in the State court

801

48. a demand against a railroad company for the taking of property where judgment has been procured against it is a lien upon the corpus of the property superior either to a prior or subsequent mortgage, and can not be defeated by a sale of the road unless the lienholder is made a party to the foreclosure proceedings

875

49. in taking an appeal from the county court to the circuit court in proceedings to condemn land sections 839 and 840, Kentucky Statutes, are to be read together, and require the appellant to file the transcript of the orders of the county court, a statement of the parties to the appeal, and execute bond within thirty days after the judgment in the county court. Where a good appeal bond was filed and an imperfect transcript which contained an imperfect statement of the parties to the appeal, it was proper for the circuit court, under section 134 of the Civil Code, to allow the transcript to be amended so as to conform to the requirements of the statutes

952

50. on the trial of a proceeding by a railroad company to condemn a strip of land of 2 71-100 acres taken alongside the county road just outside the boundary of a town of the fifth class, the court instructed the jury that "in fixing the value of the land taken and the damages to the abutting property, the jury may consider its location and use to which the land was adapted, together with the change made necessary in, or discontinuance of, the county road over or in front of said property, if any. They will also find for the defendant such sum as they believe from the evidence they are entitled to for extra fencing, if anything." Held—That said instruction did not present to the jury the proper view of the case, as nothing was said about setting off the incidental damages against the incidental advantages

952

51. the court should have told the jury in the first instruction that in estimating the direct damages they should allow such a sum as they deem from the evidence is the fair and reasonable value of the strip of land taken, considering it in relation to the entire tract, also such other direct damages, if any, as directly result to the remainder of the tract by reason of the situation in which it is placed by the taking of the strip, and such additional fencing and other improvements, if any, as may be necessary to the reasonable enjoyment of the remaining land by reason of the taking of the strip. But that their finding of direct damages should not exceed in all the amount which they may believe from the evidence is the difference between the actual value of the entire tract immediately before, and the actual value of the remainder immediately after the taking of the strip, excluding from the estimate any enhancement of the land by reason of the building of a new line of the railroad

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52. by another instruction the court should have told the jury that they should also take into consideration all the advantages and disadvantages which may be reasonably anticipated to result from the proposed construction and operation of the proposed railway, and if the balance is against the owners of the land they should also find for them the incidental damages in addition to the direct damages referred to in the first instruction. But that if the incidental damages or enhancement of the land is value

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| from the prudent construction and operation of the railroad equal or exceed the incidental disadvantages or depreciation in value, they should find for the defendant only the direct damages as set out in the first instruction | 952 |
| 53. section 795, Kentucky Statutes, was intended to force the separation of white and colored passengers while traveling upon railroads in this State, but the legislature did not have in mind, at the time this section was enacted, the purpose of fixing a penalty for failure or neglect on the part of the railroad to furnish sufficient accommodation for the transportation of passengers | 939 |
| 54. where deceased was on the track of appellee, in the country, not on a public highway, he was a trespasser and those in charge of the train were not required to keep a lookout for him, and owed him no duty except to use every effort to avoid killing him after the discovery of his peril. There being no proof that they discovered him in time to have saved him from injury and death, a peremptory instruction to the jury to find for the defendant was proper | 969 |
| 55. W. conveyed the defendant, L., A. and P. V. Electric Ry. Co., the right of way through her land in consideration that it would maintain a station thereon near the center thereof. In an action by W. for damages for failure to maintain such station, an instruction that if the jury find for the plaintiffs they should find such sum as would represent the difference in what would have been the fair market value of the residue of the plaintiff's land after the conveyance of the right of way if the station had been established, and the fair market value of such residue without the station, was proper | 977 |
| 56. in an action for damages by the owner of property for failure of a railroad company to maintain a station on land conveyed to the company in consideration thereof, where the damages consisted in the enhanced value of the property in selling it for building lots, the fact that one of the jury, while in charge of the sheriff viewing the property, asked a bystander how much hay was grown on the land, though improper, was immaterial, as the value of the property for building and not for agricultural purposes was the issue | 977 |
| 57. where it was provided in the original charter that a railroad company may consolidate with other railroad companies upon such terms as the directors may agree, and that certain other important contracts may be made by the directors without the consent of the stockholders at all, and this was subsequently amended so modifying it as to require the approval of the stockholders as to the management and disposition of the property, and power given the directors to sell or dispose of it subject to the ratification of a majority (in value) of the holders of stock, another and later amendment providing that no contract that the president and directors may make with the Louisville, Cincinnati & Lexington R. R. Co. shall be valid unless ratified by all the stockholders of the company, does not require a contract of sale to be ratified by the unanimous vote of the stockholders, but only by a majority of them | 986 |
| 58. to require the unanimous vote of all the stock of a railroad to unite with another railroad, or to sell its franchise to another road, is to render this method of development impracticable, as it gives an opportunity to a small number of stockholders to defeat control for selfish purposes and thwart control by the majority | 987 |
| 59. the expression "ratified by the stockholders of this company" is presumed to mean that the directors should bring all matters affecting the railroad before a stockholders' meeting for ratification, not by a unanimous vote, but by a majority | 987 |
| 60. it is a well-settled principle of statutory construction that repeals by implication are not favored by the courts, and will not be declared except it is impossible to permit both statutes to stand, and as the amendment in question is not repugnant to the other acts, but with them form a consistent whole, the contention that it repealed the foregoing amendment providing for a control of the property by a majority of the stockholders is not upheld | 987 |

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61. where a condemnation proceeding was dismissed upon the execution of a contract providing for the straightening of the channel of a creek, after the lapse of thirty two years the presumption will be indulged that the work was done as provided for in the contract 1051
62. where the contract also provided for the building of a bridge, which was subsequently built by the city of Louisville, if there was any right of action against the railroad company it accrued when the city built the bridge, and as more than fifteen years elapsed from that time until the suit was brought the right of action to recover the land was barred 1051
63. the Illinois Central R. R. Hospital Association is a corporation organized under chapter 22, sections 879, 880 and 881, Kentucky Statutes, "to give proper care and treatment to the sick and wounded employes of the Illinois Central R. R. Co. in a certain territory. All officers and employes of the Illinois Central R. R. Co. in said territory are members of said association, and are subject to monthly assessments to support same. While appellee was in the service of the Illinois Central R. R. Co. his knee cap was broken and he was sent to said hospital for treatment. He claims that while there under the care of the physicians and nurses he was unskillfully treated and has brought this suit against the Illinois Central R. R. Co. for damages. Held—The mere fact that the board of directors of the hospital association are selected by reason of their connection with the Illinois Central R. R. Co. does not make them the agents or officers of the Illinois Central R. R. Co. in the performance of a duty for another and distinct corporation. The duties which they are required to perform are not such as are required in the execution of the purpose and objects of the organization of the appellant .. 1198
64. there is no evidence that the Illinois Central R. R. Co. made any contract with the appellee that he should be "properly and skillfully treated by proper and skillful surgeons and attendants." The fact that the hospital association was organized for that purpose does not tend to prove that appellant made such a contract with appellee. The Illinois Central R. R. Co. is simply the agent that collects the funds for the benefit of the hospital association 1198
65. the hospital association is a separate and distinct corporation from the Illinois Central R. R. Co., and the latter has no financial interest in the result of its management, and in no way is it liable for the conduct of its directors or the physicians or attendants at the hospital 1191

RATIFICATION—See Railroads, 60.**READING EXTRACT FROM BOOK—See Criminal Law—**

it was not error in the court to refuse to allow defendant's attorney, during his argument to the jury, to read to the jury an extract from "a book on the Guiteau trial," there being no avowal as to what his counsel intended to read from the book 219

REAL ESTATE—See Lands—

1. in an action to enforce a mortgage lien on the land of a married woman executed by her and her husband, in which the land was sold after the death of the wife under a judgment against her surviving husband and children, who were all served with process, at which sale one of her sons became the purchaser at the price of \$2,730, which he paid into court under a written agreement with the city of Louisville that it would look to the fund in court for all unpaid city taxes, which order was entered and a deed made to the purchaser free of lien, and in a subsequent action by the city against the husband, who alone was served with process, to enforce a lien for taxes due the city on said lot, which were consolidated with the original action of appellant to foreclose the mortgage aforesaid, a judgment was entered against the husband for the taxes and interest, amounting to \$1,490.64, and awarding the city a first lien on the fund in court for said judgment. Held—That said judgment was erroneous. The fund in court is the proceeds of the sale of the fee-simple title of the lot under the judgment of foreclosure where all the owners were parties, and before the court. The city had

REAL ESTATE—Continued.

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properly assessed the property for taxation against the husband who was the life tenant, but as he alone was before the court in the actions for taxes, no interest of the remaindermen could be subjected to the payment of the taxes, and the city was entitled out of the fund in court only to the interest of the life tenant therein

588

2. formerly, under the common law the heir or devisee could alienate lands received by devise or descent at any time after the death of the ancestor, and pass a good title to a bona fide purchaser for a valuable consideration, but under the present statutes of this State this can not be done until after six months from the death of the ancestor. And the only way to prevent or defeat the creditors of the deceased from subjecting his land to the payment of their claims is by a voluntary alienation by the heir or devisee after six months from the date of the death of the ancestor.

1067

RECORDS—See Practice, 5; Transcripts—

where a record is taken from the clerk's office of the Court of Appeals by an attorney, to be used by him instead of a copy, his client is liable for the cost of a copy, although the clerk may have agreed with the attorney not to charge for the copy unless his client is successful, as the fees of the clerk's office now belong to the State and the clerk has no authority to make such an agreement

180

RECORDING DEED—See Notice—

where the grantee in a deed lodged his deed with the clerk of the county court of the county, where his land lies, and said deed was recorded by the clerk in the deed book kept in said office for that purpose, such recording is legal notice of and protects the grantee in his ownership of said land against any subsequent purchaser thereof. The fact that the clerk failed to index the deed book containing such record does not affect the grantee's ownership of the land

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RELIGIOUS BELIEF—See Criminal Law, 22.

REMOVAL OF CAUSES—See Railroads, 46, 47.

RENEWAL NOTES—See Liens, 7.

RES JUDICATA—See Practice 1; Settlements—

in this action by an infant and its statutory guardian to recover certain mense profits growing out of a house and lot, the petition averring that the real estate descended to the infant as the only child and heir at law of its mother and that his father became entitled to the use of one-third of it for life, it was further averred that appellee, his grandmother, brought a suit in the Jefferson Circuit Court against the infant and his father to recover the real estate mentioned, upon the alleged ground that she had furnished the money to pay for the property with the understanding that the property should be conveyed to her, which action was decided in favor of appellant by the Court of Appeals, which court directed that the action be dismissed, which was done. The accounting in this action being for rents of this property, the defense being the same claim set up in appellant's former action, the plea of res judicata interposed by appellees was properly sustained

51

RETAILERS OF OIL FROM WAGON—See Penal Action.

RIGHT OF WAY—See Lands, 14.

ROAD DISTRICTS—See Taxation.

ROADS AND PASSWAYS—See Railroads, 89—

1. where gates are erected upon public roads with the permission of the county court, the court can not abolish them by proceedings under section 4297, Kentucky Statutes
2. where the circumstances indicate a presumption that one in opening a passway and erecting gates upon it did so with the reservation that he should be permitted to maintain the gates, and this was done without objection or interference for several years, the passway being a private one, the court was without power under section 4297, Kentucky Statutes, to remove them
3. where \$75 was appropriated by the fiscal court for the building of a bridge on a public road and a special commissioner appointed to let out the contract and superintend its construction, such

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ROADS AND PASSWAYS—Continued.

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commissioner is not liable in an action for damages to one who was injured by the falling of such bridge by reason of its defective construction, the provision of section 4820, Kentucky Statutes, referring to his bond and his liability, must be held to protect the county and not to include causes of action by persons damaged..... 484

4. the rule in Kentucky is that as a county is but an integral part of the State, and the fiscal court is a part of the machinery of the State government, no action lies against the county or the fiscal court, or the judge or justices composing it, for injuries done to a traveler by the falling of a bridge constituting part of a highway and under the control of the court, although guilty of gross negligence in failing to repair it..... 484

ROBBERY—

the indictment in this case containing all the necessary allegations to constitute the crime of robbery, and the evidence showing that appellant snatched from the person of Crowder his watch, while the latter was walking along a street with two companions, pulling the watch with sufficient force to break the chain, and taking it from the possession of its owner, the evidence bringing it within the rule announced in Roscoe's Criminal Evidence, page 834, the judgment of conviction will not be disturbed 512

RULES OF COURT—See Appeals, 10.**SALE OF LAND—See Auctioneers; Auction Sale of Lots; Lands, 18, 24; Mortgages, 4, 5—**

1. where land is sold under decree of court, in which certain interests have been conveyed to the claimant of the land by married women by deeds in which their husbands did not join, in paying the proceeds of the sale to such married women they should be required to account to their vendee for the money he paid to them in purchasing their interest, but no interest should be charged to them and no rents charged to their vendee..... 227
2. appellees having purchased a tract of land from appellant, and it appearing that prior to this sale appellant had sold the mineral rights in the land to Bright, appellees are entitled to a rescission of the contract because a perfect title to the land could not be conveyed as appellant had covenanted to do 385
3. in a sale of land as a whole for a division of the proceeds, where the heirs are by different parents and do not own a joint interest in each parcel, the fact that one of the heirs, who is an infant, owns an interest in a portion of the tract which is of a greater value than an average of the whole tract, is not cause for setting aside the sale, as this fact can be ascertained by the court before distribution, and the proceeds apportioned so as to give to such infant its equitable interest therein 610
4. a sale will not be set aside because the wife of one of the defendants is not a party to the suit, as she can still be brought before the court before distribution of the sale money, and her potential interest ascertained and paid to her out of her husband's share.. 611
5. where the land intended to be sold is manifest, the sale will not be set aside, because of a misdescription of the boundary caused by a resurvey by the officer making the sale, nor because said survey was not filed, nor because some taxes are due on the land which can be paid out of the sale money before distribution 611
6. the sale will not be set aside because one of the daughters of deceased is claimed to have died testate, devising all her property to her sister, and that her will is being contested, because if the will is probated her sister, who is a party to this action, will be bound by the decree, and if rejected, then all her heirs are parties to this action and are bound by the judgment and sale..... 611
7. a sale of land made and confirmed at a special term of the circuit court, regularly called, is valid... 611
8. sale confirmed the same day the report was filed, though unusual, is not invalid as to the purchaser, where it is not shown that the purchaser was not prevented by that act from filing exceptions of merit to the sale, and does not show to have been prejudiced thereby..... 611

SALE OF LAND FOR TAXES—See Lands; Taxes—	Page.
in a proceeding to enforce a lien on land for city taxes listed by the life tenant, it was error to sell the land for the taxes primarily owing by the life tenant, where process was only served on the owner of the remainder interest, although there was an allegation that the life estate was insufficient to pay the taxes. The life tenant should have been before the court, and his interest first sold so that the remainderman could protect himself by buying in the life estate	204
SALES OF MERCHANDISE—	
where the evidence in this action showed that the goods were sold in the usual course of trade and without other warranty than the law implies in such sales; that the goods were retained by the purchasers for about seven months, before offering to return them; that one of the partners asked indulgence on the claim, never complaining of the goods or offering to return them, and most of the goods being sold, it is manifest that the defense is an afterthought and without merit.....	94
SALES OF PERSONAL PROPERTY—	
1. appellant can not complain that notice that the machine sold by it was not satisfactory was not given in accordance with the stipulation in its contract of sale where it waived its right and acted upon the notice it did receive and sent an expert to examine the machine.....	492
2. the verdict and judgment by which appellee was awarded \$500 damages upon the sale to him of a thresher will not be disturbed where, though the evidence was conflicting, it showed the machine to be almost worthless for the purpose for which it was sold.....	492
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3. where by a written contract certain oak timber was sold on the Levi Jackson home place, parol evidence is competent to prove that when the parties in the contract designated the land as the "Levi Jackson home place" they did not understand that either the Walden, State Hill or Edwards tracts were included in the sale, and that the meaning of the contract is that all the land within the meaning of the contract is that all the land within the exterior bounds given, which was then known as the Levi Jackson home place, was included in the contract.....	1110
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1. the Louisville School Board, under Kentucky Statutes, section 2949, is a corporation, with power to contract, sue and be sued, and under section 2956 it had a right to employ a janitor and fix his salary, and by section 2954 it is its duty to pay such salary out of the fund which annually comes into its hands for educational purposes	508
2. the payment of the salaries of teachers and employes is one of the duties imposed upon the school board, and a suit against it for the employe's salary relates to the business for which such board was organized, and such suit is not against public policy.	508
3. a janitor of a school, appointed by the school board, has the right to assign his salary after it is earned, and such assignee has the right to enforce its collection by suit.....	508
SCHOOL FUND—	
money paid into the treasury by foreign insurance companies on account of the tax of \$2 upon each \$10 of premiums collected by them is no part of the annual tax of 22 cents on each \$100 of value of real or personal estate or corporate franchises directed to be assessed for taxation, and is, therefore, not embraced by subdivision 5 of section 4870, Kentucky Statutes, specifying what shall constitute the school fund of the State	40

SCHOOLS AND SCHOOL DISTRICTS—**Page.**

section 448, Kentucky Statutes, provides that "where an act is required to be done by three or more, when done by a majority of them it will be deemed the act of all." Section 4541 provides "that the secretary of state, with the assent of the governor, may appoint an assistant secretary, who, in case of absence or indisposition of the principal, may do the business of the office in his name." By section 4477 "the superintendent of public instruction, together with the secretary of State and the attorney general, shall constitute the State Board of Education," of which board, by section 4879, the superintendent is made chairman. Section 4424 requires "the publishers of school books to execute before the ex-officio members of the State Board of Education the bond therein required." In an action by the Commonwealth on the bond of appellees, Ginn & Co., school book publishers, to recover the penalty for its breach, which was filed with and approved and accepted by the superintendent of public instruction and assistant secretary of state, the presumption that at the time of such approval the secretary of state was absent or indisposed is not overcome by the filing of an answer by the appellees, Ginn & Co., that "the bond was approved on October 20, 1896, not later than 9:30 o'clock, a. m., in the city of Frankfort, and that the secretary of state left said city on that day at 9:50 o'clock, a. m., for a temporary purpose only, viz., to make speeches in a political campaign, and would certainly return in a few days, and there was no occasion in passing immediately on the acceptance of the bond; that the schools throughout the State for that year had begun, and the books for that year had been adopted and were being used at that time," the pleading must be taken against the pleader, and it must be presumed, from the facts stated, that the secretary of state was not at his office when the bond was accepted, but was preparing to leave Frankfort, and had absented himself from his office with the purpose of not returning for a few days, and a demurrer to this plea should have been sustained..... 486

SCHOOLS—

1. where a twelve-year old girl, who was a pupil of the city school, of the city of Nicholasville, was injured by falling from the stairway of the school building to the first floor, she is not entitled to recover from the city damages for the injuries sustained, as the duty of providing public education at the public expense by building and maintaining schoolhouses, and conducting public schools therein, is purely a public or governmental duty, in the discharge of which school districts act as the representatives of the State, and they are exempt from corporate liability for the improper construction of the houses or want of proper repair, or the wrongs of the servants employed..... 974
2. pursuant to section 4440, Kentucky Statutes, trustees of common school districts have the power, without the interposition of an election by the people, to levy an ad valorem tax not exceeding 25 cents on each \$100 of taxable property, per school year, and a capitation tax not to exceed \$1 for four years, and this yearly tax constitutes the income and revenue which the provision of section 157 of the Constitution forbids being exceeded except by a vote of the people..... 983
3. where the claim against a common school district for supplies furnished the district is within the annual revenue of the district as provided by law, it is the duty of the trustees to collect a sufficient sum to pay it..... 983
4. presumption that officers did their duty—it will be presumed that the trustees in drawing their warrant upon the school superintendent did their duty, and the claim that the petition is defective because it did not allege that the superintendent did not notify the trustees in writing of the necessity for the apparatus is not tenable..... 983
5. the Brooksville Graded School in this State is maintained by the State by taxation. It is open to all white children within certain ages, who, or whose parents, reside in the district. In opening this school every morning the following prayer was offered: "Our Father, who art in Heaven, we ask Thy aid in our day's

SCHOOLS—Continued.

Page.

- work. Be with us in all we do and say. Give us wisdom and strength and patience to teach these children as they should be taught. May teacher and pupil have mutual love and respect. Watch over these children both in the schoolroom and on the playground. Keep them from being hurt in any way, and at last when we come to die may none of our number be missing around Thy throne. These things we ask for Christ's sake. Amen." Held—That such prayer is not "sectarian" either in form or substance within the meaning of section 5 or section 189 of the Kentucky Constitution, or of section 4368, Kentucky Statutes. 1021
6. though it be conceded that any prayer is worship, and that public prayer is public worship, where children, whose parents object, are not required to attend at such prayer service, the school can not be considered "a place of worship," nor are its teachers "ministers of religion" within the contemplation of section 5 of the Kentucky Constitution, although a prayer may be offered incidentally at the opening of the school by the teacher 1021
7. we believe the reason and weight of the authorities support the view that the King James translation of the Bible is not a "sectarian" book within the meaning of the Kentucky Statute, section 4368, which provides that "no books or other publications of a sectarian, infidel or immoral character shall be used or distributed in any common school, nor shall any sectarian, infidel or immoral doctrine be taught therein," and when used merely for reading in the common schools without note or comment by teachers is not sectarian instruction, nor does such use of the Bible make the schoolhouse a house of religious worship. 1021
8. that the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, can not make it a sectarian book. The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship, nor mechanical composition of the book, nor the use of it, but its contents that give it its character 1021
9. where a member of a board of trustees of a graded common school tendered his resignation, and it was accepted, he ceased to be a member and did not thereafter have power to withdraw it 1106
10. where a board of trustees consisted of five members, and three of them gave a written notice to the chairman requesting him to call a meeting at 10 o'clock at night of that day, which the chairman refused to call, a meeting of the three and action taken by them, without further notice to the other two, was invalid 1106
- SELF-DEFENSE**—See Criminal Law; Homicide, 6, 14—
the doctrine of self-defense rests both upon actual necessity and apparent necessity. An abandonment of a fight must, therefore, relieve the other party of both actual and apparent danger, and if the person assaulted thereafter renew the conflict or continue it, then the original assailant's right of self defense attaches as if he had not begun it. 115
- SEPARATE COACH**—See Railroads, 54.
- SEPARATION OF WITNESSES**—
under section 601 of the Civil Code the trial court may, in its discretion, allow one of the witnesses for the Commonwealth to remain in the court room to aid the attorney for the Commonwealth during the trial. 333
- SERVICE**—See Process.
- SERVICE OF PROCESS UPON NONRESIDENT**—
where an administratrix living in another State was only brought before the court on an appeal in an action which had been instituted by her deceased husband, section 542, Civil Code, has no application, and service of process in such case was proper in this State. The appeal being in effect a proceeding to set aside a judgment against her testator, she was a proper party to the appeal. 1113

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where the evidence in a case is conflicting in its character we are not warranted in setting aside the verdict of the jury	233
SETTLEMENTS—	
1. in an action against a trustee by the cestui que trust to surcharge a settlement and to obtain a complete settlement of the trustees accounts, everything that was litigated, or might have been, in that action is concluded by the judgment rendered in it, and the claim that the trustee failed to charge himself with certain sums is res judicata.	1003
2. such a judgment can not be attacked collaterally where the fraud complained of lay back of the trial, but only where it related to the obtention of the judgment.	1003
SHERIFFS—See Office and Officer, 3; Taxes, 8—	
1. in an action by a county against the surety on the official and county levy bonds of the sheriff for failing to collect and account for taxes due the county, such county is not limited in its remedy to a proceeding under section 4146, Kentucky Statutes, which authorizes the fiscal court at its October term to appoint commissioners to settle with the sheriff, where the sheriff refuses to settle or absconds and fails to settle	66
2. where for some of the years it was shown that the sheriff had made settlement as required by Kentucky Statutes, section 4146, and that such settlements had not been appealed from or otherwise set aside, such settlements are binding on the county and are not subject to collateral attack	66
3. on all taxes not paid before December 1 of the year in which they are due a penalty of 6 per cent. is added, which penalty goes to the county under Kentucky Statutes, section 1885, and when collected or collectable the sheriff is liable for it to the county precisely as he is for the taxes	66
4. under section 4147, Kentucky Statutes, if the sheriff does not collect and pay over to the county all the collectable taxes in his hands by January 1 after the year in which they were due and payable, he is liable to the county for a penalty of 6 per cent. on the amount so collected or collectable by him and not paid over, which penalty is against the sheriff, and is calculated upon the total sum due the county by him on January 1, after it became due, whether for taxes and penalties against the taxpayer collected or collectable.	67
5. it was the duty of the sheriff to pay the railroad taxes which he collected to the treasurer of the sinking fund commissioners of the railroad taxes, who is shown to have demanded them, and by his failure to do so he has incurred the penalty fixed by the statute, and such duty is not in abeyance until he has settled.	67
6. when the whole of the sheriff's liabilities are ascertained it is competent to reduce them to a single sum and to render judgment for that sum which will bear interest from the date of the judgment, for then penalties and interest already accrued are merged into the judgment which must bear interest	67
7. a judgment against a sheriff for the collection of taxes in excess of the constitutional limit, is not such a judgment as will authorize an order awarding a capias ad satisfaciendum for its collection or enforcement.	297
8. an order of the county judge directing the sheriff to pay an attorney 25 per cent. of the sum collected by the sheriff from the railroad as franchise tax was void, and the sheriff was properly refused a credit for said payment in his settlement with the county commissioner.	319
SHOOTING IN SUDDEN AFFRAY—	
an instruction under Kentucky Statutes, section 1242, for shooting in a sudden affray, etc., should follow the language of the statute	333
SLANDER—	
1. the following words, viz.: "I bribed him in a railroad case; I know he was bribed and can do it again; he sold out in the railroad case and received a bribe," when spoken of one who, at the time the bribe was alleged to have been accepted, was not an officer, do not import a crime for which the accused may be indicted, and are not actionable unless special damages are shown.	326

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2. the rule in slander is that the plaintiff must prove the words as alleged by him, and not other words of like import, and for this reason the defendant is not allowed to plead that he used other words, and attempt to justify them 326

SLAVES—

under the act of the Kentucky Legislature of February 14, 1866, providing that the issue of customary marriages of negroes while they were slaves, a son of parents who were shown to have been married according to the custom among slaves in Kentucky, and who recognized each other as husband and wife, is held to be an heir of his deceased father, although the parents failed to appear before the clerk of the county court and make the declaration required by the statute as evidence of the existence of their marriage..... 899

SPECIFIC PERFORMANCES—See Lands—

appellees were devised certain real estate by the will of Lightfoot. To the widow the devise was for life and the daughters were devised the remainder, and by another clause of the will it was provided that the same should not be sold for any purpose until the death of his wife. Held—That appellant, who had bought the land, but who, when tendered a deed refused to accept it, denying the right of appellees to convey, could not be compelled to perform the contract, the accepted doctrine in this State being that restraints upon alienation may be imposed for a limited length of time. The manifest intention of the testator was to preserve the property intact during the life of his wife, and she being beyond middle life when the will was probated, her expectancy was not so great as to render the restriction placed upon the devisees unreasonable 218

STATE FAIR—

the act of March 29, 1902, does not create Kentucky Live Stock Breeders Association. That corporation was already in existence. The act makes an appropriation and directs that a State fair be held. The Breeders' Association is simply an agency to carry out the purposes of the legislature, nor does the act relate to more than one subject. The creation of the fair and the name of the agency are germane to the subject expressed in the title of the act..... 518

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STATUTE OF FRAUDS—See Constructive Trust, 1, 2—	
an agreement to become partners in dealing in real estate is not a contract to buy nor a contract to sell real estate as between the parties to it, and is not within the statute of frauds, and, therefore, need not be in writing if to be begun, and may not end within a year, although as a fact it may not be terminated for more than a year.....	505
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STOCK CERTIFICATES—	
1. where a power of attorney appended to each of certain notes which were secured by lien upon certificates authorized a private sale of the stock certificates without advertisement or notice, but by clear implication precluded the holder of the notes from becoming the purchaser at such sale, the purchaser should be required to show that the sale was fairly made according to the terms of the contract at "public sale".....	522
2. it being evident that appellant made no effort to dispose of the stock with a view to benefit the appellees, but that his purpose was to obtain the property for himself at the lowest possible price regardless of the interest of those whom it was his duty to protect, the sale to him was contrary to law.....	522
3. it was improper for the court below to require so large a sum (\$65,000) to be placed in the hands of its commissioner at the expense of the parties, and there held until the exchange of stock and notes were made or the litigation ended. The court should have fixed a day within a reasonable time for the exchange of money and stocks to take place.....	522
STOCKHOLDERS—See Corporations, 1, 2, 3; Railroads, 59, 60, 61.	

STREET IMPROVEMENT—See Limitation; Taxation, 25— Page.

1. under section 2883, Kentucky Statutes, which requires the State to pay its proportion of the cost of the improvement of a public street in cities of the first class, on which property is situated which is owned by the State, or is held in trust for the public use of the State, where such street has been improved under the ordinance of the city and an apportionment warrant or statement of the costs thereof shall be certified by the board of public works of the city to the State auditor, it is the duty of the auditor to pay the same..... 129
2. the act supra is not in conflict with section 156 of the Constitution on the ground that it is local or special legislation, because Louisville is the only city of the first class in this State, nor is it in conflict with section 170 of the Constitution, by which it is provided that public property used for public purposes shall be exempt from taxation, as it is well settled that the sections of the Constitution relating to taxation do not apply to assessments made on adjoining property for the improvement of a highway.. 129
3. where a city loaned its credit to a lot owner for the cost of a street improvement paid for by the city, and which, at the implied request of the debtor, was payable in ten yearly installments, such debtor, after paying the two first installments and having knowledge that the city, in extending him the credit had acted upon the idea that he had requested it, will not be heard to say he had not requested it, and by a plea of limitation throw a loss upon the city which it would not have sustained but for his misleading it..... 286
4. section 2830, Kentucky Statutes, providing that changes of plans may be had upon the agreement of the board of public works by consent of contractor, it was no defense to the warrant that the grade was changed so as to lessen the cost of improvement after the contract had been let..... 437
5. where it is not contended that lots affected by the improvement is in territory defined by squares, it is not a defense that the territory in which appellant's lots are situated was divided into squares by principal streets, and that, therefore, the defining of a taxing district so as to bear one-half of the costs was unauthorized..... 437
6. although an ordinance may be inartificially drawn, yet where it is evident that the board of trustees intended that the abutting property should pay the expenses of an improvement to the street they should be required to pay for same..... 631
7. where attested copies of an ordinance is filed as evidence in a case the presumption must be indulged that they were regularly passed until their validity is impeached, and if the town clerk had failed to make a record of the passage of the ordinance that fact could be established by parol testimony..... 631
8. while the clerk of the board of trustees should have recorded the separate action of the board on different ordinances, although this is not shown, and although the board may have passed two or more ordinances at the same time, such action would not prevent a recovery by the appellees for the work which they did.... 631
9. where no apportionment warrant was issued against the owner of property no lien for street improvement exists, and the issual of such warrant against one person does not create a lien upon the property of a stranger..... 1001
10. where more than five years elapsed between the issual of the apportionment warrant and the filing of the amended petition making the vendor of appellee a party, the plea by him of limitation was conclusive against appellant..... 1001

STREET RAILWAY—

1. the driver of a wagon in a public street has the right to use any part of it, although occupied by the track of a street railway, and if while driving on the street car track he is struck by the car without negligence on the part of those in charge of the car, when his presence on the track could not be discovered by them in the exercise of ordinary care in time to avert the injury, he can not recover. But he is not a trespasser on the track, and has a right to anticipate that a proper lookout would be kept by those in charge of the cars, and that ordinary care would be exercised by them to avoid running into him..... 816

STREET RAILWAY—Continued.

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2. in an action by a passenger against a street railway company for damages for being assaulted and thrown from the car by its conductor after tendering his fare, an amended petition filed after the expiration of twelve months from the time of the alleged assault, explaining plaintiff's mistake in presenting an improper ticket for his fare, is not a new cause of action and not barred by the one-year statute of limitation..... 836
3. a street car conductor has a right to eject a passenger from the car for a failure to pay his fare, but he has no right to use more force than is reasonably necessary to do so, and if he uses more force than is reasonably necessary to do so the company is liable for the damages to the passenger resulting from such excessive force 836
4. an instruction to the jury that if they believe from the evidence that the conductor in ejecting the passenger "was inspired to use excessive force, if he did so, by actual malice or ill will towards the plaintiff, the jury may, in their discretion, allow punitive damages," was more favorable to the defendant than it was entitled to. The court should have added after the word "plaintiff" the words "or wantonly or recklessly threw him from the car" 836
5. the granting of a franchise to operate a street car line over the streets of a city to any person except to the highest and best bidder, after due advertisement, is in direct conflict with section 164 of the Constitution, and is void..... 380
6. the rule as to discharge of passengers is different in the case of street railways from steam railways. The latter is required to furnish a safe place for such discharge, while the former is under no such obligation, but may discharge its passengers at convenient places along the streets it traverses. In this action, there being no averment in the petition that there was a defect in the street, nor an averment that the conductor knew of its being an unsafe place where the car stopped, and no averment the condition alleged was not known to appellant, a demurrer was properly sustained to her petition in this action for damages against appellee 737
7. where appellee was injured upon appellant's car by being thrown while the car was rounding a curve and falling against the controller box, and the evidence was conflicting as to how he happened to fall, the verdict of the jury in his favor will not be disturbed..... 811
8. an instruction on motion of appellee, to the effect that the jury should find for him if "the defendant failed to use the utmost care to prevent such electric current from being in the controller box," and on motion of appellant, to the effect that if they believed "that the defendant used the utmost care and skill ordinarily used by persons in the same or similar business of carrying passengers," to prevent injuries, they should find for defendant, must be read together, and when so read present the whole law of the case; and, moreover, appellant can not complain of an instruction given on its own motion... .. 811
9. the proof showing that appellee's doctor's bill was \$200, appellant can not complain that the court by an instruction did not limit recovery for expenses to that sum as that was the amount alleged in his petition to have been expended for medical expenses 811
10. in an action by plaintiff for damages for an injury in a collision with a street car, in which the defendant pleads and exhibits a receipt for \$25, signed by plaintiff as a settlement of his claim for damages, it was error for the court to give the jury a peremptory instruction to find for the defendant where the plaintiff pleaded that the paper exhibited was procured by fraud, misrepresentation and duress, which was supported by his evidence that he understood when he signed it that it was only intended to secure him medical attention.... .. 965
11. where the evidence tended to show that the physician of the defendant was acting for the defendant in procuring the signing of the receipt, the court should have admitted the testimony offered by the plaintiff as to what the physician said and did before the paper was signed..... 965

STREET RAILWAY—Continuee.**Page.**

12. where an action for damages was brought against a street railway company upon the grounds that appellee, who was injured, attempted to board the car with a blind child and the motorman, after seeing her attempt to board the car, started it, throwing her to the street, injuring her, no one being in charge of the car except the motorman, instructions authorizing the jury to find for the appellee if the car was not properly officered, and if the injuries were received in the manner complained of, were properly given, and an instruction directing the jury to find for the railway company if the appellee boarded the car and attempted to alight while it was in motion was not authorized because the instructions given emphasized the fact that a verdict should be returned in favor of appellee only upon the theory upon which she claimed a right to recover.....1084

SUBROGATION—See Partnerships, 4—

- this being an action to recover of appellee bank the amount that the agent of an ice company had procured from the bank by fraudulent means, which amount appellant was compelled to pay, a demurrer to the petition was properly sustained. Appellant for a valuable consideration had guaranteed the fidelity and honesty of the agent, and it is not entitled to be subrogated to the rights of the ice company as against the bank..... 893

SUICIDE—See Life Insurance, 10.**SUPERSEDEAS—**

- where a supersedeas bond was executed before the clerk of the circuit court within the time allowed for filing the transcript of the record in the office of the clerk of the Court of Appeals, as provided by section 738, Civil Code, the appeal did not thereby abate, but was still pending in the Court of Appeals until dismissed by said court, and it was the right and duty of the clerk of the circuit court to issue the supersedeas at any time before the dismissal of the appeal and as the appeal was then pending the supersedeas was not void 769
2. upon the affirmance of a judgment by this court which has been superseded, it is error of the clerk of this court to enter a judgment giving the appellee 10 per cent. damages upon the amount superseded, unless there was a personal judgment in the lower court against the appellant which might be enforced by execution, and which was also superseded, and the motion to correct the error may be made at subsequent term of this court..... 886
3. by the supersedeas all proceedings by the parties to enforce the judgment appealed from are stayed. Any attempt to change the status of things existing just before the judgment was rendered will be a contempt of the supersedeas, and will be so treated by this court 909

SURETY—See Indemnifying Bonds, 1; Forcible Entry; Liens; Office and Officers, 3, 4, 5—

- in an action against a surety on a note, an answer by a surety that he signed it upon the condition that P. was also to sign it as surety and that plaintiff had knowledge of this fact when he accepted it, presented good defense, and a demurrer thereto should have been overruled1077

TAXATION—See Abatement; Appropriations; Foreign Corporation, 1, 2; Municipal Taxes; Schools, 2; Taxes—

1. this action to recover taxes due appellant having been instituted before the lapse of the five-year statute, it prevented the statute of limitations from running. A purchaser before its termination was a pendente lite purchaser, and the plea of the statute in such a state of case is not available, the fact that the five years had expired before such purchase will not operate as against the claim for taxes upon which the action was instituted against the real owner before the lapse of that period 175
2. the appellee not being embraced by section 4077, Kentucky Statutes, and being authorized by its charter to transact an entirely different character of business from the companies named in that section, it is not subject to assessment for a franchise tax. The fact that it is required to set aside a part of its capital stock by the provisions of section 734, Kentucky Statutes, as a guarantee fund for certain investments, does not result in a special priv-

TAXATION—Continued.

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| illeg. It is intended as a benefit to those to whom it has given guarantees, and is, therefore, to that extent a burden upon it.... | 345 |
| 3. in an action by the city against the life tenant and remainderman to subject a house and lot occupied by the life tenant for the payment of taxes due thereon, Held—That the lien thereon was properly enforced except to so much as was barred by the five years' statute of limitation..... | 472 |
| 4. in a proceeding by auditor's agent in the county court, in which he filed a statement alleging in substance that defendant had failed and refused to list for taxation for the year 1900 notes, bonds, securities, investments and cash owned by him on September 15, 1899, which were of the cash value of \$50,000, at the price they would bring at a fair voluntary sale, on which summons was issued and served on defendant, who appeared and entered a plea that he was "not guilty" of the matters and things set forth in the statement, which plea, on the motion of the Commonwealth, was stricken out and defendant declined to plead further. Held—That there was nothing of a criminal nature in the proceeding, and the plea of "not guilty" was properly stricken out, and defendant not having made a motion that the statement be made more specific, and failing to file an answer controverting same, the county court properly entered a judgment against defendant for the taxes on the \$50,000, and 20 per cent. damages thereon..... | 473 |
| 5. under section 170 of the Constitution, exempting "institutions of purely public charity" from taxation, a hospital which is an adjunct to a medical school is subject to taxation, although patients who are not able to pay for treatment therein are admitted free for the purpose of the education of the students of the medical school in their profession | 635 |
| 6. the appellant on the 28th of July 1902, having contracted with appellees for land which they conveyed under the contract, by the provisions of section 4093, Kentucky Statutes, he was liable for the taxes thereon for the year beginning September 15, 1902. He did not own the legal title at the time of the making of the contract, but its effect was to vest him with the equitable title..... | 666 |
| 7. appellees were not obliged to pay the taxes because they conveyed in terms of general warranty, because a lien then existed upon property for the taxes, and it was appellants' duty to discharge it. | 666 |
| 8. under Kentucky Statutes, section 4020, providing that "all real and personal estate within this State, * * * shall be subject to taxation, unless the same be exempt by the Constitution," railroad cross ties owned by a foreign corporation which were piled on a river bank in this State for the purpose, when a boat was secured, of being shipped by the owner out of the State, are liable to taxation in this State, both for State and county purposes, and there is no constitutional provision, State or Federal, which forbids it..... | 540 |
| 9. when one comes into equity to enjoin the collection of a tax which has been officially ascertained to be due by the assessor or by the retrospective assessor, the burden of proof is upon the plaintiff, and to do this he is required to allege and prove, if controverted, every fact, whether it be negative or affirmative, necessary to show the invalidity of the tax assailed | 591 |
| 10. it is incumbent on the taxpayer in listing his property for taxation to make, under oath, a full and fair disclosure, by items, of all his property subject to taxation, and if he does this and the assessor places a valuation on it that is too low, the city or State is bound by it; but if he fails to do this, and gives its valuation in a lump without being sworn and without disclosing the items, to the extent that the property is thereby underestimated it is omitted property in the meaning of the law, and the negligence of the officer in not requiring such disclosure will not avail the delinquent taxpayer..... | 591 |
| 11. in an action to enjoin the collection of a tax made by an officer who is required to make retrospective assessments, it is not incumbent on such officer to show that he has given notice to the taxpayer of the assessment. As the law presumes the officer did | |

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| his duty, if such notice was necessary, it will be presumed to have been given. | 591 |
| 12. assuming that the city ordinance establishing a back-tax collector is valid, there is nothing in the ordinance which indicates that he shall be more than an additional aid to the regular assessor, whose duty it is to retrospectively assess omitted property, just as it is made the duty of the sheriff and auditor's agent to look up and have assessed omitted property for State taxation | 591 |
| 13. the rule is that when one comes into equity asking relief against taxation, it is incumbent on him to show clearly that he has paid, or is willing to pay, all that he justly owes toward the public burden; he must make a full, fair and complete disclosure of the property he has, or that his ward has, subject to taxation, so that the court may judge whether he is unjustly taxed; he must come not only with clean, but with open hands | 591 |
| 14. under the provisions of the revenue laws of this State a license tax of \$5 is imposed on "each wagon" used in transporting or retailing lubricating or other oils for one year. Section 4201 Kentucky Statutes provides that "any person who shall engage in the business, or sell or offer to sell any article on which a license is required before procuring the license and paying the tax thereon * * * shall be fined not less than \$50 nor more than \$1,000 for each offense unless otherwise specifically provided," the tax is on the wagon and the offense of operating the wagon is a continuous one, and only one fine can be imposed for the violation of said statute in any one year | 1073 |
| 15. in a proceeding in the county court to list omitted property for taxation, Held—First, it is not necessary to its validity that the judgment should state the rate of taxation, as the rate for each of the years is fixed by law; second, the property is sufficiently described as "notes, mortgages and cash;" and, third, in reciting that appellant had failed to properly list his personal property for the years involved to the extent of \$7,000, and then adjudging that it be listed for these years, amounts to a judgment that the property had been "omitted" for the years mentioned ... | 1080 |
| 16. Kentucky Statutes, sections 1882, 1883, 1885, 4143, 4077, 4083 and 4091, when considered together are construed as follows: Sections 1882, 1883 and 1885 apply to county taxation on tangible property and not to taxation of franchises of corporations assessed by the State Board of Assessment and Valuation. | 1104 |
| 17. the provisions of section 4091, in so far as damages and interest are concerned, by the force of its own terms applies alone to State revenue, and not to that of counties or municipalities, and as section 1885 has reference alone to the taxes regulated by sections 1882 and 1883 and not to those provided for by section 4091, it follows that the judgment imposing a penalty of 10 per cent. in damages and interest at the rate of 10 per cent. per annum on the taxes due to the county of Henderson by the Henderson Bridge Co. upon its franchise assessed by the State Board of Valuation and Assessment for the years 1893, 1894, 1895 and 1896 is erroneous | 1104 |
| 18. under subsection 3, section 3637, and section 3644, Kentucky Statutes, cities of the fifth class have an express grant of power to levy and collect ad valorem taxes on all property within the city not exceeding 75 cents on the \$1 of its assessed value, and to provide a system of taxation and assessment, and no system of assessments is complete or just that fails to provide for listing omitted property | 1150 |
| 19. the fact that an ordinance of a city of the fifth class for the collection of a tax on omitted property is retrospective does not render it invalid, but to the extent that it imposes a penalty it is void | 1150 |
| 20. the fact that such ordinance does not provide for an appeal does not invalidate it, but if the assessing tribunal acts without warrant of law, or assesses to the taxpayer property that did not belong to him, or if for any reason the taxpayer is not legally liable to pay the tax, the courts are open to him notwithstanding the assessment. | 1150 |
| 21. the act of a city council in assessing omitted property is purely ministerial although it has mixed certain discretion as to find- | |

TAXATION—Continued.

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- ing values and the like, which is not reviewable, and which quality is sometimes called judicial 1150
22. the fact that Kentucky Statutes, section 3638, requires that all ordinances be published, it does not follow that it would devolve upon the city, when its tax levy ordinances are called into question, to prove that they had been published. The presumption of law that public officers have done their duty applies, and it is upon the one attacking the ordinance to show affirmatively and satisfactorily that it has not been published 1150
23. in this action it is held that the passing by the legislature of the act of May 5, 1893 (Kentucky Statutes, section 4136), had the effect to amend the act of May, 1890, in relation to creation of road districts in Kenton county for traction turnpikes, and the two acts must be construed and considered as one consistent whole. And when any liabilities were created and assumed after the act of May 5, 1893, took effect, it must be presumed that they were created and assumed under the act of 1890 as modified by the general act of 1893 1173
24. Kentucky Statutes, section 4136, was not intended to be retrospective in its operation, but was intended to change the effect and operation of the act of 1890 from that date. Whether or not the general assembly has the power to enact a law shifting the liabilities owing by one person and placing them upon another without his consent is expressly not decided. Section 4136 is not in conflict with section 171 of the Constitution, and the costs of constructing roads in Kenton county should be paid for as required by the aforesaid acts. The legislature had the power to pass this act, and, to the extent named, it is valid 1173
25. three suits were pending by appellee against the owners of a certain lot, the object being to enforce its lien for taxes. A judgment was rendered in one and appellant at the sale thereunder purchased the property. Afterwards the city amended its petition in the other two cases making appellant a party and praying for a judgment for the enforcement of the lien. Held—The provision in the judgment that "said sale shall be made subject to the liens for unpaid State taxes, and unpaid taxes due or to become due the city of Louisville on said property, and not recovered by this judgment, rendered the property subject to the lien for unpaid taxes 514
26. section 3005, Kentucky Statutes, which provides that "when an action heretofore or hereafter brought under this or the following sections is still pending or undetermined, a new action upon subsequent accruing taxes may be brought, and either action may, in the discretion of the court, be carried to judgment separately, and a sale may be had under the judgment therein of sufficient property to satisfy the same, giving the purchaser a title free from tax liens set up in other causes," will not relieve appellant of the liens in the other actions in which he was made a party because he can not claim both under and against the judgment at the same time, and having made his purchase subject to the lien of the city he can not afterwards claim that he holds free of that lien 514
27. under Kentucky Statutes, section 4143, providing that a penalty of 6 per cent. shall be collected by the sheriff of persons failing to pay their tax by the first day of December, after it is due, it is the duty of the sheriff to collect such penalty as well as the principal, and such penalty is the property of the county, and the sheriff must account for it on his official bond 623

TELEGRAM—

1. the fact that a telegram announcing a son's illness was unreasonably delayed in its transmission and delivery will not entitle the father to damages for mental suffering in not seeing his son before his death where the evidence fails to show that he could have reached his son before his death if there had been no delay. 244
2. in an action for damages for delay in the transmission or delivery of a telegram announcing the illness of a son, the burden is on the plaintiff to prove not only the negligence in its transmission and delivery, but that such negligence was the proximate cause of the failure of the parent to reach the son before his death. 244

TELEGRAM—Continued.

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3. in an action in this State for the negligent transmission or delivery of a telegram from another State to this State, damages for mental suffering may be recovered in this State, although the laws of the State from which it was sent do not allow a recovery for mental suffering unless accompanied by physical injury 244
4. where, in an action against a telegraph company, the petition alleges that the plaintiff addressed a telegram to a lumber dealer, offering to sell him lumber at \$35 per 1,000 feet, and by negligence of the company the telegram transmitted read \$25 instead of \$35, and that the lumber was delivered to the purchaser before the mistake was discovered, whereby the plaintiff lost \$494.10, the difference in the price of the bill of lumber at \$25 instead of \$35 per 1,000 feet, for which difference the plaintiffs ask judgment against the company. The petition states a cause of action for which the company is liable..... 340
5. the question of proper diligence in the delivery was properly submitted to the jury 430
6. the contract for the nondelivery of a telegram must be construed under the law of the State where it is received..... 430
7. two telegrams when read together, meant: Father is dead. Can you come. Answer must have been so understood by appellee's agent and by appellant, and by reason of the delay in appellee's agent in their prompt delivery appellant was prevented from seeing her father before his burial, for which she was entitled to recover damages for injury to her feelings 569
8. where a telegram is sent for a sick person summoning medical aid for him, the meritorious cause of action is in the sick person for the negligence in the sending. He may recover for his pain and suffering endured by reason of the negligence in sending the message, but no recovery can be had by his father or other relatives by reason of such suffering 659
9. in an action for damages for failure to deliver a telegram sent from Radnor, W. Va., to Catlettsburg, Ky., thirty miles away, between 12 and 1 o'clock p. m. and not delivered until 8 o'clock of the same day, on which the company relied on the free limits rule as a defense, the sendee residing two and one-half miles from Catlettsburg, it was error in the court to submit to the jury the question as to the reasonableness of the free delivery rule. The facts being undisputed the reasonableness of the rule was a question for the court, and the rule was certainly reasonable as to one who lived two and one-half miles away 975
10. in an action for delay for failure to deliver a telegram for a casting to run a sawmill, by which the operation of the sawmill was delayed several days, the measure of damages is the profits which the plaintiffs would have earned by ordinary diligence in the operation of the mill if the telegram had been delivered in proper time 975
11. where there was evidence from which the jury might have inferred that plaintiffs could have done all their sawing notwithstanding the delay by the time their lease expired, in about twelve days thereunder, the jury should have been instructed that if the plaintiff, by ordinary diligence, could have gotten the casting in time to have done all their sawing before the end of their lease, then no loss of profits should be recovered 975
12. in an action against a telegraph company by an aunt of deceased, to recover damages for mental suffering caused by having to keep the corpse two days and nights by reason of the delay of the company in sending telegrams to relatives of the deceased, while the court properly struck out so much of the petition as sought to recover for mental suffering, leaving alone the question of nominal damages, it was error in the court to then sustain a special demurrer to the petition for want of jurisdiction of the amount in controversy, as the plaintiff was entitled to have the question adjudicated, although the court is of the opinion that there is no merit in her claim 999

TELEPHONES—See Contracts, 27.

TELEPHONE COMPANIES—

section 163 of the Constitution prohibits the erection by telephone companies of "poles, posts, etc., along, over, under or across the streets of a city or town without the consent of such city or

TELEPHONE COMPANIES—Continued.

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town." Section 8699, Kentucky Statutes, part of the charter of towns of the sixth class, provides that "no order or resolution granting any franchise shall be passed by the board of trustees within five days after its introduction, nor at any other than a regular meeting." At a special meeting of the board of trustees of the town of Hartford, Ky., September 1, 1898, the following resolution was passed: "The Cumberland Telephone and Telegraph Co. made application for the privilege to set their posts and run their telephone lines through the streets of Hartford, Ky., which privilege was granted." Held—That this resolution is void, first, because it was not required to lay over five days from the time it was introduced; second, because it was passed at a special meeting of the board of trustees, and, therefore, conferred no right whatever upon the appellee.....

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TENANT IN POSSESSION—See Lands—

a tenant in possession of real estate, whether holding for life or claiming the fee, is bound for the taxes thereon, and the possession of such tenant is not adverse to the remaindermen who claim under the will after the death of the life tenant.....

124

TIMBER—See Lands, 3—

where a written contract is made for the sale of all the timber on a tract, to be removed therefrom in fifteen months, the purchaser acquired no right to cut or remove any timber from said land after the expiration of fifteen months from the date of the contract.....

838

TIME—See Contracts, 38.

TITLE—See Lands, 1; Pleading, 1.

TRADE-MARK—

1. in an action by a distilling company for damages for an infringement of its trade-mark as a manufacturer of whisky, and for an injunction and accounting of profits alleged to have been made by the defendant thereby, it was proper for the lower court to require the plaintiff to elect whether it would prosecute its action for an injunction and profits, or for damages, as an injunction and profits could be had in an equitable proceeding, while damages for the simulation of its whisky is properly a common law action as in other cases for fraud.....

625

2. where a partnership was formed by E. H. T., Jr. & Sons, for distilling whisky, which was advertised and known as the "Old Taylor" whisky, and said firm made an assignment, and was succeeded by the same parties, under the corporate name of E. H. T., Jr. & Sons. Co., which continued to make and advertise their product as the "Old Taylor" whisky, it must be presumed, nothing to the contrary appearing, that the debts of the firm were settled, and that the "brand," as the property of the partners, reverted to them, and they had the right to use it in the name of the corporation which they subsequently formed.....

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3. where an application was made by the firm which appellants succeeded to register its trade-mark, "Old Taylor," was rejected by the patent office because of a prior use of the brand, and later the firm made another application which was granted, in which they said: "Our trade-mark consists of the arbitrary word—symbol 'E. H. Taylor, Jr. & Sons,' being a script fac simile of the signature of our firm name by the senior member thereof," the trade-mark of the firm did not consist in the words "Old Taylor," but it was abandoned for the one registered, and as it is not claimed that defendant has infringed the registered trade-mark, so much of the action as sought an injunction to restrain the defendant from infringing plaintiff's trade-mark, or on account of profits therefor, was properly dismissed by the circuit court.....

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4. it appearing from the evidence that appellant (defendant) was not a distiller, but a blender of whiskeys, and that he intentionally labeled and advertised his whisky as "Old Kentucky Taylor," but not as blended goods, and as the whisky of appellant (plaintiff) had attained a high reputation as a pure Kentucky distilled whisky, the selling by appellee of his blended whisky was a violation of appellant's rights which can not be sanctioned. The appellee may properly sell his brand of "Old Kentucky Tay-

- TRADE-MARK—Continued.** **Page.**
- lor," provided he so frames his advertisements as to show that it is a blended whisky but he can not be allowed to impose on the public a cheaper article, and thus deprive appellant of the fruits of its energy and expenditures, by selling his blended whisky under labels or advertisements which conceal the true character of the article. So much of appellant's action as sought damages having been dismissed without prejudice, the only remedy to which it is entitled is an injunction as indicated 625
- TRADE NAME—See Fire Insurance, 3.**
- TRANSCRIPTS—**
- the settled rule of this court is that the clerk of the circuit court must furnish the appellant with a transcript of the record where he is a poor person and unable to pay for it, and it is the duty of the circuit judge to direct the stenographic reporter to furnish appellant a transcript of his notes of the testimony heard on the trial where it is shown that such appellant is a poor person and unable to pay for it, and a failure to do so is subject to review in this court 1170
- TRESPASSER—See Railroads, 55.**
- TRESPASS—**
1. in an action by a land owner against a city to restrain it from digging a ditch across his land, a defect in the petition in failing to specify the officers and agents of the city who had entered upon the land, was cured by the answer of the city claiming a prescriptive right to the land over which the ditch was to be constructed 1086
 2. while the city had been in possession of a narrow ditch used for carrying water from the city for many years as a claim of right, gave it the right to clean it out and maintain it in its previous condition, it has no right to double its width and depth and thus take from the plaintiff additional property 1086
- TRIAL COURT—**
1. a judgment was rendered on April 9, 1904, on a trial by the court without a jury, which concluded with the words: "The defendant excepts and prays an appeal to the Court of Appeals, which is granted." On April 11 the defendant filed grounds and moved the court for a new trial, which was overruled and sixty days' time given to file bill of exceptions, but no appeal was then granted. The bill of exceptions was filed on July 9. On August 5 defendant executed an appeal bond and a supersedeas was issued. On September 1 an administrator was appointed for defendant, who had died after the execution of the appeal bond. On January 16, 1905, an order of revivor was entered in the circuit court in the name of the administrator, and he was then granted an appeal to this court from the judgment. On March 21 he filed the transcript with the clerk of this court and an appeal was granted him and the appearance of the appellee was entered. On April 26 an agreed order of revivor was made in this court, appellee entering her appearance and consenting thereto. On May 9 appellee filed notice and entered a motion to dismiss the appeal granted by the circuit court because the record was not filed in this court twenty days before the second term after the granting of the appeal. Held—That though defendant had been granted an appeal on April 9, the entry of his motion for a new trial was an abandonment of the appeal which had been granted, and the appeal bond and supersedeas executed on August 5 were void, as the evident purpose of the defendant was not to appeal from the judgment, but from the order refusing him a new trial. The circuit court had lost jurisdiction over the case in January, 1905, and, therefore, appellant properly filed his record with the clerk of this court and had an appeal granted here. Appellee having entered her appearance to the appeal the case stands regularly on the docket for hearing, and the motion of appellee to dismiss, with damages, the appeal granted by the circuit court is overruled. 1059
 2. the bill of exceptions was filed within the time allowed by the court, the appeal which had been previously granted had been abandoned by the motion for a new trial, the court had power under the Code when it overruled the motion for a new trial to

TRIAL COURT—Continued.	Page.
give time for the filing of the bill of exceptions not beyond a day in the next term, and the time given was not beyond the limit thus fixed, and appellee's motion to strike out the bill of exceptions is overruled	1059
TRIAL BY JURY—See Municipal Corporations, 5.	
TRUSTEES—See Schools, 9, 10.	
TRUSTS AND TRUSTEES—See Lunatics, 5; Wills, 19, 22, 31, 32; Partnerships, 5.	
TURNPIKES—See Taxation—	
1. where parties owning bonds issued by a turnpike company for its construction sued the turnpike company and the county, after a sale of the turnpike to the county under the free turnpike act of March 17, 1896, asking to subject the road to the payment of such bonds, and more than five years after such sale and transfer filed an amended petition, alleging that the turnpike company, while indebted to plaintiffs and insolvent, without valuable consideration and with intent to defraud plaintiffs in the collection of their debt, conveyed to the county, by writing, all the property of the company, which the county has received and has since used and operated, such amendment was an abandonment of the original action, and sets up a new action, which shows on its face that it is barred by the five years' statute of limitation	542
2. a sale of a turnpike road made under the free turnpike act of March 17, 1896, where a majority of the voters and taxpayers have voted in favor of such sale, is not in violation of Kentucky Constitution, section 203, prohibiting a corporation from selling or leasing its franchise so as to relieve the franchise or property held thereunder from corporate debts.....	542
USURY—See Interest, 3; Liens, 7; Mortgages, 5—	
the contract having been adjudged to be a mortgage and not a sale, appellant is entitled to only 6 per cent interest on his debt.....	231
VARIANCE—See Account, 4—	
in the settlement of complicated accounts a variance between the pleading and proof of certain items is not material where the form of the plea is not objected to unless the party complaining was misled thereby to his prejudice.....	400
VENUE—	
on trial of defendant for murder where the trial was held in the city of Louisville and the evidence showed the offense was committed at the Louisville & Nashville railroad depot, on the corner of Tenth and Broadway streets, in said city, the evidence was sufficient to authorize the jury to find that the offense was committed in Jefferson county.....	219
VERDICT—See Actions, 15; Criminal Law; Master and Servant, 6—	
1. if the verdict of the jury be so inadequate in form or substance, or its language so indefinite or ambiguous as to make its meaning uncertain, the jury should be required to perfect it, and this may be done by them in the presence of the court and under its direction, or after returning to the jury room, or it may be done by the court in the presence of the jury and with their approval.	171
2. a verdict of a jury in a criminal case for maliciously striking with a deadly weapon with intent to kill, which reads as follows: "We, the jury, find the defendant guilty, fix his punishment three years in pen." though awkwardly expressed, is not so defective as to affect its validity.....	171
3. where one was assaulted in the night time and knocked unconscious at his front gate with a weapon, on the trial of his assailant for malicious striking with intent to kill it was not error in the court to admit evidence that after the injured man regained consciousness he discovered that \$42 in money had been taken from his pocket after he was stricken, as such taking was a part of the res gestæ	171
4. a verdict as follows: "We, of the jury, find for the plaintiff \$1,800. Morris Sheets, Foreman," was sufficient to support a judgment for \$1,800 for the plaintiff, where the bill of exceptions shows it to have been read by the clerk as of that amount; that the jury reported they had agreed, and informed the court that it was their verdict, there being no objection as to the form of the verdict at the time it was returned, nor any motion made to correct the order book until the day after it was signed by the judge....	1055

VERDICT—Continued.**Page.**

5. the verdict was in such form that the court could tell from its contents the intention of the jury, and it being assented to by the jury was ample warrant for entering judgment upon it.....1055

VERIFICATION—See Actions, 14.**VICIOUS DOG—See Actions, 2—**

1. where a vicious dog known to be so by the owner was allowed to run at large, went upon the premises of another and bit and mangled a child, which suffered great pain therefrom for thirty-five days, when she died from the injuries the cause of action for her pain and suffering survived to her administrator and not to her parents, and a plea by the defendant of a settlement and compromise with the parents of the child for the damages is no defense to an action by the administrator 167
2. while the parents of the child had a cause of action against the owner of the dog at the time of the alleged compromise for nursing and medical bills bestowed and incurred in endeavoring to cure the child, they had no claim for compensation for her pain and suffering caused by the injury to her by the dog..... 167

VOLUNTARY MANSLAUGHTER—See Criminal Law, 17—

where the defendant relied upon insanity as his defense and there was no evidence tending to show any angry altercation between defendant and the deceased at the time of the killing, or that deceased said or did anything tending to insult or assault defendant, the court did not err in failing on the trial to give the jury an instruction on voluntary manslaughter..... 220

VOTES—See Local Option, 6.**WAIVER—See Sales of Personalty, 2.****WARNING ORDER—**

where the affidavit for a warning order was made on the 27th of January, and the order made on the 30th of January, following, the delay of three days was not an unreasonable one, and it should not be presumed, in the absence of proof to the contrary, that a resident of Chicago, who was at home on the former date, should be in this State on the latter..... 723

WARRANTY—See Contracts, 30; Lands, 42—

in an action for damages for breach of warranty in the sale of a horse, where the uncontradicted evidence shows the sale was made, it was proper for the court in the instruction to the jury to assume that the sale was made, and to submit only the question whether or not there was a warranty.....1018

WILLS—See Conduct of attorney; Lunatics, 4—

1. Mrs. Belle Lee's will bequeathed her property to her four children, naming them; which estate was left her in trust by her father, with power to dispose of it by will. She provided that the property should be equally divided among her children and be kept in trust by the Fidelity Trust Co., or any other trust company preferred by them, and she further provided that if any of her children die without issue then the portion of the one so dying shall revert to her estate for the benefit of her living heirs. Held—From the instrument it is clearly apparent that she intended the property to be kept in trust that her children should have the privilege of selecting the trust company, and that should any of them die without issue such shares should revert to the estate for the benefit of the living heirs. The instrument is so clearly expressed that there is little room for the application of the technical rules of construction 64
2. the evidence of one that testator stated before she made her will that she would never tie her property up as her father tied his up, can not be considered in construing the will. The rights of the parties must be determined from the will itself, and not from testator's oral statements as to what kind of a will was intended to be made 64
3. where a will provided that the remainder of an estate should be equally divided among the descendants of Bullock at the time of his death, the judgment in this action decreeing a division and settlement among his descendants (he is still living), was erroneous, because it is impossible at this time to know which of his children will survive him 161

WILLS—Continued.

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4. by the will of John B. Carpenter the following trust was created:
 "6. I direct the share of my son, E. A. Carpenter, to be paid into the hands of a trustee to be appointed by the Hart County Court, to be used for his benefit and to keep him from want, but that it be not paid into his hands." A trustee having been appointed under the will, the cestui que trust has instituted this action to vacate the trust, alleging that it was made by his father under a misapprehension of plaintiff's physical and mental condition, etc. Held—That the case at bar presents an active trust, where the trustee has the sole management and control of the estate, and the question involved is whether evidence allunde can be introduced to establish for a testator a motive for his action when he has expressed none in his will, and where his language is perfectly plain and unambiguous. This we hold can not be done, and the opinion of this court in Webster v. Bush, 19 Ky. Law Rep., 565, is no longer to be regarded as authority..... 206
5. while it is proper for the attorney for the will to conclude his statement to the jury of the facts relied on to sustain the will, before the contestant's attorney makes his statement the fact that the court permitted the attorney for the will to make an additional statement after the opposing attorney had made his statement is not a reversible error..... 275
6. a statement made by counsel for the will in his argument to the jury, that "the proof fails to show, for twenty years, one act of kindness to the testator by any one of the contestants," and "that only four of the children have appeared in the action, the others having washed their hands of the transaction," are legitimate conclusions from the evidence and not objectionable..... 275
7. T. J. Smith by his will, among other devises, made the following: "I also give to my wife 100 shares of bank stock in the Farmers National Bank of Richmond, Ky., at her death this property goes to my son and his children. I also give to my wife during her life 140 acres of land upon the Irvine pike, and known as the Collins place, at her death to my son and his children." Held—That the word "children," as here used, must be construed as a word of purchase and not limitation, and by the will the testator's wife was given the "bank stock" and "Collins place" during her life, and at her death to the testator's son for his life, and at his death to his children 362
8. Kentucky Statutes, section 4820, provides that no will shall be valid unless it is in writing, with the name of the testator subscribed thereto, and section 468 provides that when the law requires any writing to be signed, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing. Where a testatrix in making her will placed her signature at close of the substantial provisions of the document, and the writing as signed is sufficient to effectuate the intention of the party signing it the statute is substantially complied with although there may be words following the signature which are unessential to the validity of the will 367
9. Anna Maria Schwer owning an estate of something like \$15,000 died leaving it all to a daughter except \$150 each to the four children of her deceased son, and \$100 to their mother. The daughter and the four grandchildren were her only heirs at law. The paper was admitted to probate, but upon appeal to the circuit court the jury found it not to be her will. The son's widow and children had nothing but a home worth \$1,000, and it not fully paid for. There was proof showing the testatrix to be seventy-five years of age; that she was childish and had to be looked after like a child; that she did not realize what was going on about her, and was not deemed by her family as competent to be trusted on the street some time before her death. There was other evidence sufficient to support the will, but the question was for the jury. There was no sufficient reason shown for giving the bulk of the estate to the daughter, to the exclusion of her dead son's children, and there being no error in the admission or rejection of the evidence the verdict will not be disturbed. 386
10. the will in controversy is silent as to the period of distribution except it is provided that "when the eldest child attains the age

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- of 21 years, or, being a daughter, marries, I authorize the trustees for the time being, acting under this will, to appoint three competent persons to appraise and value the whole of my property, and to partition and divide the same among such of my children as may be then living," the trust will endure until it has been terminated by act of the parties, or a court of competent jurisdiction, and, therefore, the contract and deed for the mining property sold appellant by the trustees was not beyond the power conferred upon them by the will..... 526
11. it is as necessary in order to have testamentary capacity for one to have such sensibilities as will enable him to know the obligations he owes to the natural objects of his bounty, as it is for him to have the capacity to know the nature and value of his estate and a fixed purpose to dispose of it 607
12. on the trial of a will contest, though the evidence showed that the testator had the mind to know his estate and the nature and value of it, but had a fixed purpose to give his children as little interest in it as possible, and that his aversion to his children was such that he did not know the obligation he was under to them, there was abundant evidence tending to show a lack of testamentary capacity to justify the court in submitting the case to the jury, and a verdict of the jury against the will is not flagrantly against the weight of the evidence..... 607
13. the testator by his will directed that his farm be sold and the proceeds divided between his three children, after the payment of a named sum to his widow, and concluded with the following words: "The estate so willed above, should any of the heirs die without heirs, is to be divided amongst the survivors; and should they all die without heirs, it is to be divided amongst my brothers and sisters, or their children." Held—That this must refer to the death of the devisees without children before the division of the estate..... 642
14. in a devise of the remainder of his estate to his three children Thomas A. Courtney, Paulina Smith and Orma E. Courtney, the will provides: "Paulina Smith may use the estate so willed to her but at her death it is to go to her bodily heirs." Held—That this can not refer to her death in the testator's lifetime, or before the division of the estate, but as the estate devised was money, the testator intended that his daughter should use the money as she pleased, and if any of it was left at her death, which could be identified, it was to go to her children 642
15. W. F. Norton, Jr., by his will devised to his two cousins, Mary Morton and Gabriel Morton, his "family home," on Fourth street, in Louisville, Ky., and everything contained therein, also two stores in Paducah, Ky., the income from the stores to be used in paying taxes on the stores and on the family home, and the remainder of said income for the maintenance of the family home, and, if deemed necessary by his executors, said Paducah stores should be sold and the proceeds deposited as a fund to be used only for the maintenance of said family home, and in the event of the death of either of the devisees, Gabriel Morton or Mary Morton, the interest of the one dying to belong to the other, and if Gabriel should be the last to die, said home should go to his daughter, Gabrielle, and if Mary Morton should be the last to die, said home should go to her half-sister, Aldine Morton. In an action by Mary Morton, one of the two devisees, against Gabriel Morton, Aldine Morton, Gabrielle Morton, who is an infant under fourteen years of age, and the Fidelity Trust and Safety Vault Co., guardian for Gabrielle Morton, for a construction of the will and a sale of the real estate devised, Held—That under the will Mary Morton and Gabriel Morton took a joint life estate in the property devised, the interest of the one first dying to go to the other for life only, with the remainder in fee as to the whole, to Aldine Morton in case Mary Morton should survive Gabriel Morton, but to Gabrielle Morton if Gabriel Morton should survive Mary Morton..... 661
16. where the testator further provided in his will that the "said family home must never be mortgaged or sold" if he intended thereby to forever prevent alienation by any of the devisees, or

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- by those who may take it as heirs at law of any of them, such provision is violative of Kentucky Statutes, section 2360, against perpetuities, and is to that extent void, but as it was manifestly the purpose of the testator to prevent the alienation of the family home and the Paducah stores as well (unless an earlier sale of the latter should become necessary for the maintenance of the family home) during the life tenancy of Mary Morton and Gabriel Morton, to that extent it was reasonable and should be upheld. 661
17. as the will does not authorize a sale of the Paducah stores except upon the ground that it should become necessary in order to provide a fund for the maintenance of the family home, and its sale for any other purpose is forbidden by the will during the life tenancy under Civil Code, section 492, subsections 3, 4 and 5, such sale can not be made. 661
18. by the will of Margaret Nevill this devise was made: "I desire that \$300 be paid to my executors and held in trust by them for the use and benefit of John William Nevill, son of John and Mary Nevill, to be used in educating said John William Nevill." The executors named were residuary legatees under the will. Nothing was paid to John William Nevill, or on account of his education. He was under fourteen years of age when the will was probated, and died about three years thereafter. In a suit brought by his administrator to recover the legacy, Held—That the devise, though made to trustees, was expressly for the use of John William Nevill; that the primary purpose of the will was to give the money to the boy, and that it might help him to get an education seems to be secondary. The testatrix did not intend that the legacy should lapse or that it should go to the other legatees. His education was not made as a condition precedent or subsequent to the gift. The demurrer to the petition should have been overruled 678
19. where a testator by his will directs that certain real estate in the city of Louisville shall be conveyed by his executor to a trustee to be selected by his daughter, who is the beneficiary, and who under the will is to have the income of such real estate and other property devised during her life free from the debts, liabilities or control of her husband, with remainder in fee as she may by will appoint, and in default of such appointment then to her heirs at law, where the daughter selected her husband as such trustee, who was a nonresident of this State, the executor of the will properly refused to convey or turn over the property to him unless he executed bond with security, and procured an order of the court directing the property to be conveyed to him as trustee. 708
20. testator died in 1899, leaving a wife and seven infant children. His will was written January 24, 1887, and at that time he had but three children, one by a former marriage and two by his last wife, all boys. At his death he owned his home place of 297 acres, and a tract of 40 acres, known as the "Hall Place." His personal estate was not sufficient to pay his debts. He devised the 297 acres to his wife until her two sons became of age, when it was to go to them. By another clause one-third of his personal estate was to be held in trust for his wife and at her death such as remained was to go to her two sons and such other children, if any, he might have by her, and all of his personal estate not given to his wife to go to her two sons and such other children, if any, which he might have by her. In another clause he gave to his son M., who was a child by his first wife, the 40 acres, known as the "Hall Place," and if said son died before he was twenty-one years of age it should go to testator's other children. After the will was probated the widow renounced its provisions as to her, and dower was assigned her in the land, and the executor brought this suit for a construction of the will, making the widow and all the seven children parties. The chancellor rendered a judgment holding that the four children born to decedent after the date of the will were "pretermitted," and entitled under Kentucky Statutes, section 4848, to participate in their father's estate, as if he had died intestate. From this judgment M., the son by testator's first marriage, has appealed. Held—That the will clearly indicates that testator's afterborn

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- children were in his mind when his will was made, and he made such provision for them as he then thought proper, and under the language of Kentucky Statutes, section 4848, only "such afterborn children as are not provided for by any settlement, and neither provided for nor expressly excluded by the will, are pre-termitted" 699
21. the word "pretermitted" means "to pass by," "to omit," "to disregard." The statute (section 4848) was enacted not to control the right of the testator to dispose of his estate according to a plan of his own, but to guard against carelessness and oversight in those who, having written their wills, afterwards have children born unto them and fail to make provision for them. But if there be in the language of the testament a clear indication that there has been no oversight or omission, and that the testator has chosen to distribute his estate unequally among his children, or even to exclude some of them entirely, it is not the policy of the law to interfere with his right to do so..... 699
22. under a devise to his daughter in-law the testator gave her during her life, or so long as she remained unmarried, certain property to be used for herself and her children, as long as any of them live with her, but in the event she marries before the children are of full age, the property shall pass to the children. Held—The children took subject to the rights of their mother as expressed in the will, the residue going into her hands as trustee for the children..... 715
23. in this action attacking testator's will on the ground of mental incapacity, evidence examined and held that it does not create a suspicion of mental incompetency to make and execute the will. 742
24. where Allard was devised by his father the latter's estate, but under an agreement a contest of the will should be disposed of by consent that it should be established and he should convey the one-half of the estate to two grandchildren, which he did an action upon his death by his widow to have dower in the lands thus conveyed can not be maintained for the reason that under the agreement Allard held the property one-half for himself and one-half for the contestants, the purpose of the agreement being not only to settle the will contest, but to obtain a division of the land, and under it he merely held the one-half in which dower is claimed as trustee, and, therefore, his widow was not entitled to a right of dower in that part of the estate. 750
25. a fund of \$5,800 was willed to the appellee to be held in trust to pay the income to M. W. during her life, the object being not only to make provision for her, but to enable her to assist in the support of her father and mother. The trustee invested \$5,000 of it in a house in Louisville, which was occupied by M. W., and her parents until she became of age, when in an action by her against the trustee for an accounting she recovered and was paid \$450. The house was then sold by the trustee for \$6,000, and M. W. claimed the \$700 excess. Held—That it was the duty of the trustee to keep the house in repair; that the excess in the value of the house was due to a rise in property in that neighborhood, and that appellant was not entitled to it..... 800
26. P., who died in June, 1902, by his will devised to his wife all his personal estate absolutely, and certain real estate during her life. At his death there were unpaid taxes assessed against his real and personal estate amounting to \$826.50. His widow died September 16, 1902. Held—It was the duty of the personal representative of the widow to pay said taxes, as under our statutes the taxes were a lien on the lands, and it is the duty of one to whom land is devised for life to pay the taxes and keep it free from lien as against the remaindermen 946
27. P. owned two tracts of land and by his will, dated September 8, 1894, devised to his wife all his personal estate absolutely, and all his real estate during her life, and by a codicil, dated November 18, 1899, directed that the "home tract" be sold at his death and the proceeds divided among the children of his two sisters, and on July 30, 1901, after the date of the will and codicil, leased the other tract of land for the term of three years at \$800 per year, for which he held the three notes of the lessee at the time

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- of his death in June, 1902. Held—That the will speaks as of the date of the death of the testator, and the three notes were payable to the testator and were his personal property, and passed with his other personal estate under the will to his widow..... 946
28. appellee's wife in 1892 made a will devising a certain estate to him in fee, and subsequently she executed two others by which he was left a life estate in the property. Upon her death the three wills were offered for probate and the county court admitted the first one to record, but upon appeal to the circuit court the jury found the last one to be her will. Appellee qualified as executor of the first will, and Green, one of the appellants, as executor of the last one. Appellee appealed from the judgment of the circuit court, and while that appeal was pending appellant instituted this action, setting up his executorship and that he was entitled to the possession of the property, alleged a wasting of the estate by appellee and asking that appellee be compelled to settle his accounts and turn all of the estate over to appellant, and also asked that a receiver be appointed. The prayer of the petition was properly refused as it had not then been settled who was the executor. The appointment of a receiver was properly refused because it was not alleged that appellee or his surety was insolvent, and there was no proof to support these allegations 894
29. where a testator conveyed a certain described boundary by will, it will not be held that he intended it to be reduced in quantity that an adjoining part of the land should contain a certain number of acres, and the statement in his will that the part directed to be sold contained such a number of acres, when it shows that he was in error as to the number of acres such part contained ... 949
30. where a testator specifically devised a tract of land to a son, directing that the remainder of it shall be sold, his executor under a clause in the will, to the effect that "they are directed to dispose of my property as they think best," have not the power to sell that specifically devised 950
31. in an action to obtain a sale of real estate left by will where all of the heirs at law, who are the devisees under the will, are all parties to the action and properly before the court, they only having any interest in the estate sold, the widow never having sold any of the estate, nor encumbered it, what she left went to her children and heirs at law as provided by the will, and it is unnecessary to decide whether she took a fee simple or a life estate in the property devised to her by her husband.....1057
32. where an estate sold under an order of court was a vested estate and in possession it was such an estate as could be sold under section 490, subsection 2, Civil Code, and a purchaser of such an estate need not look to the distribution of the proceeds.....1057
33. where a lot was misdescribed in the judgment and notice of sale, but was correctly described in a supplemental decree and its actual dimensions given, and the purchaser does not complain that he was misled in any way by the incorrect description of the property, and he got what he purchased, takes by the deed of the court's commissioner a good title to the property.....1057
34. where testator by his will directed that "all the residue of my estate be equally divided among my four daughters in kind, so far as the same can be done, and in case same can not be divided in kind I direct my son-in law, William Finley, shall sell and convey in behalf of my estate all that can not be divided in kind, and divide the proceeds among my four daughters equally." Held—That in the absence of language refuting the idea the testator intended to vest complete discretion in the matter to his executor, and where the proof shows that the property could not be divided in kind without impairment of its value, its sale by the executor was authorized under the will1072
35. where a testator by his will devised his estate to his wife for life, and at her death to Rachell Young and the heirs of her body, there being nothing in the instrument to show that the words "heirs of her body" were not used in their ordinary sense, a fee simple estate in the land passed to Rachel Young upon the death of testator's widow1079

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86. testator died in 1900. His daughter and only child, Caroline (appellant), was born in 1893. By his will, written in 1892, testator devised all his estate, real and personal, to his wife to do with as she pleased, and further provided: "If my wife has any children at my death, I desire that this will be the same, or that she have full control of all money arising from my property that I may have at my death." Testator's widow, after his death, married John E. Bean, and soon thereafter died. The infant child, Caroline, by her guardian, set up claim to testator's land, on the ground that she was not born at the time this will as written and was not provided for or mentioned in the will. Held—That under Kentucky Statutes, sections 4842 and 4848, the appellant, Caroline, was "mentioned" in the will, and, therefore, took no interest in the property under the statute 1081
87. upon the trial of this case, which involved the validity of the will of Samuel Lancaster, deceased, the evidence establishing the fact that for several years prior to his death the testator claimed that his brother, Robert, had robbed him of large sums of money in matters growing out of his assigned estate, and that testator had made statements showing a determination not to leave him anything by his will, the judge should have instructed the jury that if the deceased at the time of the execution of the paper in contest was under an insane delusion that his brother, Robert, had grossly wronged him; was of unsound mind on this subject, and by reason of such mental unsoundness made a different disposition of his property than he otherwise would have made, they should find the paper not to be his last will, although his mental capacity was sound on other subjects..... 1127
88. an instruction to the "objects of his bounty" should be modified by prefixing the word "natural" before such expression..... 1127
89. where a witness was testifying as an expert on the subject of testator's mental condition, it was incompetent for him to state the relative merits of the testimony of other witnesses 1127
40. the testimony of Willett, a witness to the will, should not have been admitted over appellant's objection, the purport of it being to detail a conversation had with one then deceased who had been testator's attorney and confidential adviser, the effect of this being to introduce hearsay evidence upon an important question to appellant, and for this reason incompetent..... 1127
41. by a devise of "all my property to W. E. M. for her lifetime", and at her death to go to Mary Jane Slemmons and her heirs, "a fee simple in land owned by the testator passed to Mary Jane Slemmons upon the death of the life tenant, W. E. M 1165

WITNESS—See Process.

WITNESSES—See Impeaching Witness, 1; Separation of Witnesses.

WRIT OF PROHIBITION—

1. section 110 of the Constitution of Kentucky, which provides, among other things: "That the Court of Appeals shall have power to issue such writs as may be necessary to give it general control of inferior jurisdictions," confers the power and jurisdiction upon this court to intervene by the writ of prohibition to stay the inferior courts of the State from proceeding out of their jurisdiction, and such writ may issue whether or not there is an appeal; whether or not it ought to issue in advance of the decision of the lower court, or whether the party will be left to his remedy by appeal, will depend on whether that remedy is given, or whether it is adequate or not ... 441
2. where two counties have concurrent jurisdiction of parties charged as accessories before the fact to a murder, and such parties upon their own instigation, or that of some of them acting for all, procure a fraudulent proceeding, by having themselves arrested in one of the counties and executing bond, with the design not to have a trial of the charge there, or elsewhere, but as a cloak to prevent a trial elsewhere, such proceeding is void and no protection to the parties procuring it, against a prosecution subsequently instituted in good faith in the other county..... 441
3. the fact that the fraudulent proceeding was put in operation by the legally constituted officers of the county acting therein, does not bind the Commonwealth, as the courts which administer the

WRIT OF PROHIBITION.—Continued.

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- law may protect their own jurisdiction from mere subterfuges intended to defeat their jurisdiction..... 441
4. where, in a homicide, the wounding occurred in one county and the death in another county, the fact that the accused accessories before the fact all resided in the county where the wound was inflicted and all their alleged acts are admitted to have been done in that county, does not give that county the sole jurisdiction to try them for the offense charged 441
5. Feltner was under bond for his appearance, charged with the commission of a felony in Breathitt county, and upon the calling of his case for trial in that county it appeared that he was in jail in Clark county, where he had failed to execute bond in a contempt case against him in that county. The appellant, the jailer of the latter county, acting upon the advice of his attorney and the circuit judge of that county, refused to surrender Feltner to the authorities of Breathitt county upon the order of the circuit judge of the latter county. Held—It is apparent that the appellant was acting in good faith and meant no disrespect under the circumstances, and should not be punished for contempt in acting in disobedience to either of the courts. The error, if any, was not upon the part of appellant 828
6. where one is charged with two offenses, one a misdemeanor and the other a felony, the proper practice in the administration of the law is to waive for the time being the trial of the misdemeanor in order that the felony charged may be investigated and tried, and as the Breathitt Circuit Court was in session at the time, it would have been in keeping with the orderly administration of the criminal laws of the State for the prisoner to have been surrendered to that county 828
7. it is unnecessary to consider the question of jurisdiction of the Court of Appeals at this time as the Breathitt Circuit Court is not in session, and while the Clark Circuit Court may try the prisoners for contempt, it should surrender them to the Breathitt Circuit Court when it is in session and upon demand 828

WRONGDOERS—

- it is a well established rule that for an injury inflicted by two or more wrongdoers an action may be maintained against one or all of them. The liability is joint and several, and the injured party can elect whether he will proceed against one or all of them..... 398

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COURT OF APPEALS OF KENTUCKY.

LOCKE & ELLISON v. LYON MEDICINE CO.

(Filed January 4, 1905—Not to be reported.)

1. In an action upon a contract to sell patent medicines where the defense was that the written contract did not correctly reflect the contract between the parties, an instruction was erroneous which excluded from the consideration of the jury all evidence that conduced to support the contention of the defense as to the mistake in the writing.

2. Same—Where the language of a contract is indefinite or ambiguous, or it is averred that some provision was omitted and parol evidence is required to establish what was meant by the parties, it is the province of the jury to determine its meaning from the evidence.

Herman Morris for appellants.

W. M. Smith for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Settle.

This is an appeal from a judgment for \$347.26 recovered by appellee of appellants in the court below, which judgment was entered upon the verdict of a jury whereby appellee was awarded that sum.

The entire amount claimed in the petition was \$358, alleged to be due appellee by appellants upon an account for a patent medicine known as "Lyon's Laxative Syrup," which it was averred appellee had sold and delivered appellants at their request, and upon their promise to pay therefor the amount named. The answer of appellants denied any indebtedness upon their part to appellee, but admitted that the "Lyon's Laxative Syrup" mentioned in the petition was received by them of appellee under a contract whereby they agreed to become its distributing agents for the sale thereof in the county of Barren and contiguous territory, but that all sales of such syrup were to be made by a traveling agent of appellee whom it would furnish to travel in the territory named for the purpose of securing

orders therefor, which orders were to be sent to appellants and by them filled from the stock of syrup furnished them by appellee for that purpose, and that for all sales thus made by appellee's traveling agent the money was to be collected or received by appellants and remitted to appellee, less their commission, that the "Lyon's Laxative Syrup" mentioned in the petition was consigned to appellants to be sold by them upon orders secured through appellee's traveling salesman in the territory named, and for no other purpose; that soon after the contract with appellee was made the latter sent one of its traveling salesmen to Glasgow, appellants' place of business, and he made a few trips through a part of the agreed territory and took some orders for the syrup, which were filled by appellants, and they, by check, forwarded to appellee the moneys received therefor, less their commission, but the check was rejected by appellee and returned to appellants, and appellee thereupon set up the claim that the syrup sent appellants had been sold them and demanded of them the market value thereof, and refused to again send its traveling salesman to sell the "Lyon's Laxative Syrup" in the territory agreed upon.

The further averment was in substance made in the answer that by its failure to send and keep a traveling agent in the agreed territory to sell the syrup consigned to appellants, appellee violated its contract, prevented the sale of the syrup in appellants' hands, deprived them of the commission they would have realized from its sale, and thereby damaged them in the sum of \$250, to recover which the answer was made a counterclaim.

The reply filed by appellee specifically denied the alleged contract relied on by appellants, and in addition averred that the syrup in controversy was purchased by appellants, and that the only contract made between them in regard thereto is contained in the following writing:

"Lyon Medicine Co., Incorporated, Louisville, Ky. :

"Please ship the following order which is not subject to countermand, nor to any agreement not specified hereon, and of which we have a duplicate:

"Name: Locke & Ellison.

"Postoffice: Glasgow.

"County: Barren; State, Ky.

"Shipping point: Glasgow.

"Positively no goods consigned.

"Check doz.

"60 Lyon's Laxative Syrup, 25c. size, at \$2 per doz \$120

"60 Lyon's Laxative Syrup, 50c size, at \$4 per doz 240

\$360

"36 doz. 25c free. You are to furnish man to go over territory and turn orders over to us.

"Date sold Oct. 14, '02. Sold by: D. B. McBee. Salesman's number 77.

"Terms 4 mos. or 50c. 80 days. House No. 1449.

"Packed by M. Date shipped: Oct. 16, 1902.

Folio.

"Paste label on back of this order.

"Ship through _____

"Signature of purchaser, Locke & Ellison."

The reply contains the further averment that by the terms of the above-written contract appellee only undertook to furnish a man to go over the agreed territory and turn over orders to the appellants for the purpose of introducing the syrup in such territory, and that it fully complied with this undertaking.

Appellants by rejoinder admitted that they signed the written contract, and alleged that the entire contract is not expressed in the writing, but that the undertaking of appellee to keep an agent in the territory agreed upon to sell all the syrup they shipped appellants, as set forth in the answer and counterclaim, was by mistake of the draftsman of the written contract omitted therefrom, and that it was signed by them in haste and without reading it or hearing it read, for which reason the omission was not noticed by them at the time. The affirmative matter of the rejoinder was controverted of record. Numerous grounds were urged in support of the motion for a new trial, but we think the only one necessary to consider is the contention that the trial court erred in instructing the jury.

The following were the only instructions given:

"1st. The court instructs the jury that they should find for the plaintiff in the sum of \$358, with interest from the 1st day of June, 1908, less \$10.70, freight charges, unless they shall believe from the evidence that the plaintiff failed or refused to send a man to the defendants to introduce the medicines sold defendants in accordance with the terms of the contract between the parties.

"2d. If the plaintiff did so fail, the law is for the defendants, and the jury should so find."

We think the instructions failed to properly present for the consideration of the jury the law of the case. In the first place, instruction No. 1 required the jury to construe the written contract, yet furnished them no guide as to the manner of arriving at its meaning, and in addition excluded from their consideration all evidence in appellants' behalf that conduced to support their contention as to the mistake in the writing. Where a written contract is so explicit in terms as to be susceptible of but one construction, it is the duty of the court to advise the jury as to its meaning and effect; but when, as in this case, its language is indefinite or ambiguous as to one or more of its provisions, or it is averred by one of the parties that by mistake some provision of the contract was left out of the writing, and parol evidence is required to explain what was intended by the parties, it is the province of the jury to determine from the evidence its meaning.

It seems to be well settled that where there has been a defective attempt to put in writing the terms of an agreement actually made, parol evidence is admissible to establish that fact, and to show what the true agreement was. (A. & E. Ency. of Law, volume 15, 638-9.

It was contended by appellants, and the evidence introduced by them conduced to prove, that the true agreement between them and appellee was that the patent medicine received by them from appellee was to be sold exclusively by an agent of the latter in the agreed territory to be canvassed by him, and that it was the duty of appellants to furnish to purchasers from the supply or syrup consigned to them by appellee all that was sold by such agent in such territory; and further, that this agreement was by mistake of

the draftsman of the written contract omitted therefrom, and that owing to the haste in which the contract was written, and the immediate departure of the draftsman, appellants were not afforded an opportunity to discover the mistake.

Upon the other hand, the testimony in behalf of appellee tended to prove that the writing contains the entire contract between the parties; that it was read to and understood by appellants, and that an addition was made to same at the suggestion of the appellant, Locke, after it was read to him. The evidence was conflicting, but that did not authorize the court to relieve the jury of deciding the issues of fact as to the questions of mistake in the contract, and the damages, if any, sustained by appellants from appellee's violation of the contract, if there was such mistake. The meaning of the language "you (appellee) are to furnish a man to go over territory and turn orders over to us," found in the contract, is by no means clear. What territory was included is not stated, nor does the language indicate whether the man to be furnished by appellee was to go over the territory once or oftener, or whether he was merely to introduce the syrup for appellants, or sell it all. Yet in the instructions it was assumed by the court that he was to go over the territory only to introduce the syrup, and but one time.

The court should have further instructed the jury, in substance, that if they believed from the evidence that appellee agreed with appellants to furnish a man to travel in Barren and contiguous counties to sell the syrup furnished them by appellee, and that the syrup was to be delivered by appellants to purchasers thereof upon the orders of appellee's traveling salesman, the money therefor to be collected by appellants and remitted to appellee, less appellants' commission, and that this provision of the contract, if such was the contract, was by mistake of the draftsman of the writing omitted from the writing without the knowledge of appellants; and should further believe from the evidence that appellee violated the contract by failing to furnish a man to sell the syrup in the agreed territory, and that by reason thereof appellants were prevented from selling the syrup sent them by appellee, they should in that event find for appellants the damages, if any, the evidence may show they sustained thereby, not to exceed \$250 or the commission they would have received upon the whole of the syrup received by them of appellee if it had been sold in such territory by appellee's traveling agent.

For the errors indicated in the instructions the judgment is reversed, with directions to the lower court to grant appellant a new trial and for further proceedings consistent with this opinion.

CONRAD v. HUMPHREY.

(Filed January 4, 1905—Not to be reported.)

Contracts—Arbitration—Where the contract for the building of a house provided for arbitration, in case of disagreement between the parties, there being nothing in the record showing that appellant dissented from the decision of his architect upon any of the matters in dispute, or that appellant ever asked arbitration before the bringing of this action by the contractor, or asked it in his answer, the lower court was not without jurisdiction, and the judgment for the balance of the contract price was properly rendered.

M. A., D. A. & J. G. Sachs for appellant.

R. C. & J. J. Davis for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Jefferson Circuit Court for the sum of \$455, recovered of appellant by appellee for the balance of the contract price in the erecting of a house, and \$88, the price of extra work performed, and material furnished and used in the erection thereof.

Appellant admitted that there was a balance of the contract price which had not been paid appellee, to wit, \$867, and denied knowledge or information sufficient to form a belief that the appellee, under the order of the architect, did extra work or furnished extra material to the amount of \$88 in the erection of the house. Appellant alleged that appellee, by his contract, agreed to erect and complete the house by the 1st day of August, 1902, but did not complete it until the 31st day of December, 1902, to his damage in the sum of \$750. By an amended answer appellant alleged in substance that appellee violated his contract in the erection of this house by using bad material, and his work was carelessly, negligently, unskillfully and defectively performed; that by reason thereof both the plumbing and roof leaked, to the damage of plastering, wall paper and building in the sum of \$500.

Appellee, by reply, controverted the allegations of the answer and amended answers, except as to the time of the completion of the building, and stated that the reason he did not finish the building by the 1st day of August, 1902, was by reason of bad weather and the fault of appellant and other contractors in failing to perform their duties within a reasonable time as per contract.

The appellee agreed to furnish the material and erect the house in accordance with the plans and specifications as prepared by the architect, Adolph Hallenberg, at the price of \$7,667. The house was erected under the immediate supervision of Hallenberg, the architect, who acted as the agent of the owner, appellant. The appellant also pleaded in his answer, and contends in his brief, that appellee can not maintain this action because the differences between them were not submitted to arbitration; that a submission to arbitration was a condition precedent to the bringing of this action. As the differences between the parties were never submitted to arbitrators, it becomes necessary to settle this question first, for if appellant's contention be correct, it necessarily results in a reversal. We quote from the contract what is said on the subject of arbitration:

"Article 8. No alteration shall be made in the work shown or described by the drawings and specifications except upon a written order of the architect, and when so made the value of the work added or omitted shall be computed by the architects, and the amount ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto the valuation of the work added or omitted shall be referred to three (3) disinterested arbitrators, one to be selected by each of the parties to this contract, and the third by the two thus chosen. The de-

cision of any two of them shall be final and binding, and each of the parties hereto shall pay one-half of the expense of such reference."

Again, in article 7 the extension of time for the completion of the work shall be fixed by the architects or by arbitration as provided in article 8 of this contract.

And in article 8, if the contractor delays "the material progress of the work so as to cause any damage for which the owner shall become liable (as above stated), then he shall make good to the owner any such damage. The amount of such loss or damage to either party thereto shall in every case be fixed and determined by the architect or by arbitration, as provided in article 8 of this contract."

These are the only sections of the contract bearing on arbitration, and in each of them it was agreed that the architect should be the judge of the questions, with an appeal from his decision by either party who might feel aggrieved. It appears from the record that Hallenberg, the architect, the agent of appellant, under positive authority as stipulated in the contract, approved the request of appellee for an extension of time on account of delays caused by bad weather, and delays of other contractors, not employed by appellee. The architect also authorized and approved the doing of the extra work, amounting to \$88. There is not an intimation in the record that appellant dissented from the action or decision of his architect on any of these matters until about the time of the bringing of this action, which was long after the architect had passed upon these questions. Appellant does not show that he ever asked arbitration, nor did he ask it in his answer. Conceding, for the purposes of this case, that such an arbitration clause in a contract was binding upon the parties, and a condition precedent to the institution of an action on the contract, which question is not decided here, yet under the facts as they appear in this record we are of the opinion that if appellant was dissatisfied with the decisions of his agent and architect, it was his duty, in a reasonable time after the questions were passed upon by the architect, to make known his dissatisfaction and call for arbitration, and in the absence of such a demand the court would not be ousted of its jurisdiction. The proof showed that appellee was delayed in the erection of this building by bad weather and other causes provided for in the contract, which delay was consented to and approved by the architect, as provided in the contract. The same consent and approval is true as to the item of \$88 for extra material and labor furnished.

The proof also shows that the plastering and wall paper were damaged in a portion of the building after its completion by reason of leaks in the roof and the bursting of a water pipe. The appellee did not have anything to do with the water pipe; the plumbing was let to another contractor by appellant; the leak in the roof was caused by a collection of water freezing in a valley, and by expansion caused a seam in the valley to burst or part, which was repaired immediately after notice of it. Appellant introduced one tinner by profession, who testified to the manner in which the roof was put on, and stated that there was a better way to fix it or put it on, but neither he nor any other witness stated that the plans and specifications by which appellee was guided in his work required the roof to be put on in any other manner than the way it was put on. Appellee's witnesses stated that it.

was put on in accordance with the plans and specifications. The plans and specifications are not copied in the record, and we are unable to tell whether the defect, if any, in the roof was caused by defective plans and specifications, or defective workmanship. The instructions given by the court to the jury were proper.

Perceiving no error prejudicial to the substantial rights of the appellant the judgment is affirmed.

WATHEN v. HOWARD.

(Filed January 4, 1905—Not to be reported.)

Passway—Presumption—The continued use of a passway as a matter of right for fifteen years, unexplained, will create a presumption of grant, and when the passway has been used for more than a quarter of a century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but that after such great length of time the burden is on the other party to show that the use was only permissive.

J. P. Thompson and S. A. Russell for appellant.

W. J. Lisle and I. H. Thurman for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Nunn.

Appellant owns a farm containing over two hundred acres, situated near the town of Lebanon, abutting and north of the Danville turnpike. Appellant and appellee own in equal parts seventeen acres of land adjoining and north of appellant's survey. Appellee owns two hundred acres or more adjoining and north of this seventeen acres, extending back to Cartright's creek.

Appellee and his vendor, Dr. Maxwell, have continuously, for more than thirty years, exercised the right and used a passway out from their tract through the seventeen acres, and on through appellant's land to the Danville turnpike; thence to Lebanon, a distance of about one and one-fourth miles. Appellant claims that their use of this passway was merely permissive. Appellee contends that its use was a matter of right. The tract of land owned by appellant, including the seventeen acres, was owned by one David Phillips. He devised it to one Ben P. Doom, Laura and Foster Ray, the Rays taking the seventeen acres, and Doom the tract now owned by appellant. In the deeds of partition this passway was reserved through the Doom tract to and for the benefit of the seventeen-acre tract. Appellant agrees that this passway must remain open, subject to be used by those owning the seventeen acres; that appellant has the right to use the passway for the benefit of his half interest in the seventeen acres, but that he has not the right to use it for the benefit of his two hundred-acre tract. Appellant is correct in this contention unless the right to the use of this passway for his farm has been obtained by the long and continued use thereof as a matter of right, and by prescription.

The case of *Riley v. Buchanan*, 25 Ky. Law Rep., 863, *Talbot v. Thorn*, 91 Ky., 417, and many other cases not necessary to cite, in substance hold

that the continued use of a passway as a matter of right for fifteen years, unexplained, will create a presumption of grant, and that when the passway has been used for more than a quarter of a century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but that after such great length of time the burden is on the other party to show that the use was only permissive. We do not think it necessary to refer to the evidence in detail, but it conduces to prove that appellee and his vendor used this passway as a matter of right continuously and without interference or objection for more than thirty years. There is some evidence that this right was obtained by oral contract, and evidence that the use of this passway was by permission only. Considering all the evidence, and giving proper effect to the judgment of the chancellor, we are unwilling to disturb the judgment.

Therefore, the judgment is affirmed.

UNDERWOOD v COMMONWEALTH.

(Filed January 5, 1905.)

1. Homicide—Affidavit for a continuance—It was not error for the court to overrule the motion for a continuance where it appeared that one of the persons named in the affidavit was beyond the jurisdiction of the court and the other in the county, and his attendance could be procured, which was afterwards done. While section 120 of the Criminal Code requires that the names of the witnesses before the grand jury shall be placed on the indictment, there is no rule of law which prevents the Commonwealth from calling additional witnesses upon the trial of the case.

2. Evidence—Where the clothing of the deceased had been carried out of the State by his widow, it was competent to prove the condition of the clothing just after the homicide occurred. The witnesses testified to physical facts of which they were cognizant.

3. Same—Upon the trial of appellant upon motion of the Commonwealth's attorney the court permitted the jury in charge of the sheriff to go upon the premises where the tragedy occurred, the judge, the accused and his counsel all being present. When at the scene one of the jurors requested the court to have the accused point out to them the particular spot where he had testified he had hidden his pistol. The judge having some doubt about this took the accused and his counsel aside, and no objection being made, permitted the accused to point out to the jury the spot. Upon the return of the jury objection was made by appellant for the first time as to what had taken place. Held—This was not error, and no reason appears why the court should have not tried the whole case at the place where the tragedy occurred if it had suited his convenience.

E. H. Johnson and Sam C. Hardin for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

The appellant, William Underwood, was indicted by the grand jury of Laurel county, charging him in several counts, first, with conspiring with Ab. Early and Joe Harp to murder Ed. Jones, in furtherance of which the

latter was killed; second, with the murder of Ed. Jones, and, third, with aiding and abetting Ab. Early and Joe Harp, and each of them, in the murder of Ed. Jones. To this indictment he pleaded not guilty, and a trial resulted in his being found guilty of voluntary manslaughter, and his punishment fixed at confinement in the penitentiary for four years.

The facts are substantially these: On the day of the killing Ab. Early, Joe Harp and William Underwood were engaged in playing at a game of dice or craps, which it, perhaps, would be more than flattery to call a game of chance. There were a good many others engaged in the game, and it is not clear who owned and controlled it, although there is evidence conducing to show that Underwood and his companions were its operators. Ed. Jones and a man by the name of T. J. McQueen, Sr., were standing near, watching the play. Jones asked McQueen to drop a quarter into the game for him, which was done, and the money lost, it being taken by Early; McQueen then said, substantially, "come away, boys, they are playing with loaded dice;" whereupon Ab. Early sprang to his feet, and, with a pistol in his right hand, commenced to strike McQueen in the chest with his left, and pushing him about, holding the pistol in easy range, and in a threatening manner. Jones, who seems to have been a friend of McQueen, interfered, and told Early that he ought not to treat an old man in that way. Early then transferred the assault he was making upon McQueen to Jones, holding his pistol in the same manner, and striking Jones in the chest with his left hand. The latter protested that he had no weapon, and was not prepared to fight, and asked Early to desist from his attack, pulling up the skirts of his coat to show that he was unarmed. The men were separated at this point, and Jones taken some fifteen to twenty feet away and given a pistol by one of his friends, said to have been T. J. McQueen, Jr. Early and Underwood left the game and followed Jones to where he had been conducted by his friends, and the quarrel was renewed, resulting in Early firing upon Jones, and Jones returning his fire. Early was shot in the wrist or forearm, and Jones through the chest; whereupon Early commenced to retreat, firing as he ran, while Jones pursued him, firing upon him as he retreated. At this point several shots were fired by other parties from behind Jones, one bullet entering his back, killing him instantly.

Early and Harp were each tried for the murder, found guilty, and sentenced to the penitentiary, where they are now serving their terms. Upon the trial of this case several of the witnesses of the Commonwealth testified that they saw appellant shoot at Jones at the time he was killed, and others as to acts done, and language spoken by him, which abundantly showed him guilty of aiding and abetting Early and Harp in the homicide, if the evidence was true. The testimony, however, on this point was very conflicting. Several of the witnesses, who claimed to be present during the trouble, testified that he did no shooting, nor was in any way concerned in the killing. Under this state of case it is sufficient to say that there was evidence which authorized the submission of the case to the jury, and we will not revise their determination on the facts, but will content ourselves with reviewing the several questions of law raised by counsel for appellant.

Upon the calling of the case appellant moved for a continuance because of the absence of two witnesses, and filed an affidavit in support thereof.

This motion the court overruled, it appearing that one of these witnesses was in the United States army, and out of the jurisdiction of the court, and that the other was within a short distance of London, and his attendance could be easily procured. This was afterwards done, and the witness testified for appellant, and he was, therefore, not prejudiced by the adverse ruling.

During the trial the Commonwealth called as witnesses two brothers by the name of Barnes, and two by the name of Jones, the latter being brothers of the dead man, who testified to having seen a small hole through the pants and drawers worn by the deceased at the time he was killed. The names of these witnesses were not included in the subpoena issued for the Commonwealth, and appellant objected to their evidence, and at the conclusion of the Commonwealth's testimony filed his affidavit, to the effect that he was surprised by the testimony of these witnesses, and asked that the jury be discharged and the case re-assigned for trial, or if that could not be done, that their evidence be excluded from the jury as incompetent. Both of these motions were overruled. Section 120 of the Criminal Code does require the names of the witnesses who testify before the grand jury to be placed on the indictment, but we know of no rule, and the learned counsel for appellant has cited us to no authority, holding that the Commonwealth may not call such additional witnesses as may be able to furnish evidence material to the prosecution. The record does not show any request of the parties that the witnesses should be sworn and excluded from the court room; but even if this were otherwise, the fact that these witnesses had been in the court room while other witnesses for the Commonwealth testified, would not have been prejudicial under the circumstances, as no witness for the Commonwealth but themselves testified on the particular subject upon which they deposed, and, therefore, what they may have heard could not have affected their evidence. Counsel insists that it was incompetent for these witnesses to testify about the hole in the clothing of the dead man, as it was the best evidence of what it showed. These witnesses testified to the physical facts of which they were cognizant. It was shown that the clothing was not within the jurisdiction of the court at the time of the trial, it having been carried out of the State by the widow of the deceased; but there was no more necessity for producing the clothing as the best evidence of its containing bullet holes than for producing the dead body as the best evidence of the wounds appearing on it. Moreover, "there was no suggestion in the affidavit of appellant that the testimony of the witnesses was in anywise untrue, or that if he were given an opportunity he could contradict it. The affidavit simply recites the fact that the names of the witnesses were not on the subpoena; that they had never been called before, and that no such evidence had ever appeared in any of the former trials of the case; but it wholly fails to impeach the truth of the evidence itself. The surprise which will authorize the court to continue a case or discharge the jury is not the mere mental emotion of a party upon being confronted with evidence he hoped would not be produced, but must be the result of a practical injustice to his substantial rights; he must show that he has been, in some way, injured or misled by what has happened, and that if a reasonable opportunity is afforded him he can remedy the evil.

After the evidence was all heard the court, upon motion of the Commonwealth's attorney, permitted the jury, under the charge of the sheriff, to go to the place of the tragedy and view the premises, the judge, the accused and his counsel, and the prosecuting attorney, all being in attendance. When at the scene one of the jurors requested the judge to have the accused point out to them the particular spot where he had testified on the stand that he had hid his pistol. The judge having some doubt as to his right to do this, took the accused and his counsel aside, and, after some discussion, no objection being made, he was permitted to point out to the jury the spot. When the jury returned to the court room his counsel, for the first time, entered an objection to what had taken place, and this is now insisted upon as a ground for reversal. We are able to see no reason why the judge should not have tried the whole case at the place where the tragedy occurred, if it suited his convenience so to do. There is no peculiar sanctity about the court room which requires trials to be held there. The court room is for the convenience of the court, but there is no reason that forbids the judge, in hot weather, for instance, to hold his court out in the yard under a tree, or any other place which better suited his convenience and the comfort of the jurors and the parties litigant; nor are we able to see in what way the interest of the appellant was prejudiced by being allowed to give additional testimony in his own favor to the jury. The Commonwealth's attorney might have objected to this, but there is no ground for complaint of it by appellant.

The court did not err in overruling the motion for a new trial based upon the newly-discovered evidence. Most of it would have been incompetent as hearsay, and the balance was merely cumulative. Besides, under section 281 of the Criminal Code, we have no jurisdiction to reverse a criminal case for an error of the court in overruling the motion for a new trial. Counsel for appellant earnestly insists that the court should have given the jury an instruction embracing the principle that, although the accused might have wrongfully begun the affray in which the killing was done, yet if he afterward in good faith had withdrawn from it, and made it apparent to his antagonist that he had so withdrawn in the interest of peace, then his right of self-defense returned to him, and if his antagonist afterwards attacked him, he might then kill him in his apparent necessary self-defense. Instructions must be based on evidence, and while the abstract principle contended for by the counsel for appellant is unquestionably correct, there are no facts in this record upon which it could have been predicated. Jones never knew that he had but one antagonist—Ab. Early; and while Early, after firing, retreated, this was not a withdrawal in the interest of peace, because he fired as he ran. If Underwood shot Jones at all, he shot him from behind, and without Jones' knowledge. There was never any withdrawal by Underwood in the interest of peace, and, therefore, there was no evidence which would have authorized the trial judge to give the instruction, for the absence of which appellant complains.

Taking a survey of the whole case, we are impressed with the fact that the accused had a fair trial in every particular. The instructions, as given by the court, seem to contain the whole law of the case, but if they are subject to any criticism whatever, it is that they are too favorable to appel-

lant. The jury, under the facts as shown by this record, were more than lenient in their verdict, and this should be a matter of congratulation rather than complaint on the part of the accused.

Perceiving no error in the record the judgment is affirmed.

SMITH v. PARK'S ADM'R.

(Filed January 5, 1905—Not to be reported.)

1. Contracts — Peremptory instruction — Pleading — Where the petition alleged, in this action upon a contract for services rendered as overseer, that appellant performed the labor at the special instance and request of the deceased; that he looked after her farm and stock, collected her debts, paid off her indebtedness and transacted all of her business, and the evidence conducing to substantiate these allegations and the further allegation that deceased agreed and promised to pay for these services, it was error for the lower court to peremptorily instruct the jury to find for defendant.

2. Devise—Pleading—Where decedent devised so much to appellant, but such devise was not equal to the whole debt claimed by him, a demurrer was properly sustained to a plea of the devise. If the money was due by contract the deceased had no right to attach conditions to its payment as was done. Moreover, the will contains express provisions as to the payment of debts, and this fact negatives the idea that the bequest was intended as a payment

R. H. Tomlinson and R. L. Greene for appellant.

W. I. Williams and R. L. Davidson for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Barker.

The appellant, George W. Smith, instituted this action to recover of the appellee a debt of \$1,925, which he claimed to be due him from the estate of Margaret H. Parks, deceased.

Mrs. Parks was an old, feeble lady, who owned a farm of about 200 acres of bluegrass land in Garrard county, Kentucky. The appellant seems to have been her overseer from the year 1888 until her death in August, 1901. During this time he lived with her on the farm, acted as overseer, attended to all her affairs, looked after the stock, saw that the laborers performed their duties, made sales of the produce of the farm, collected the money, hired the servants and paid them off; in fact did everything that an overseer is expected to do. After her death he presented this claim to her administrator for services rendered, being at the rate of \$150 per year. Payment being refused, this action was instituted. The answer contains, first, a traverse; second, a plea of the statute of limitation; third, the allegation that the services performed were gratuitous, the claimant being a member of the family, and the decedent having no idea that his services were to be paid for; and, fourth, payment by devise of \$500 by the decedent to appellant.

Upon the trial of the case the court sustained a demurrer to the plea of payment by the devise, and a trial being had upon the issues remaining in the record, the court, after the conclusion of the appellant's (plaintiff's)

testimony, sustained a motion for a peremptory instruction to the jury to find for the appellee (defendant); and of this the appellant now complains. There was no such relationship between the appellant and Margaret H. Parks as warrants the assumption that the services, which the record shows that he performed for her in her lifetime, were to be gratuitous. On the contrary, they were only distantly related, and the services are of that character, both in kind and value, for which those who receive them usually have to pay. It is true where personal services are rendered by one member of a family to another, as by a child to a parent, no implication of a promise to pay will arise; but where no such relationship exists, and the parties stand as strangers towards each other, so far as duty is concerned, the rendering by one, and the acceptance by the other, of such services as are involved in this case raises by legal implication a promise to pay on the part of the recipient. If the evidence for appellant is true, the decedent, Margaret H. Parks, who was utterly unable to manage her farm herself, received for many years his whole services, which were devoted to the care and control of her farm; and these services were just such as men usually seek from the overseers whom they employ to manage their affairs.

Appellant was faithful and loyal in the discharge of his duties, and very kind and attentive to the little wants of his invalid employer, and it was but natural that there should spring up a warm affection between them. Because Mrs. Parks rewarded the fidelity of her employe by her friendship and esteem is no reason for not paying him the value of his services, if the claim is just.

The petition contains allegations which constitute an express contract of employment and promise to pay. So much as bears upon this particular point is as follows: "Plaintiff states that at her special instance and request, he performed labor for her on her farm, looking after her stock, cultivated her land, collected her debts, paid off her indebtedness and transacted all business for her in any way connected with or pertaining to the management of her farm for and during the period of time mentioned, and also waited on her during that time; all of which was done at her special instance and request, and for all of which she agreed and promised to pay him."

The evidence for appellant conduced to substantiate this allegation, and the court erred in granting a peremptory instruction. The rule we are seeking to state is nowhere more clearly set forth than in the case of *Cloud, &c. v. Clinkinbeard's Ex'ors*, 8 B. M., 899. In the opinion in that case it is said: "It appeared in proof that Mrs. Cloud was a relative, and had lived in the family of the testator, and had been treated more like a child than a servant or dependent. If during the time she lived with him the testator believed himself under no legal obligations to pay for the services rendered by her, and she did not intend to demand compensation therefor, or expect to receive it except as an act of his bounty, then the law will not imply a promise to pay on his part. Unless, however, such an understanding of the parties is fairly deducible from their attitude and conduct, the law does, in the absence of all circumstances to repel such an inference, imply a promise to pay a reasonable compensation for the services rendered. This question the jury had to determine, and in the event of its decision in the plaintiff's

Yavor they had also to estimate and ascertain the value of the services." (Green's Ex'or v. Green, 26 Ky. Law Rep., 1007, and cases there cited; Galloway v. Galloway, 24 Ky. Law Rep., 857.)

The trial court correctly overruled the demurrer to the plea of the statute of limitation, thus limiting the right of appellant to recover so much of his claim as accrued within five years next before the time when his right to sue accrued. The judgment sustaining a demurrer to the plea of payment by devise from the decedent to appellant must also be sustained as a correct exposition of the law. The devise was not equal to the whole debt claimed by the appellant from the estate of the decedent, even after the application of the statute of limitations, therefore, the rule that where a party is in debt and devises to his creditor a sum equal to or greater than the amount of the debt, it is to be construed as a payment, has no application here. Moreover, the fact that the decedent devised the sum of \$500 in trust to be paid appellant as he needed it, refutes the claim that she intended it as a payment of a debt. If it was money due by contract, she had no right to attach conditions to its use, and would not have done so. The will, in addition, contains an express devise for the payment of her debts, and this fact negatives the idea that the specific devise of \$500 was intended as a payment, the rule being that where a testator in his will directs all his just debts to be paid, if then he owed to his devise a just debt, he virtually directs its payment as well as the payment of the legacy. (Cloud, &c. v. Clinkinbeard's Ex'or, 8 B. M., 399; Lisle v. Tribble, 92 Ky., 308.)

The exceptions to the depositions of Higginbotham and Lusk should have been overruled.

For the reasons indicated the judgment on the cross appeal is affirmed and the judgment on the direct appeal is reversed for proceedings consistent with this opinion.

COMMONWEALTH v. ROBINSON.

(Filed January 6, 1905—Not to be reported.)

Resisting an officer—Instructions—Upon the trial of appellee upon an indictment charging him with feloniously striking and wounding an officer with a deadly weapon, it appearing that appellee was resisting arrest by the officer, an instruction to the effect that if the jury believed beyond a reasonable doubt that the accused had committed a public offense in the presence of the officer and knew the officer to be the marshal of the town where the offense was committed, and the officer attempted to arrest him, it was his duty to submit to the arrest; and if he refused to do so and assaulted the officer, the latter had the right to repel the assault and compel the defendant to submit to the arrest, correctly stated the law, and should have been given by the lower court.

A. L. Kendall, Ed. Daum, N. B. Hays and L. Mix for appellant.

R. J. Babbitt and J. B. Cumber for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Settle.

The appellee, John Robinson, was indicted in the Fleming Circuit Court for maliciously and feloniously striking and wounding Mat Bramble with a deadly weapon with the intent to kill him, but of which wound the latter did not die.

The trial resulted in the conviction of appellee for a lower degree of the offense charged, and his punishment was fixed by the jury at a fine of \$85 and imprisonment in jail sixty days. The lower court granted appellee a new trial, and the Commonwealth appeals from the ruling of the court in refusing an instruction asked by it upon the trial.

By sections 335-337, Criminal Code, an appeal may be taken by the Commonwealth before final judgment to have the law of a case settled by this court, but the appeal can not interfere with the action of the lower court in granting a new trial. (Commonwealth v. Hourigan, 89 Ky., 505.) It appears from the record that there was evidence conducing to prove that Bramel, who was deputy marshal of the city of Flemingsburg, received information from the family of appellee that the latter had committed a felony by maliciously striking and wounding one of his own children with a deadly weapon with intent to kill her, and that appellee was somewhere in the city.

Bramel, upon receiving this information, started out to find and arrest appellee for the alleged felony, without taking time to secure a warrant, and found him at a livery stable. Appellee refused to submit to arrest upon the charge preferred, and being drunk, commenced to threaten the officer, and to curse and abuse him in his presence. The officer then left him, secured his pistol and returned to arrest appellee without a warrant for the felony and the offense of which he was guilty in his presence, that is, being drunk and disorderly, threatening the officer and using profane language in his presence. Upon being again approached by the officer, appellee again refused to be arrested, and in resisting the officer struck him with a club, breaking one of his ribs, and in the difficulty was shot by the officer.

Upon the trial of appellee for wounding the officer, the Commonwealth, upon the conclusion of the evidence, asked the following instruction: "The court further instructs the jury that if they believe from all the evidence that Mat Bramble was deputy marshal of the town of Flemingsburg, a town of the fifth class in Fleming county, Kentucky, at the time of the striking and wounding alleged in the indictment herein, then it was his duty to suppress any disturbance of the peace or any disorderly conduct committed in his presence in said town, and to arrest any person guilty of such offense, where the offense was committed in his presence, and this he had a right to do without a warrant, and it was likewise the duty of the said Mat Bramble, acting as marshal, to arrest any person who was guilty of a public offense in his presence, such as using profane language or being drunk in the presence of the officer, and this it was his duty to do without a warrant; and if the jury further believe from all the evidence, to the exclusion of a reasonable doubt, that a public offense was committed in the presence of the said marshal by the accused, John Robinson, and the said Robinson knew that the said Mat Bramble was a marshal, then said Mat Bramble, acting as a marshal, had the right to arrest the said John Robinson without a warrant, and if the jury believe from the evidence, beyond a reasonable doubt, that the accused had committed a public offense in the presence of

said Mat Bramble, the marshal aforesaid, and knew that the said Mat Bramble was marshal, and said Bramble attempted to arrest the accused, John Robinson, in the town of Flemingsburg, for such offense committed in his presence, then it was the duty of the said defendant to submit to the arrest, and if he refused to do so, and assaulted the said marshal, with a club or stick or deadly weapon, then said marshal had the right to repel said assault, and to compel the defendant to submit to the arrest."

This instruction was refused by the court, which we think was error. In *Helm v. Commonwealth*, 26 Ky. Law Rep., 165, it appeared that the appellant, Helm, was misbehaving at a picnic near Whitesville, in Daviess county, information of which is given the marshal of the town, who went to the picnic grounds to arrest him. Upon his finding Helm the latter committed an offense in his presence, and in resisting arrest cut and wounded the officer with a knife. Upon the trial of Helm for cutting the officer the lower court gave to the jury an instruction precisely like the one offered in this case. Helm objected to the instruction, and being convicted, appealed. This court, however, held that the instruction was proper, and approved it. Regarding that case as conclusive of the correctness of the instruction refused in this case, we hold that the instruction asked by the Commonwealth should have been given in this case.

Wherefore, this conclusion is certified to the lower court.

COMMONWEALTH v. JONES.

(Filed January 6, 1905—Not to be reported.)

Local option—Peremptory instruction—The fact that an order of a county court directing the holding of a local option election recited that the petition for the election was signed by more than twenty-five per cent. of the legal voters residing and living within the magisterial district in which the election was held, instead of following the language of the statute requiring a number of names to the petition equal to twenty-five per cent. of the votes of each precinct cast at the last general election, etc., did not render the election void where it appeared the petitioners represented more than twenty-five per cent. of the votes cast at the last election, and that at the election 64 votes were cast in favor of the sale of whisky and 849 were cast against it; and where a case was made out for the violation of the local option law, it was error for the lower court to peremptorily instruct the jury to find for the defendant.

J. G. Lovett and N. B. Hays for appellant.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Settle.

The appellee, J. A. Jones, was indicted by the grand jury of Marshall county for the offense of selling unlawfully spirituous, vinous and malt liquors by retail in territory where the local option law was in force.

Upon the trial in the circuit court it was proved that he sold within a year next before the finding of the indictment to one Charles Bolin in Magisterial District, No. 2, of Marshall county, where the local option law was in

force, seven bottles of beer at ten cents per bottle, and the intoxicating quality of the beer was demonstrated by the fact, also established by the evidence, that Bolin became intoxicated from drinking it. The Commonwealth introduced in evidence several orders of the county court showing that an election was held in the magisterial district in question under the provisions of the local option law, and that a majority of the votes in said election were cast against the sale of liquor.

No evidence was introduced in behalf of the appellee, yet he was declared not guilty by the verdict of the jury, they having been directed to so find by a peremptory instruction from the court to that effect. The appellant, Commonwealth of Kentucky, excepted to the giving of the peremptory instruction, and filed motion and grounds for a new trial, but the motion was overruled by the court, to which an exception was likewise taken by appellant, and this court is now asked to review the several rulings of the lower court complained of. It appears that the ruling of the trial judge in giving the peremptory instruction was based upon what he considered a fatal defect in the order of the county court in the matter of directing the holding of the election under the local option law in the magisterial district; that part of the order containing the supposed defect is as follows: "And this being the next regular term of the Marshall County Court after receiving said petition by the judge of the Marshall County Court, which petition was filed with the clerk of the Marshall County Court and noted of record by him in his office, and same is now ordered filed of record; and it appearing to the satisfaction of the court that said petition was signed by more than twenty five per cent. of the legal voters living and residing within Magisterial District, No. 2, in the county of Marshall, in the State of Kentucky, and more than twenty-five per cent. of the legal votes cast at the last preceding general election in and for said Magisterial District, No. 2." * * *

It will be observed that the order quoted in part above does not recite that the petition for the election was signed by legal voters in each precinct of the territory to be affected, equal to twenty-five per cent. of the legal votes of each precinct of the Magisterial District, No. 2, cast at the last preceding general election, and as the statute (section 2554) provides that an order directing the holding of an election under the local option law in a magisterial district may be granted by the judge of the county court, "upon application, by written petition, signed by a number of legal voters in each precinct of the territory to be affected equal to twenty-five per cent. of the votes cast in each of said precincts at the last preceding general election," * * * it was assumed by the lower court that the election held under the order was void, and that consequently the local option law was not in force in Magisterial District, No. 2, at the time of the sale of the beer for which appellant was indicted. In other words, it was the opinion of the trial judge that the order of the county judge should recite all the jurisdictional facts authorizing him to direct the holding of the election.

It is stated in the order filing the petition for the election, which was entered at a regular term of the county court preceding that at which the order directing the election was entered, that the petitioners, Charles Smith, and others, constituting a number "equal to twenty-five per cent. of the

legal voters of the various voting places (precincts) in Magisterial Precinct, No. 2. in Marshall county, Kentucky," appeared and filed with the county judge the petition requesting that the election be held. The order directing the holding of the election entered at the following term declares that the petitioners were "resident citizens and legal voters of Magisterial District, No. 2," and that they constituted more than twenty-five per cent. of the legal votes cast in the magisterial district at the last preceding general election in and for such district. The two orders, therefore, establish the facts, first, that those signing the petition were residents and legal voters of the magisterial district; second, that they constituted more than twenty-five per cent. of the legal votes cast at the last preceding general election in the district; and, third, were in number equal to twenty-five per cent. of the legal voters of the various voting places in the district.

According to Webster the word "various" means "different," and "several" means "separate," "distinct." Therefore, to say of persons whose names appear to the petition in question that they equal in number twenty-five per cent. of the legal voters of the several voting places in the magisterial district, is equivalent to saying that they equal twenty-five per cent. of the legal voters in each precinct, and if equal to twenty-five per cent. of the legal voters in each precinct, equal also to the same per cent. of the legal votes cast in each precinct at the last preceding general election. It is true that the statute says the petition for such an election must be signed by a number of legal voters in each precinct of the territory to be affected, but it does not say that it must be signed by twenty-five per cent. of the legal voters residing in each precinct. It is only required that the number of legal voters of each precinct signing the petition shall be equal to twenty-five per cent. of the votes cast in each precinct in the last preceding general election.

It is shown by the petition for the election under consideration that at the end of many of the names signed thereto appears the word and figure "No. 5," and at the end of others "No. 4," indicating, doubtless, that these numbers refer to the precincts respectively of the magisterial district; it would seem, therefore, that the fact that the petition was signed by legal voters of each precinct of the magisterial district is to be inferred from the appearance and language of the petition which was introduced in evidence.

The several orders of the county court considered together show that the election was held as directed; that the votes were canvassed and counted, and the result ascertained by the election officers, and the result was by them certified to the county judge and spread upon the records of his court; and further, that 64 votes were cast in favor of the sale of spirituous, vinous and malt liquors and 349 against its sale, making a total of 413 votes cast in the magisterial district, and a majority of 285 against the sale of liquors.

A comparison of the total vote cast at the election with the names upon the petition will show what proportion of the voters of the district joined in the request for the holding of the election. The petition contains 152 names, equalling about thirty-seven per cent. of the votes cast in the entire district. A careful examination of the orders and other record evidence from the county court introduced by the Commonwealth upon the trial will show but one irregularity in the proceedings leading to and resulting in the elec-

tion, and that is the failure to have the order of election contain an express recital of the fact that the petition for the election was signed by a number of legal voters in each precinct of the territory to be affected equal to twenty-five per cent. of the votes cast in each of the precincts at the last preceding general election.

We are not prepared to say that this single omission ought to invalidate the election, for we think the orders altogether, in connection with the statements of the petition, establish the jurisdictional facts, and that they were regarded by the county judge as existing is shown by the following statement contained in the order directing the holding of the election: "It further appearing to the satisfaction of the court that the said petitioners have in all respects complied with the law, it is now ordered and adjudged by the court that an election be held," etc.

Where, as in this case, the validity of the proceedings under which the election was held are attacked collaterally, if a substantial compliance with the provisions of the statute is shown, by the petition therefor and the orders entered of record by the county judge, the election will not be declared void. We are of opinion, therefore, that the lower court erred in giving the peremptory instruction directing the jury to find the appellee not guilty, but as under the statute the offense of which appellee was guilty may be punished by imprisonment in jail not less than ten nor more than forty days, as well as by a fine of not less than \$50 nor more than \$100, we can not reverse the judgment of the lower court and require him to be retried, and must be content to certify to the court below the law as herein expressed, which is accordingly done.

LAUGHLIN'S EX'TX v. BOUGHNER, &c.

(Filed January 6, 1905—Not to be reported.)

Former appeal—Where a former appeal settled all questions between the parties and nothing remained except to state the claims between them and calculate the interest, it was not error to refuse an allowance to the executrix of commissions, or attorney's fees, but the lower court erred in fixing the date from which interest must be computed, May 8, 1888, being the date from which interest must run.

W. S. Pryor for appellant.

B. F. Graziani, G. F. Boughner and George Doniphan for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case. The opinion in the first appeal is published in 23 Ky. Law Rep., 1167, and the response to the petition for rehearing can be found in 25 Ky. Law Rep., 869. This opinion settled all the questions between the parties, and nothing remained to be done except to calculate the interest on and stating the claims of the parties named in the opinion, and render a judgment for the party in whose favor the balance might be found. On the filing of the mandate in the lower court the appellant in this appeal moved the court to refer the case to the master commissioner to take proof and report the state of accounts or claims existing

between the parties. The court refused this motion. There was no error in this. The court had the right to refer the matter to the commissioner, or to make the calculations itself, which was done. The court by its calculation ascertained that there was due from the appellants to appellees on the 25th of March, 1904, the sum of \$3,756.60, and rendered judgment for that sum with interest from that date. Appellants appeal from this judgment, and claim that there was an error in this calculation and judgment to their prejudice; also that the court erred in refusing to allow the executrix of Laughlin the statutory allowance or commissions on her collection of the debt of the Cummins note, and also for refusing to allow her \$250, the amount she had paid as executrix to the attorney for his services in the collection of this Cummins note.

We are of opinion that the court did not err in refusing her an allowance or commissions as executrix in the collection of the Cummins debt, and refusing her credit for the alleged attorney's fee paid, for two reasons: First, the former opinion of this court is a bar to her claim in this respect. That opinion or judgment settled all matters of claims between the parties that were or might have been therein presented. The second reason is that the Cummins claim did not belong to the estate of Laughlin. The commission or allowance fixed by statute for compensation to personal representatives of decedents is for the purpose of paying them for the collection and disbursement of money belonging to the decedent, and as this Cummins claim belonged to the appellees, Boughners, she was, therefore, not entitled to the statutory allowance. If she had made this collection of the Cummins debt for the benefit of the Boughners, there would be equity in her claim for fees paid to attorneys in the collection thereof. But the collection was made for the benefit of the Laughlin estate. She denied the right of the Boughners to any part of that claim, which was the main and real matter litigated in this action from its inception. The appellees were only made to surrender this claim to Boughners after long and expensive litigation. It would be inequitable to cause the appellees, Boughners, to pay large fees in the recovery of this Cummins claim from Laughlin's estate, and also pay the fee expended by her in recovering from Cummins and getting the money into their hands.

We are of opinion, however, that the court erred to the prejudice of appellants in the calculation of interest and the statement of the accounts between the parties. The court should have fixed May 8, 1888, the date that the executrix purchased the Cummins real estate, as the date for the ascertainment of the state of accounts and fixing the balance due to one party or the other, instead of December, 1887. A careful calculation shows that on May 8, 1888, the appellants herein were indebted to appellees in the sum of \$1,868.50, after giving appellants all the credits to which they were entitled, and the court should have rendered a judgment for that sum, with interest at 6 per cent. from that date until paid.

For these reasons the judgment of the lower court is reversed and cause remanded, with directions to enter a judgment in conformity herewith.

**SCHMIDT, &O. v. LOUISVILLE, CINCINNATI & LEXINGTON RY.
CO., &O.**

(Filed December 18, 1904.)

1. Action on mortgage and coupons—Accounting—Net earnings—In an action by a mortgage of the bonds and coupons of the net earnings of a railroad company for an accounting, it does not devolve upon the plaintiff to aver that there was such earnings; all that is required is to set forth the bonds and the coupons and to aver nonpayment and ask for an accounting, and any supposed conditions precedent are defensive matter.

2. Judgment—Bar—A judgment in an action upon certain coupons of a bond is not a bar to a recovery in an action on other coupons of the same bond, as each coupon is a separate promise and gives rise to a separate cause of action thereon.

3. Railroads—Operating expenses—There is no rule of law declaring what constitutes operating expenses of a railroad company. It is a matter of evidence, and determinable like any other fact, and where the witnesses differ in their testimony as to this matter, the preponderance on the point as to what constitutes operating expenses must control.

Pirtle, Trabue & Cox, Simrall & Doolan, W. S. Pryor and J. H. Hazelrigg for appellants.

Helm, Bruce & Helm for appellees.

Appeal from Jefferson Circuit Court, Law and Equity Division.

Opinion of the court by Special Judge Morrow.

STATEMENT OF CASE.

On the 2d day of July, 1879, the Northern Division of the Cumberland & Ohio R. R. Co. executed and delivered to Joshua F. Speed, as trustee, its deed of mortgage, by which it conveyed to him all and singular its property, franchises, etc., to secure the payment of three hundred and fifty of its bonds of the denomination of \$1,000 each, payable in twenty years, with interest at the rate of 7 per cent., the latter represented by coupons payable semiannually.

On the 28th of July thereafter the said Northern Division, as lessor, executed a deed to the L., C. & L. Ry. Co., by the terms of which it leased to the latter for the period of thirty years its unfinished road, etc., upon certain terms and conditions therein expressed, inter alia, "that the stockholders of said Northern Division would execute to the lessee a deed of mortgage upon all its property, franchises and resources, except private subscriptions."

It also provided that it is further agreed and understood that in the operation of said line of railway said party of the second part will make to said first party quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping the roadbed in order, and the net earnings arising therefrom shall be applied to the payment of the interest and providing a sinking fund and retiring said bonds; but out of the gross earnings shall be deducted annually the sum of \$1,000, which shall be paid to the first party with which to pay expenses of keeping up its organization; and if the net earnings do not prove sufficient to pay the interest and provide for the sinking fund on said mortgage bonds, then second party, if all other sources of raising money of said first party prove insufficient,

will supply the deficiency, so far as may be done, by appropriating the net earnings, or so much thereof as may be necessary, on its own lines which may accrue to it by reason of business coming to it from or over said party of the first part's lines. It was further agreed that the second party "should be indemnified out of the earnings for the cost of printing the bonds and issuing same or incidental thereto."

On the same day the L., C. & L. executed and delivered to Speed, as trustee, a deed of mortgage, containing a covenant, putting in lien the net earnings mentioned in the lease to it.

The bonds, with coupons attached, were printed, issued and sold by appellee. Each bond had printed on its face: "The holder of this bond, together with the holders of the others of this series, is entitled to a first lien for the equal security of principal and interest, of each respectively, on all the property, rights and franchises of the said Northern Division of the C. & O.; as also a first lien on the net earnings of the L., C. & L., duly pledged thereto, which may accrue to it by reason of business coming to it over the lines of the mortgagor, the Northern Division of the C. & O." The mortgage referred to is the mortgage to Speed of July 2, 1879.

None of the coupons which fell due subsequent to December 31, 1883, having been paid, the appellants on October 12, 1885, brought this action in equity to recover on the coupons and to enforce the lien. The foregoing matters were substantially set forth and the various writings filed as exhibits. The petition, in substance, avers that the coupons were unpaid; that the defendant denied all responsibility for the payment of any of them, and had so informed plaintiffs; and that sufficient earnings had accrued to pay same. It further avers that defendant, though requested, had wholly failed to make any of the quarterly returns as provided for; that plaintiffs were ignorant of the exact amount of the net earnings, and that this information was exclusively within the knowledge of defendant; and that defendants "claim that beside the net earnings on its own lines coming to it over the line of the Northern Division, all other sources of raising money of said Northern Division have proved insufficient to pay said interest or to provide for such sinking fund." The prayer of the pleading is "that this action be referred to the commissioner of this court to take proof and report concerning the net earnings, and that the defendant be required to pay into court all such earnings, and that same be applied to the payment of the coupons." By an amendment filed December 7, 1885, the word "exclusive" was stricken from before the word "knowledge," in the petition. The defendant filed its answer February 8, 1886, in which it denied that there had been any net earnings; that any demand had been made; and a denial that it had exclusive knowledge as to the net earnings.

January 28, 1890, plaintiff filed another amendment in which they say: "It is true that all other sources of raising money of said first party, the N. D. of the C. & O., had and has proved insufficient, and there are no net earnings from said Cumberland & Ohio road or company."

The plaintiffs, January 6, 1891, filed an amendment, in which the allegation is made "that all the coupons falling due since the institution of the suit and up to that date were unpaid, etc., * * * wherefore plaintiffs pray as in their original petition, * * * and that all the net earnings as they

may hereafter accrue be applied to the payment of the coupons now due, and as hereafter fall due, and also to the payment of the interest on said coupons from their respective maturities, and that any surplus net earnings be set apart as a sinking fund for the payment of the bonds as they mature."

This was the last pleading filed in the case. Upon the issues thus formed the action, after a reference to, and a report by, the commissioner, was dismissed by the chancellor. On appeal the judgment of the lower court was reversed, with directions to find for plaintiffs on the coupons due up to June 30, 1890. The action has continuously since that time remained on the docket. Treating the proceeding as one for an accounting for the purpose of raising a fund, not only to meet the coupons then due and such as might become due during the litigation, but also to create a fund to retire the bonds at maturity, the chancellor on the 21st of July, 1899 (the cause having remained on the docket pending certain appeals), referred it to the commissioner, with directions "to ascertain and report the net earnings of the defendant coming to it from or over the said Northern Division since the time of the last earnings reported herein in report R. E. S., No. 2, * * * said net earnings to be ascertained in the same way as in said report."

The report of the commissioner, without reporting any finding as absolute, submitted for the consideration of the court four aspects of the proof:

1st. On the basis of excluding from "operating expenses," construction, rents and taxes the amount which plaintiffs ought to recover would be \$139,961.90.

2d. Upon the basis of construction, rents and taxes, but deducting at the end of each six months' period losses incurred in that period, it should be \$128,431.76.

3d. On the basis of including rents and taxes, but excluding construction, it should be \$54,637.21.

4th. Including in operating expenses, construction, rents and taxes, the finding should be for defendant.

The chancellor adopting the last view dismissed the petition, from which judgment the plaintiffs appealed, and the case is now before us for review.

There is no difference of opinion as to the meaning of the contract. That a fund was to be raised from the net earnings of the appellee road to pay off the coupons and the bonds themselves, if there was a sufficiency for the purpose, stands agreed. What constituted net earnings, and whether there has been such, are the evidential propositions involved in this controversy. The appellee concedes that the net earnings were to be applied, but insists that there can be no recovery in this suit in its present status because there have been no net earnings; but if there has been, the action was properly dismissed for the reason:

1st. There is no pleading which alleges (1) that for a period subsequent to the 1st of July, 1890, the net earnings of the Northern Division of the C. & O. were insufficient to pay in whole or in part the coupons; (2) or that all sources of raising money of the Northern Division had proved insufficient; (3) that the net earnings of the L., C. & L. had proved sufficient, and that appellee had collected them and failed to account for them.

2d. That all matters now in litigation are res judicata.

3d. If not *res judicata*, that *Schmidt v. L., C. & L.*, in 95 Ky., —, is to be followed as a precedent, and under the principles therein announced there have been no net earnings.

4th. No cause of action is stated against the L. & N.

The appellee concedes that the pleadings up to 1891 were sufficient, but its contention now is that additional pleadings should have been filed covering the time now in controversy; that appellants are in the position of a plaintiff without written pleading in a court where written pleadings are required. In this we do not concur. The allegations and the prayer for relief contained in the petition and in the amended petition of January 28, 1891, seek to recover on not only the coupons then due, but to compel the paying into court of the net earnings as they might thereafter accrue to meet subsequent coupons, and to provide a fund to meet the bonds at maturity. The action is one for an accounting, and the prayer that the case be retained on the docket for all purposes, the bonds then having only about eight years to run. It was asked that the money be paid into court for the equal benefit of all the bondholders. Such action is clearly within the lines of good equity pleading. Whether there had been net earnings could only be known to appellants from the reports that were to be furnished to them by appellee. Failing to furnish such reports, the information as to whether there had been such earnings was exclusively within the knowledge of appellee, and it did not devolve on appellants to aver that there were such earnings: all that was required was to set forth the bond, the coupon and aver nonpayment and ask for an accounting. This has been done, the prayer being laid in the *continuendo*. The averments in the pleadings that the net earnings of the Northern Division had proved insufficient; that all other sources of raising money of said Northern Division had proved insufficient; and that sufficient earnings had accrued to the L., C. & L. were sufficient, were not necessary averments in order to set forth a cause of action. These supposed conditions precedent are defensive matter. The appellee must pay if there is sufficient from any one or more or all the sources. If the appellants had averred that there was a sufficiency of the net earnings derived from the L., C. & L., would a denial as to this constitute a complete defense? All the resources were in lien, and to have made the defense good denials should have been made as to the insufficiency of the other sources. The appellee assumed to pay the bonds, and the Northern Division, in consideration of its so doing, turned over to it all of its franchises, rights, subscriptions, etc., thereby denuding itself of every source of raising money. In fact it had to be paid out of the gross earnings \$1,000 per annum to keep alive the organization. No effort on the part either of the bondholders or the Northern Division was expected. All effort in that direction was to be made by appellee. It was with it to make earnings out of the Northern Division, and to use the sources of raising money of it. The verbiage of the writing is conclusive on this point. The preposition "of" preceding the words "the said Northern Division shall prove insufficient, etc.," is used in its general and primary sense, "off," "from," "out of," not in the obsolete sense "by." The verb "prove" means "after trial." It was the duty of appellee, to the extent pointed out in the various writings, to pay the coupons; the funds and means with which to do so were in its possession and under its complete

control; it devolved on it to make the trial from the sources mortgaged to it; it undertook to do so. It was not obligatory on appellants nor on the Northern Division to take any step in that direction; nor is it on them to aver the inability of appellee. Such seems to have been the contemporaneous understanding of the parties. As it appears in the statement of the case, the bonds were issued and sold by the appellee. It, therefore, had full notice of the contents and by the sale and receipt of the proceeds ratified the terms thereof and were bound by omissions, if any. The bonds do not pledge the net earnings of the Northern Division, nor do they contain the supposed condition "that if all other source of raising money of the Northern Division prove insufficient," etc. The language in the face of each bond is "that it and the other bonds and the coupons are secured by * * * a first lien on the net earnings of the L., C. & L., duly pledged thereto, which may come to it by reason of business coming to it over the lines of the Northern Division." The appellee was the ostensible, if not the real, owner of the bonds; they were printed, issued and sold by it; it received the proceeds of sale and appropriated them to an enterprise from which it anticipated the reaping of profits. There was neither gratuity nor friendship in the contract. The combination of these facts and circumstances, constitute a pledge on the part of appellee that to the extent of its net earnings arising from business coming to it over the Northern Division the bonds and coupons attached would be promptly paid. The holders of these bonds are innocent purchasers for value. The terms of the bonds do not put the purchaser on notice of modification of its terms to be elsewhere found; nor is he given to understand that he must exhaust other securities before he can look to these found in the bond. Upon any other theory than the one we hold the bonds would have been worthless on the market; no purchaser could have been found for them had it been suggested that payment could be obtained only through the labyrinthal process contended for by appellees and the object of their issual would have been frustrated. The pleadings are sufficient to maintain and uphold a judgment for appellants if there have been net earnings.

The claim that the matters in issue are res adjudicata is not tenable. The case was heard below as to a different set of coupons from these in controversy when the decision in 95 Ky., —, was rendered. The U. S. Supreme Court in *Neebit v. Riverside Independent District*, 144 U. S., —, held that "each coupon is a separate promise, and gives rise to a separate cause of action. * * * So while the promise on the bond and the coupons in the first instance are upon the same paper, and the coupons are for the interest on the bonds, yet the promise to pay the coupons is as distinct from that to pay the bond as if the two promises were placed in different instruments and different paper."

This view is sustained in *Davis v. Brown*, 94 U. S., 423; *Cromwell v. County of Sac*, *ibid*, 351-60. These enunciations are in harmony with the Kentucky authorities.

In *Board of Commissioners v. Sutliff*, 97 Fed. Rep., 270-82, it was held that a judgment upon certain coupons did not prevent an action from being brought upon other coupons of the same series, holding that estoppel applied only as to points and questions actually litigated and determined. In this

action a new question is presented, one that could not have been determined in the other, and that is whether the cost of constructing the Shelbyville Branch is capital or operating expense. An additional fact is thereby put into the litigation which makes it a new question. "The litigation of the effect of one fact alone does not preclude in a second suit an inquiry and determination of that fact in conjunction with others." (144 U. S., 619.)

The opinion in 95 Ky.,—, is not res judicata under the Kentucky authorities, nor is this court absolutely bound by it as precedent. (Bank Tax Cases; Barker v. Southern Construction Co., 20 Ky. Law Rep., 796; Tennessee Paving Co., &c. v. Barker, 22 Ky. Law Rep., 1069-1419; L. & N. R. Co. v. Offutt, 99 Ky., 427.)

In Barker v. Southern Construction Co. it appeared that the appellee had recovered judgment below on certain apportionment warrants issued to it in payment for the construction of certain sidewalks in the city of Somerset, the contract having been let under an ordinance of the city council. The case was brought to this court on alleged errors of the trial court, prominent among which were the facts that no engineer had either been elected or appointed by the council; that the work had not been done under the inspection or supervision of the engineer; and that the plaintiff had not before commencing the work, or at all, executed the bond required by the terms of the contract letting the work. This court reversed the case on all the points and on the further ground that the statute was highly arbitrary, and should be construed strictly in favor of the lot holders. The mandate was not that the case should proceed on principles consistent with the opinion, but directed the absolute dismissal of the petition, which was done by the circuit court on the return of the case. That suit was brought on only a part of the work, the city having been laid off into sections, but the entire work was let under one and the same letting or contract. While the case was pending the residue of the work was completed. After such completion of the Southern Construction Co. transferred its claim for the entire work, including claims then in litigation, to the Tennessee Paving Co. The paving company uniting with it, the construction company brought suit on all the warrants. A demurrer was filed to the petition because it failed to allege either that there was a city engineer or that the contractor had executed the bond required. The circuit court holding that it was bound by the opinion of this court in the construction company case, sustained the demurrer and dismissed the petition, from which an appeal was taken to this court. So far as the action on the warrants that had been sued on in the first case an estoppel was relied on as a complete bar, and the opinion of this court either as a bar or as a binding precedent as to the work subsequently done. This court on a review of both cases held that there was no estoppel, and refused to follow the principles announced in the construction company case. This court, on the last appeal, held that it was not necessary that there should have been an engineer; that the failure of the contractor to execute the required bond did not affect the validity of the warrants, and that the statute should be liberally construed to carry into effect the object intended by the statute, which was to beautify and ornament the cities of the Commonwealth. The reason given why the cause was not adjudicated was that the first one was heard on the merits, and second on demurrer. It

was a narrow but sufficiently wide fringe; it did, however, overrule every principle enunciated in the construction company opinion.

In *Louisville & Nashville R. R. Co. v. Offutt*, 99 Ky., 427, it was held that "this court, on a second appeal in the same case, will treat the opinion of the Superior Court on the former appeal as the law of the case whether that opinion be erroneous or not; but it would not be proper for the court to follow such an opinion unless the law as therein held applies to the facts in the record on a second appeal."

The doctrine laid down in the *L. & N. R. R. Co. v. Offutt* and the construction company cases is sound in principle, and following them we must hold that the "claim of matters determined" contended for by appellee is not available. The law on this point, if there be such, in 95 Ky., —, does not apply to the facts of this case. Full weight has been given in the consideration of this appeal to the able and exhaustive briefs of the learned attorneys for appellee; but the vice, as it seems to us, in the argument on this particular phase is the assumption that we held in 95 Ky., —, as a matter of law that "taxes, rents and cost of construction" were operating expenses. In that case, construing the opinion most favorably to appellee, this court only held that on what was then before it, Report R. E. S., No. 2, most nearly approximated correct results. The court did not mean to be understood as holding that under all and every state of case that these items were chargeable to operating expenses. It is in proof that there are some kinds of construction, some kinds of rents and some taxes that ought not to be so charged. If this be not true, then proof is useless; the parties will be bound by the manner in which appellee saw proper to keep his accounts, and by its view as to what is necessary to bring construction within the lines that make it chargeable to capital. There is no rule of law declaring what constitutes operating expenses; that is to be determined by the testimony as to each item of expenditure; it is a matter of evidence and determinable like any other fact. There can in this view be no sort of inconsistency in this court holding now, if the proof warrants, that these matters, or any of them, are not operating expenses, and its having held on a different state of facts with different testimony that they were of that description. In the view we have taken it is not necessary that we should affirm or overrule 95 Ky., —. If, however, that issue were presented, we should overrule so much of it as is supposed to hold that all descriptions of construction, rents and taxes are operating expenses of a railroad.

As to the point that no pleading is filed against the L. & N. it is sufficient to say that no judgment is sought against it; that it is not a party is due to its own successful resistance. If to be held responsible at all it must be in the capacity of dominus litis. It has no ground of complaint that it has not been made a party. That there have been sufficient earnings coming to appellee by reason of business coming to it from and over the said Northern Division to satisfy at least a portion of the coupons in suit admits of no doubt. The contract provides that appellee should make quarterly returns as to this, and would appropriate the net earnings for the purpose of meeting the interest as it fell due. In equity that will be considered as done which should have been performed. We must, therefore, treat these earnings as having been set apart, appropriated by the appellee at the end of the

first six months' period as a fund to pay the coupons that had then matured, and so as to the other periods as they should successively arise. We are of the opinion that it would not be competent for appellee to make default and then claim at a subsequent time that losses had occurred, and set the latter off against previously due coupons. It would be to allow it to take advantage of its own wrong. The sum so appropriated, on equitable principles, ceased on such appropriation to be longer the property of appellee. The contention of appellee on this point is not maintainable. The appellants have not been guilty of laches, as claimed by appellee. The original action was instituted in 1885, and the amendment of 1891 in the prayer asked that the net earnings should be paid in as they might accrue or be found to exist at the termination of each and every six months. The proof shows that there were net earnings up to June 30, 1895, and from July 1, 1896, up to February 5, 1898. From July 1, 1895, to June 30, 1896, there were no net earnings. The proof in that respect showing that, even excluding construction, rents and taxes from operating expenses, there had been no earnings. We not only hold that the earnings up to June 30, 1895, can not be swallowed up and absorbed by losses, if any, in the year above mentioned, but that such losses can not be set-off against subsequent earnings.

On the subject as to whether "rents, taxes and construction," as claimed by appellee, should be charged to capital or to operating expenses, the depositions of five witnesses were taken, four for appellants and one for appellee. Baird, Krebs, O'Brien and Dunbar, for plaintiff, swear that taxes (with a few exceptions) should be charged against capital; also rents, with like exceptions; as also the construction account. Sewell, Auditor for the L. & N. R. R. Co., the only witness for appellee, swears as pointedly to the contrary, basing the opinion alone on his own idea. Appellants' witnesses rely on as sustaining their theory "The American Railway Association of Accounting Officers," "The Interstate Commerce Commission," and the Louisville & Nashville R. R. up to 1894-5. That these parties are quoted correctly is not denied by Sewell. His deposition was taken after those of the appellant. In it he admits that such was the practice of the L. & N. up to the period mentioned; he also says there was a change made by that road in this respect. This change was made a short time before the extensive improvements on the Shelbyville Branch. That improvement was made to enable appellee to make a favorable lease to Chesapeake & Ohio R. R. Co. It is so extensive in its nature that there can be no doubt as to its expense being chargeable to capital and not to operating expenses. The cost of that work can not be deducted from gross earnings as a part of the operating expense of the appellee. O'Brien says, speaking of the Shelbyville Branch, "It is an entirely different road—except so far as to the fact of the road existing, it is the same roadbed." This is corroborated by the other witnesses for appellants, and as a matter of fact is not disputed by Sewell, except his claiming that anything short of building a new road outright should be charged to operating expense. All of the witnesses are expert railroad men. Crediting each, which from their honorable positions we should do, we must declare that the preponderance on the point as to what constitutes operating expenses is with the four rather than with one, especially when the four witnesses are endorsed by the Interstate Commerce

Commission, the American Association of Railway Accountants and the L. & N. R. R. Co.

Entertaining these views, we are constrained to reverse the action of the lower court, with directions to set aside the judgment dismissing the petition, and to render a judgment for plaintiffs for the sum of \$128,481.75 as of date February 21, 1908. A mandate will issue in accordance with this opinion.

Whole court sitting.

COMMONWEALTH v. AMERICAN TELEGRAPH AND TELEPHONE COMPANY.

(Filed January 18, 1905—Not to be reported.)

1. Construction of statutes—The common law remedy for the obstruction of public roads has not been supplanted by chapter 110, Kentucky Statutes. (20 Ky. Law Rep., 606.)

2. Indictments—Sufficiency of—Where an indictment charged in substance that appellee had created and maintained a nuisance by unlawfully, wrongfully and injuriously cutting down and felling a large tree in the public road, leaving it there for a period of three months, it properly charged a nuisance.

N. B. Hays, Lorraine Mix and W. H. Hester for appellant.

Trabue, Dolan & Cox, Robbins & Thomas and Robert L. Greene for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Nunn.

Appellant appeals from the action of the lower court in sustaining a demurrer to the following indictment: "The grand jury of the county of Ballard, in the name and by the authority of the Commonwealth of Kentucky, accuse the American Telephone and Telegraph Co. of the offense of creating and maintaining a common nuisance, committed in manner and form as follows: The said American Telephone and Telegraph Co., in the said county of Ballard, on the 1st day of December, 1903, and up until the 22d day of April, 1904, and on all the days and times between said days in the county aforesaid, and within twelve months before finding this indictment, is, and was, a company duly incorporated by the laws and the Constitution of this State, to build and maintain and operate telegraph and telephone lines and poles for stringing its wires, in and through Ballard county, Ky., did unlawfully, wrongfully, injuriously and unnecessarily cut down and fell a large tree in and across a public road of said county, and did wholly obstruct all public travel in, along and upon said road, same being known as the Wickliffe and East Cairo road. Said obstruction has been suffered and permitted by said company to remain down, in and across said public road upon all the days and times aforesaid, and said road being a public and common highway upon all the days and times aforesaid, to the common nuisance of all good citizens passing and repassing, going and returning in and along said public road and common highway, against the peace and dignity of the Commonwealth of Kentucky."

We gather from the briefs filed in the case that the action of the lower

court in sustaining the demurrer was upon the ground that chapter 110 of Kentucky Statutes, on the subject of roads and passways, has repealed and supplanted the common law remedy for the obstruction of public roads, and has vested exclusive jurisdiction of such offense in the county and quarterly courts. In this the court erred. (20 Ky. Law Rep., 606.) There are other cases not necessary to cite, as appellee in its brief concedes this point. Appellee contends that the demurrer was properly sustained for the reason that the indictment does not charge a common law offense, and cites the opinion of this court supra as sustaining its position. In that case the Illinois Central R. R. Co. was indicted for obstructing a public highway. It was alleged in the indictment that it had taken down a bridge that had been erected over its highway, leaving it down for about three months. There was no allegation that it wrongfully or unnecessarily took it down, or that it remained down for an unnecessary length of time, or that they failed to replace it in a reasonable time. The court in this case said the inference was, there being nothing stated to the contrary, that it was proper to take it down for the purpose of rebuilding it and making it a good one, and that they did not leave it down for an improper length of time. But in the case at bar the allegation in substance is that appellee created and maintained a nuisance by unlawfully, wrongfully, injuriously and unnecessarily cutting down and felling a large tree in the public road, describing the road, leaving it remaining there for a period of three months or more.

We are of opinion that the indictment charged a nuisance. It is stated in the brief that appellee could not remove the tree from the public highway by reason of back water from the river. If this is true it should be made a defense. We can not consider that upon this appeal as it does not appear in the record.

For these reasons the judgment of the lower court is reversed and cause remanded for further proceedings not inconsistent herewith.

THE MT. CARMEL TELEPHONE CO. v. THE MT. CARMEL AND FLEMINGSBURG TELEPHONE CO.

(Filed January 13, 1905.)

Corporations—Organization—Rights of subscribers to organize—Majority to control organization—Thirty-six persons subscribe various sums for the purpose of organizing a telephone company, and appoint a committee of nine of their number to prepare articles of incorporation, five of whom agree on articles which the other four refuse to accept, and which the remaining subscribers also refuse to accept, and the five members proceed to organize a corporation under one name, while the other thirty-one subscribers also organize under another name, the latter holding the subscription list and money paid in, for which the corporation composed of the five members has brought this suit. Held—That the subscribers for the stock of a proposed corporation, before they are incorporated, are partners in the business which they have in hand, and a committee appointed to prepare articles of incorporation are merely agents of the larger body, and it is not obligatory on the larger body to accept the articles prepared by such agents, and the larger body had the right to reject the same, and adopt articles of their

own, and having done so the larger body are entitled to the assets of the partnership.

McCartney, Dearing & Grannis for appellant.

E. L. Worthington, J. R. Power and O. B. Bright for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Barker.

Thirty-six citizens of Fleming county desiring to incorporate themselves into a telephone company and to build and operate a telephone line between Mt. Carmel and Flemingsburg, subscribed various sums, from \$25 to \$5 each, for the capital stock of the corporation afterwards to be organized, the total amount of subscription being \$480. The stock was to consist of ninety-six shares of the par value of \$5 each. Before the articles of incorporation were prepared the subscribers seem to have obtained a right of way along the turnpike between the two towns, purchased and erected poles thereon and sufficient wire and insulators to complete that part of the proposed line.

At this stage of their organization they appointed nine of their number a special committee to prepare the proposed articles of incorporation. This committee seems to have been unable to agree as to the articles, and, as a result, four of them refused to go on with the organization, and reported back to the subscribers, who agreed with the minority of the committee. The remaining five prepared articles of incorporation under the name and style of the Mt. Carmel Telephone Co., which they signed and acknowledged, had recorded, as by law required, paid to the State the organization tax due, and fixed a time, some three months off, for the purpose of electing directors. The thirty-one subscribers, repudiating the action of the five members of the committee, had articles of incorporation prepared, the name and style of which was the Mt. Carmel and Flemingsburg Telephone Co., which they acknowledged and subscribed, as by law required, elected directors and officers, and were proceeding to carry into effect, so far as they could, the original contract between the subscribers. These latter had possession of the original subscription list and money paid in, and other property, including the wire, insulators, etc.

Deeming themselves the original company, the five subscribers who had incorporated themselves as the Mt. Carmel Telephone Co. instituted this action against the thirty-one subscribers incorporated under the name and style of the Mt. Carmel and Flemingsburg Telephone Co. to recover possession of the personal property held by them as before stated. And the question presented by this record is the mutual rights of the respective parties to this property. The subscribers for the stock of a proposed corporation before they are incorporated are partners in the business which they have in hand. (Cincinnati Cooperage Co. v. Bate, 96 Ky., 356; Warring v. Arthur, 98 Ky., 84.) The committee of subscribers appointed to prepare the articles of incorporation were merely the agents of the larger body for the purpose for which they were appointed, and it is an elementary doctrine of agency that the principal may at any time, due regard being had to the rights of third persons, withdraw the authority of the agent. Although this committee were authorized to prepare for the majority articles of in-

corporation, it was not obligatory upon the latter to accept or agree to them, and the principals in this case having refused to sign and acknowledge the articles prepared, this in law amounted to a repudiation of the action of the agents. The fact that a majority of the agents saw proper to adopt their own work, and sign and acknowledge the articles prepared by themselves, did not incorporate or bind the principals, or entitle the corporation so created to the property of the original partners who refused to incorporate with them. After refusing to ratify the work of their agents, the majority of the subscribers incorporated themselves by signing and acknowledging other articles under the name and style of the Mt. Carmel and Flemingsburg Telephone Co., and this corporation became the owner of the assets of the partnership.

In a partnership composed of numerous individuals bound loosely together by subscription to the stock of a proposed corporation, for all the purposes of the organization, a majority must have the right of control so long as they act within the purview of the contract of subscription, and it would be an anomalous proposition if such a body, having appointed a committee of their number as agents to prepare articles of incorporation, should find themselves irrevocably bound to agree to any articles which their agents might see fit to prepare, or of having the alternative presented to them, either of adopting the unacceptable articles or of losing all the property belonging to the partnership, provided the agents had the temerity to organize themselves under the rejected articles, and to claim the property of the partnership. And yet this is the very proposition which appellant is here seeking to maintain.

Counsel for both litigants have discussed at great length the question as to what point in the process of organization an action may be maintained by the corporation. The decision of that question does not seem to us necessarily presented by this record. Conceding the appellant to be a properly-organized corporation, and, therefore, to be empowered to maintain any action involving its property rights, the facts herein recited are admitted in the pleadings, and show that the plaintiff (appellant) had no right to the property it sought to recover. This belonged to the partners, and as a large majority of these organized themselves into the defendant (appellee) company, the title thereto became invested in it. One partner can not maintain detinue for the recovery of the partnership assets from his partners.

The trial judge correctly sustained the demurrer of appellee and dismissed appellants' petition, and this judgment is affirmed.

ROUGH RIVER TELEPHONE CO. v. CUMBERLAND TELEPHONE
AND TELEGRAPH CO.

(Filed January 17, 1905.)

Telephone companies—Rights in cities and towns—Consent of towns—How granted—Section 163 of the Constitution prohibits the erection by telephone companies of "poles, posts, etc., along, over, under or across the streets of a city or town without the consent of such city or town." Section 8619, Kentucky Statutes, part of the charter of towns of the sixth class, provides that "no order or resolution granting any franchise shall be passed.

by the board of trustees within five days after its introduction, nor at any other than a regular meeting." At a special meeting of the board of trustees of the town of Hartford, Ky., September 1, 1898, the following resolution was passed: "The Cumberland Telephone and Telegraph Co. made application for the privilege to set their posts and run their telephone lines through the streets of Hartford, Ky., which privilege was granted." Held—That this resolution is void, first, because it was not required to lay over five days from the time it was introduced; second, because it was passed at a special meeting of the board of trustees, and, therefore, conferred no right whatever upon the appellee.

Glenn & Ringo for appellant.

R. E. Lee Simmerman and G. B. Likens for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Barker.

The appellee, a corporation, was operating a telephone line over and along one of the public streets of Hartford, Ky., a city of the sixth class. The appellant, also a corporation, in placing poles along the same street for the purpose of erecting a telephone line, so stationed one of the poles, in the language of the petition, "that it displaces plaintiff's wires and jamps and bunches them together, so that plaintiff's exchange and system of telephone are greatly disarranged and their service greatly hindered and rendered worthless to many of plaintiff's subscribers, and will result in the loss of many of plaintiff's patrons if the wrongs complained of are allowed to be continued." The issues being made up, the court, by final judgment, awarded a perpetual injunction in accordance with the prayer of the petition. From this judgment appellant has appealed.

In the pleadings the right of appellee (plaintiff) to operate its line over the public highway of Hartford was placed in issue, and the view we have taken of this question renders unnecessary the consideration of any other question in the case. Section 163 of the Constitution prohibits, among other things, the erection by a telephone company of "its poles, posts or other apparatus, along, over, under or across the streets, alleys or public grounds of a city or town without the consent of the proper legislative bodies or boards of such cities or towns being first obtained." * * * Section 3699 of the Kentucky Statutes (charter of cities of the sixth class) provides as follows: "No order or resolution granting any franchise shall be passed by the board of trustees within five days after its introduction, nor at any other than a regular meeting." * * *

Whatever right appellee had in the streets of Hartford were obtained under the following resolution of its board of trustees, as appears from exhibit "A," filed by it:

"Special meeting of the Board of Trustees of the town of Hartford, Ky., September 1, 1898.

"The Cumberland Telephone and Telegraph Co. made application for the privilege to set their posts and run their telephone lines through the streets of Hartford, Ky., which privilege was granted.

"Attest: W. G. HARDWICK,

"Clerk Board of Trustees,

"Town of Hartford, Ky."

It will be observed that this resolution violates the charter of the municipality in two ways: First, it was not required to lay over five days from the time it was introduced before its passage; and, second, it was passed at a special meeting of the board. It was, therefore, void, and conferred no right whatever upon appellee. (East Tennessee Telephone Co. v. Anderson County Telephone Co., 22 Ky. Law Rep., 418; East Tennessee Telephone Co. v. Anderson County Telephone Co., 24 Ky. Law Rep., 2358; Maraman v. Ohio Valley Telephone Co., 25 Ky. Law Rep., 784.) In the second case cited, after quoting section 163 of the Constitution, the court, speaking through Chief Justice Burnam, said: "This section of the Constitution is mandatory and highly important, and as the Anderson Telephone Co. failed to comply with its provisions, or the statute passed pursuant thereto, it is clear that they had no right to use the streets or highway of the city of Lawrenceburg for the conduct of their business." Then, after discussing numerous authorities, it is said: "In this action they (the Anderson County Telephone Co.) can only recover upon the ground that they were prevented by an injunction sued out by appellant from exercising a lawful right to occupy the streets of the city with their plant; as it is conclusively shown they had no such legal right, but were mere trespassers, they have no standing in court."

The infirmity in the title to the franchise in each of the cases above cited was the same as in the case at bar. Originally, the East Tennessee Telephone Co. had enjoined the Anderson County Telephone Co. from operating a telephone line in Lawrenceburg, Ky., and had executed bond, according to law, as a condition precedent to the obtention of the order. This injunction was dismissed for the reason given in 22 Ky. Law Rep., 418. Thereupon the Anderson County Telephone Co. instituted an action on the bond to recover damages for the wrongful suing out of the injunction, and its right to maintain it was disposed of in the opinion contained in 24 Ky. Law Rep., 2358, the court holding that it could not recover damages on the bond for the wrongful suing out of the injunction, because it possessed no lawful franchise to operate a telephone line along the streets of Lawrenceburg, and, therefore, was not entitled to damages for being prevented from doing what it had no right to do, it being a mere trespasser. No practical difference can be discovered between the effect of preventing a telephone company from operating its franchise by a wrongfully obtained injunction, and from preventing its so doing by the wrongful erection of a pole which merely bunches its wires without otherwise injuring them. The injury arises in both cases from depriving the corporation of the power to earn money by the operation of its franchise. A mere trespasser can not complain that he is prevented from continuing his wrongful act. No injury is claimed to the corporeal property of appellee. The sole injury is the prevention of the full exercise of its invalid claim of a franchise in the streets of the city. It follows, therefore, under the authorities cited, that, as it has no such franchise, it can have received no injury of which equity will take cognizance.

For these reasons the judgment is reversed, with directions to dismiss the petition.

VAUGHN v. HULETT.

(Filed January 4, 1905.)

1. Road overseers—Compensation—Kentucky Statutes, section 4810, fixes the compensation of road overseers by exempting them from jury service and from poll tax for road and bridge purposes, and this excludes the idea that they can legally be allowed anything in addition thereto for their services as overseers.

2. Fiscal court—Authority to allow compensation—The fiscal court has no authority to allow road overseers \$50 per year, or any compensation for their services as overseers, and an order of said court making such allowance is void.

W. D. O'Neal, Jr., for appellant.

M. S. Burns for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Nunn.

At a special term of the fiscal court of Lawrence county, held in the month of June, 1903, the following order was entered: "It is ordered by the court that the road overseers of this county be paid a reasonable compensation per year as a salary for their services as such, but in no event to exceed \$50 per annum, beginning on and after July 1, 1903, and provided the number of overseers in the county is not to exceed twenty."

In pursuance of this order the county court caused the county to be divided into seventeen road precincts, and fixed the boundaries of the same and allotted all the able-bodied male citizens within the boundary between the ages of eighteen and fifty years to work on the roads in their respective precincts, and appointed for each precinct an overseer. Before the expiration of a year from the date of the appointment of these overseers the fiscal court made to them an allowance for their services as such overseers, and directed the treasurer of the county, who is the appellee, to pay them. The appellant, a citizen and taxpayer of the county, who sued for himself and the other taxpayers, brought this action against appellant to enjoin him from paying these orders upon the ground that they were void; that the law did not authorize the fiscal court to appropriate the funds of the county to pay overseers a salary or any compensation for their services as overseers of roads. It appears that the roads of Lawrence county are maintained by both taxation and by hands allotted to work thereon. The county has a supervisor of roads in addition to the seventeen overseers.

The only question necessary to be determined on this appeal is whether the fiscal court was authorized by law to allow overseers a salary or compensation for their services as such overseers. This is evidently what the fiscal court intended to and did do by its orders referred to. While the statutes on the subject are not clear, we have arrived at the conclusion that the court did not have any authority to make the orders, and that its action in the matter was void. The fiscal court is a court of limited powers, and has no jurisdiction to appropriate county funds except as it is authorized by law to do so. (22 Ky. Law Rep., 211; section 1840, Kentucky Statutes.)

The section of the statute referred to provides that the fiscal court shall have jurisdiction to appropriate county funds authorized by law to be ap-

propriated. We construe this to mean that the fiscal court has not the jurisdiction to appropriate the funds of the county for any purpose unless the law authorized the appropriation. The county court appoints the overseers and the fiscal court the supervisor. The statute, section 4310, fixed the compensation of overseers, wherein it is provided that they shall be exempt from service on juries, and from poll tax for road and bridge purposes. This language excludes the idea that they can legally be allowed or receive anything in addition thereto as compensation for their services as overseers.

The makers of the statutes on this subject contemplated that, in consideration of the benefits received under section 4310, the overseers would cause the roads to be worked by the road hands, as provided in section 4308, that is, not exceeding six days in any year, and in cases of unusual emergency. The overseers are required, for the consideration named, only to perform the work and labor required of them by the statutes in counties wherein the roads are not maintained by taxation. For their services performed by direction of the fiscal court, under section 4315, when there is no supervisor, and if appointed as assistant supervisor as authorized by sections 4344 and 4346, the fiscal court is authorized and directed to fix and appropriate money to pay a reasonable compensation to them for their services rendered by direction of the fiscal court other than for their services for which they are paid by reason of the exemptions and benefits provided for them by section 4310, Kentucky Statutes.

It appearing from the orders of the fiscal court that the allowance to the overseers was for the purpose of paying them a salary for their general services as overseers, under their appointment by the county court, and not for the purpose of paying them for special services rendered or to be rendered, under direction or by appointment of the fiscal court, by virtue of sections 4315, 4344 and 4346 we are, therefore, of the opinion that the orders of the fiscal court allowing to the overseers compensation or salaries for their services are void, and the court erred in dismissing appellant's petition.

Wherefore, the judgment of the lower court is reversed and remanded to the lower court for further proceedings consistent with this opinion.

Whole court sitting.

TAYLOR v. ADAIR COUNTY.

(Filed January 4, 1905.)

1. County board of health—Health officer—Appointment—Action for services—Sufficiency of answer—In an action against the county by a county health officer for his services for one year in inspecting localities and persons thought to be infected with contagious diseases and for treating such diseases, an answer by the county denying, upon knowledge or information, that the plaintiff had been appointed health officer, or a member of the board of health, was an sufficient denial, as these boards are not required by statute to keep records of their proceedings.

2. Power of board to delegate its duties to health officer—The county board of health has not the power to delegate its duties to the county health officer in the matter of looking after epidemics of contagious diseases. It is to the county board and not to the health officer that is committed the duty of examining into these nuisances and conditions of filth and infection

that tend to spread contagious diseases, and it must act as a board on each case or epidemic as it arises.

3. Fiscal court—Fixing compensation—The fiscal court of a county can not fix the compensation of a county health officer in advance of rendering the service as it can not then be known what service he may be required to render.

4. Petition—Necessary allegations—A petition for services by a county health officer which fails to show that the patients were not able and willing to pay for the service rendered them, or that they were indigent persons, or that any of them were treated in the county pest house or other place where they were confined, by order of the board of health, or that they were treated by order of the board of health, is demurrable.

J. F. Montgomery and W. W. Jones for appellant.

James Garnett, Jr., and Jas. Garnett for appellee.

Appeal from Adair Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant alleges in his petition, against appellee that he as a member of the county board of health of Adair county; was appointed health officer by that board, and that while so acting he rendered services to the county in one year in inspecting localities and persons thought to be affected with contagious diseases, and treated quite a number affected with smallpox, and some who had scarlet fever. He presented a bill amounting to \$245 for the services, which the fiscal court refused to allow or pay.

The answer denied, upon knowledge or information, that appellant had been appointed health officer, or had been appointed a member of the board of health. This was a sufficient denial, because these boards are not required by statute to keep records of their proceedings. (*Bardstown v. Nelson County*, 25 Ky. Law Rep., 1900.) Therefore, these acts, though official, are not presumed to be known of every one. It also denied that he rendered the services charged for, or that they were worth the sums charged. In addition, the defense was that prior to the time when appellant claims to have been appointed health officer, and to have rendered the services sued for, the fiscal court of Adair county had, by an order of court, fixed the salary of the health officer at \$40 per annum, and that appellant accepted the appointment and rendered the services with knowledge of that fact, and had for a time acquiesced in it by accepting payments based on that allowance.

A demurrer having been overruled to the last-named plea, appellant declined to plead further, and his petition was dismissed, hence this appeal. The county's position is that as the salary or compensation of appellant was fixed before his term of office began, it could not be either increased or diminished during his term. (Constitution, section 161.) The statute (section 2060, Kentucky Statutes) reads: "Physicians appointed as health officers for cities, towns and counties shall receive reasonable compensation for their services, to be allowed by the councils, trustees or county (fiscal) courts of the cities, towns or counties, and to be paid as other city, town or county officers are paid, and such officers may be removed at any time by the local boards appointing them." * * *

County judges and treasurers are to be paid annual salaries, to be fixed at reasonable amounts by the fiscal courts. (Sections 1072, 984 Kentucky Statutes.) The fees allowed to certain officers as compensation in lieu of salaries are subject to the same constitutional limitation. (Bright v. Stone, Auditor, 20 Ky. Law Rep., 817.) But here it is not known what services may be rendered. They are of a nature that may vary considerably in value and extent in different years. Some years no services may be rendered. Again, an epidemic of smallpox or yellow fever might take all the health officer's time for a great part of a year. For that reason it seems that the legislature has not seen proper to require a salary to be fixed and paid to such officer, but that for such services as he may render he shall be paid reasonable compensation. That can not be determined in advance, if for no other reason, because their nature and extent are impossible to be known before the emergency happens calling for them. If it is intended to fix in advance the pay for such services, a reasonable schedule of rates might be adopted. A salary of \$40, which should cover all possible services that may be required of the health officer in a year, while in some instances it might be enough, or even too much, yet in others it would be manifestly and grossly inadequate. The result must be, if it be allowed, to deter qualified physicians from accepting such appointments. In this way fiscal courts might overthrow the legislative provision in its practical application, by which it was intended that the treatment of these deadly contagions might be controlled or stamped out by the employment of skilled and competent physicians. The action of the fiscal court in attempting to so fix a salary in advance was not binding, under the circumstances shown, upon the health officer, for it was his duty to do what the law required of him, under direction of the board of health, in stamping out and preventing the spread of contagious diseases, and he has the right to claim adequate pay for his services, which the fiscal court must allow, if the services were in fact rendered as required by the law.

We are of the opinion, however, that while the demurrer should have been sustained to that defense, yet it should have been carried back to the petition in this case. The petition alleges that the county board of health when appointing appellant health officer gave him general authority and direction to look after epidemics of contagious and infectious diseases appearing in the county, and to make all necessary inspections and visitations called for by the situations that might arise. We are of opinion that the county board of health had not the power to delegate its duties in such matters, and that it could not, by an attempt to do so, create any right in the health officer that did not already exist. The powers given to these boards are extraordinary, seemingly justified by the most serious exigency affecting the public health. More than one person is required by statute to be appointed upon the board. The legislature was evidently unwilling to leave to one person the determination of such important and drastic measures as are given to the county boards. In the judgment and fidelity of a greater number acting together is the greatest security against abuse of extraordinary power. It is to the county board of health, not to the health officer, their creature and executive, that is committed the duty of examining into those nuisances and conditions of filth and infection that tend to spread the con-

tagious diseases: to establish quarantines, and to bring the population of an infected or suspected community into prescribed treatment and disinfection. This power is given by the statute to the board, and it must act as a board on each case or epidemic, as it arises, determining the necessities of each situation from the facts then existing. (Sections 2055, 2057, Kentucky Statutes.) The petition shows on its face that this was not done in Adair county, but that appellant, acting alone under the deputation of the county board, undertook to determine all such matters, and for his services in so doing the bill sued on is in large part made up. For other services, waiting upon smallpox patients, he charges the county. There is nothing to show that the patients were not fully able and willing to pay for the services rendered them; nothing whatever to show that they were indigent persons; nothing to show that any of them were treated in the county pest house, or other place where they were confined by order of the board of health, and nothing to show that they were treated by direction of the county board of health. (Hudgins v. Carter Co., 24 Ky. Law Rep., 1980.) For some of these charges there may be a right to recover. The circuit court should allow the petition to be amended, if it can be, so as to state a cause of action.

Judgment reversed and cause remanded for further proceedings consistent herewith.

KENTUCKY LIVE STOCK BREEDERS' ASSO'N, &c. v. MILLER, &c.

(Filed January 5, 1905.)

1. Indemnity—Promoting stock fair—Subscription to cover loss—Liability of subscribers—An action was brought by the Kentucky Live Stock Breeders' Association and the Citizens National Bank, which had advanced money to the association against the subscribers to the following paper: "The Kentucky State Fair, to be held by the Live Stock Breeders' Association during the week beginning September —, 1903, for the purpose of having the above described fair in or near the city of Owensboro, and of providing a fund to cover possible loss in giving said fair, the undersigned hereby subscribe the sums set opposite their names on condition that not less than — are subscribed. The loss, if any, be divided among the subscribers to the fund in proportion that each subscription bears to the whole amount subscribed." Held—That to the extent that the receipts of the association holding the fair at that point failed to pay the expenses thereof there was a deficit which in business parlance represented "a loss."

2. When liability attached—Condition precedent—It was not contemplated by the parties that the association should have to suffer judgment and sequestration of its property as a condition precedent to the liability of the subscribers on the obligation sued on.

3. Construction of writing—The paper sued on limits each subscriber's liability to a pro rata proportion of the total amount subscribed. No one guarantees the solvency of another, or that any other subscription will be paid. The association risked the solvency of each subscriber, and where any are insolvent the association will bear that loss.

4. Trading partnerships — Corporations—Ultra vires undertaking — The question as to whether a trading partnership or corporation who subscribed the paper is bound thereon, because the undertaking was contrary to the charter, or not within the original scope of the partnership, is not decided

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under the pleadings. If all the partners agreed to it or ratified it, and the association has thereby been induced to act upon it, between the copartners and the association it ought to be binding, and if a street railway induced the association to locate its fair at a certain point where it could get a monopoly of carrying visitors to and from the fair it would be liable.

5. Joint action—Separate liability—Under Civil Code, section 26, persons severally liable upon the same contract may be included in the same action at the plaintiff's option.

6. Who are subscribers—Those who never became bound are not subscribers, and the pro rata liability of those who are bound will be measured without reference to those who escape because they were not bound.

J. A. Dean and W. O. Harris for appellants.

La Vega Clements, C. S. Walker, Miller & Todd and J. D. Atchison for appellees.

Appeal from Davless Circuit Court.

Opinion of the court by Judge O'Rear.

To induce the holding of the annual fair of the Kentucky Live Stock Breeders' Association at or near the city of Owensboro for the year 1903, certain persons of that community gave to appellant association a writing, obligating the subscribers to make up any loss that might be sustained by the association. The paper, omitting signatures, is as follows: "The Kentucky State fair to be held by the Kentucky Live Stock Breeders' Association during the week beginning September —, 1903, for the purpose of having the above described fair in or near the city of Owensboro, and of providing a fund to cover possible loss in giving said fair, the undersigned hereby subscribe the sums set opposite their names on condition that not less than —— are subscribed. The loss, if any, to be divided among the subscribers to the fund in proportion that each subscription bears to the total amount subscribed."

This suit was brought by the Kentucky Live Stock Breeders' Association and by the Citizens National Bank, which had advanced money to the association upon assignment to it of the obligation first quoted, and against all the subscribers save two or three, one of whom was alleged to be dead and the other two insolvent. The petition setting out the interest and benefit to the subscribers, defendants, by the holding of the State Fair at Owensboro, charged that it was located and held at that point on the faith of the paper sued on, and that as a result the association had disbursed and expended in holding the fair the sum of \$33,420.78, while its receipts had been but \$21,594.49, leaving a deficit of \$11,826.29. It was averred that some of the subscribers were corporations and others trading firms, whose subscriptions were being denied or questioned because not within the scope of their charter privileges or partnership enterprises; that others were insolvent; that at least one was claiming that he had not in fact signed nor authorized the signing of the agreement. Plaintiffs asked a reference to the commissioner and the adjustment of the several liabilities of the subscribers, and for judgment against each in the pro rata sum so found against him.

A demurrer was sustained to the petition as amended, and the action was dismissed by the court. In an opinion delivered by the learned chancellor who sat in the case it is disclosed that the court construed the

writing sued upon to be a contract of indemnity against loss, several in nature, upon which no cause of action could be based until the obligee had actually sustained loss and had paid it. The petition disclosing that some part of the loss claimed was represented by the debt it owed the bank for borrowed money, and other parts by unpaid bills or accounts against the association, the trial court was of the opinion, and so held, that there was in fact no loss, inasmuch as it had not been definitely ascertained and actually paid. It was also thought by the trial court that a joint action in equity could not be maintained upon the obligation.

A very able and interesting discussion has been indulged by counsel concerning the nature of the obligation, whether it is a guaranty, a promise to pay or an indemnity. It seems to be conceded that if it be a guaranty or promise to pay, in the first instance, it is not necessary to show that the obligee had actually paid the liabilities incurred. On the other hand, it may be assumed that upon a contract of indemnity against loss the liability of the indemnitor is not complete till the indemnitee has sustained the loss, which includes its payment. Without tracing the lines of distinction between the classes of obligation, we come at once to determine the meaning of the words used by the parties to this agreement. The word "loss" is used twice in the paper. A fund is to be provided by the subscribers "to cover possible loss in giving said fair;" and "the loss, if any, to be divided among the subscribers to the fund in proportion that each subscription bears to the total amount subscribed." It is the presence of this word "loss" that alone suggests the idea of indemnity as determining the character of the paper. In seeking the meaning of the term, as intended by the parties, the etymology of the word will not be exclusively studied, but rather the situation and surroundings of the contracting persons. The obligors desired the appellant association to hold the State Fair at the city of Owensboro, in order to draw to that city the large and unusual crowds which it was believed the event would attract. These crowds were expected to expend considerable sums of money in the city, by which the merchants, street railway, transfer companies, and other business concerns, anticipated unusual profits and increase of income and business. All of the subscribers are alleged to have belonged to these classes, merchants and trading partnerships and corporations, and transfer and street railway companies doing business in Owensboro, Ky. On the other hand, the breeders' association evidently had misgivings as to the probability of its receipts from holding the fair at that point paying its expenses. To the extent that they did fail there would be a deficit. This deficit in business parlance represented "a loss." To induce the breeders' association to hold its fair at Owensboro, the subscribers agreed that they, to the extent of their subscriptions, would take the chance of there being a deficit of income over expenditures. So they agreed "to provide a fund to cover possible loss," that is, to cover the loss that might occur. Their subscriptions were not alone to pay back to the association money it paid out in conducting the fair over and above its income from the fair, but to provide a fund from which the "possible loss" was to be paid, in the first instance, if need be. It was not contemplated by the parties that the breeders' association should have to suffer judgments and sequestration of its property, or liquidation of its affairs, destruction of

its credit, annihilation of its corporate existence, or total bankruptcy as a condition precedent to the liability of the subscribers on the obligation sued on. Just the opposite must have been in mind, as if the association should fail to make expenses by locating and holding its fair at Owensboro, it was intended that not it, but the subscribers to the extent indicated, should carry all the burden of the failure. The "fund" to be provided under the agreement was the aggregate of the subscriptions. It was not necessary, nor was it contemplated, that the subscriptions were to be paid in advance. On the contrary, the "loss," that is, the deficit of receipts apportioned to cost of conducting the fair, was to be made up by pro rata assessments on the subscriptions. The expression, "the loss, if any, to be divided among the subscribers to the fund in proportion that each subscription bears to the total amount subscribed," means nothing else.

There is a class of liabilities that do not entail loss unless and until they are paid. Contingent and inchoate liability for the debts or doings of another may be so classed. But where one in his own business had expended more than the business had produced, whether the expenditure represented capital invested or borrowed means, or property and labor bought upon the credit of the concern, the deficit is in fact and in commercial understanding a loss. If appellant association had borrowed all the money it expended it would be no more a loss than it is now. Or if it had been settled by an assessment upon its stockholders it would be the same thing. The fact is, the very contingency contemplated by the parties as a "possible" result of the venture has occurred. It follows that the undertaking of the subscribers to bear the failure to the extent indicated has become absolute.

The next question is, what is the extent of each subscriber's liability? The paper in terms limits it to a pro rata proportion of the total amount subscribed. No one guarantees the solvency of another, or that any other subscription will be paid. The appellant association risked the solvency of each subscriber, and where any are insolvent the association will bear that loss. The question whether all whose names appear on the paper as subscribers are in fact bound thereon is not yet fully presented. Some who are apparently bound may be able to show that they were never bound, because, for example, they did not execute the paper. Others may be held never to have been bound, because their undertaking was contrary to the purposes of their charter, as in cases of certain corporations, and the act would be, therefore, ultra vires. On what may on the face appear an ineffectual attempt to bind a trading partnership or corporation, may be shown by acts of estoppel to be binding. The street railway corporation, for example, may not have had authority generally to become a party to a scheme to raise a fund to indemnify some other corporation against loss in the conduct of the latter's business. Yet the street railway company could make a valid contract to increase its own business. If it induced the fair company to locate at a certain point where the railway company would get a monopoly practically of carrying to and from the fair grounds all the visitors attending the fair, and it got all the benefits obtainable under its contract, there is ample authority and undoubted principle for holding it liable on its undertaking, for it is not every ultra vires undertaking that is unen-

forcible. So where a trading partnership signed the paper, it may or may not be invalid, for, although beyond the original scope of the partnership enterprise, still, if both or all the partners agreed to it, and ratified it, and the association has been induced to act upon it, as between the copartners and the association it ought to be binding, whether or not as a partnership liability, as a personal one against the individual members.

From what has been said the trial court can fix the liability or determine the nonliability of the putative subscribers. Those who never became bound are not subscribers, and the pro rata liability of those who are bound will be measured without reference to those who escape because they were never bound. Under the Civil Code of Practice (section 26) persons severally liable upon the same contract may be included in the same action at the plaintiff's option. The nature of this case presents circumstances of great complication, and other difficulties in the way of adequate relief at law, sufficiently indicated by the facts above recited, that makes it more appropriate that it should be determined and the relief apportioned and applied by a court of equity. (Pomperoy's Equity, sections 1420, 1421; O'Connor v. Henderson Bridge Co., 95 Ky., 643.)

Judgment reversed and cause remanded, with directions to overrule the demurrer to the petition as amended and for further proceedings not inconsistent herewith.

DEPPEN, &c. v. IMMOHR'S EX'OR.

(Filed January 10, 1905.)

Appeals—Death of appellant pending appeal—Decision without revivor—Effect—Where the appellant dies after his appeal has been filed in the appellate court and the appeal is decided in said court without an order of revivor, the decision of the appellate court is not void, but is erroneous, and the error can be corrected only in the Court of Appeals, and until so corrected is binding upon the parties and the lower court.

J. W. Clemmons and S. J. Boldrick for appellants.

H. H. Nettleroth and E. J. Bacon for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

The appellee's testate, H. F. Immohr, Louisville Banking Co. and one Hess, in the year 1900, recovered a judgment in the lower court against these appellants for the amount of several notes, and the enforcement of a mortgage lien on the real estate of appellants for the satisfaction of same. They appealed from that judgment without executing a supersedeas bond, and before this court passed upon the case the appellees caused that judgment to be executed, and the land sold to satisfy their judgment.

This court in the year 1902 reversed that judgment, and declared the notes and mortgage void, except to the extent of \$1,600, for the reasons stated in the opinion. (24 Ky. Law Rep., 1110.) When the mandate issued in that case was filed in the lower court the appellants learned for the first time that appellee's testate was dead. He died after the appeal referred to had

been taken and perfected, but before the submission of the case for trial. The court and appellants were not informed of his death, and consequently the case was submitted and opinion rendered reversing without any suggestion of his death or revivor against his personal representative. After the filing of the mandate in the lower court appellants filed an amended petition making Drexler, the executor of Immohr, a party, and sought to revive the action against him for the purpose of carrying the reversal into effect by recovering from the estate of Immohr the value of the land of which they had been deprived. The appellee filed a demurrer to this amended and supplemental petition, which was sustained. In this amended pleading appellants stated the facts that no revivor was had in the Court of Appeals; that appellee Drexler was not a party to that appeal, and that H. F. Immohr died before the case was submitted in the Court of Appeals.

Appellee contends that this reversal was absolutely void as to him, and that it was the duty of the lower court to take notice of this fact, and to hold it ineffectual so far as appellee was concerned. The court so held. The appellants claim that this was error; that the reversal was not void, at most it was merely erroneous. The question at issue is, was the reversal by this court merely erroneous and irregular, or was it absolutely null and void? If only erroneous and irregular, it was the duty of the lower court to give it full faith and credence until vacated or modified by the court which rendered the decision. If it was void, the action of the lower court must be affirmed; if merely irregular and erroneous, reversed.

We have examined with care the able briefs of counsel and the authorities therein cited, and we are of the opinion that the contention of appellants is the correct one. The decisions in most of the States hold that the death of a party after appeal is granted, without any revivor against his personal representative, does not render the decision of the appellate court void, and many of them hold that it is not even error.

The case of *Spalding v. Wathen*, 7 Bush, 661, sustains our view of this question. In that case a negro man named "John," in the year 1858, sued Wathen for his freedom. The case was tried in the year 1863, and "John" was defeated. He then went into the army, and died at Paducah, Ky., in the year 1864. About eight months after his death the attorney who represented him, not knowing of his death, appealed his case to this court, which reversed that judgment and directed the lower court to grant John his freedom, which was done, and a judgment rendered by the lower court in his favor against Wathen for the value of his services from the time he brought his action. Upon this judgment an execution was issued and levied on the land of Wathen, which was sold.

Wathen then filed an action, alleging that he had just discovered the fact that John had died several months before the appeal of his case to this court, and there was no revivor therein, and that by reason thereof all the proceedings had in this court and in the lower court after the death of John were void. The lower court sustained Wathen, but on an appeal this court, in an opinion by Judge Lindsay, reversed the judgment, and said: "Unless the granting of the first appeal, the judgment of this court reversing the action of the court below, and the mandate of this court directing the subsequent proceedings in the lower court are void, we do not well see how the

decision of the common pleas court can be sustained. The judgments of all courts of competent jurisdiction are binding upon the parties thereto until reversed or vacated in the manner prescribed by law, notwithstanding irregularities in the proceedings through which the same are obtained. The Union Circuit Court had jurisdiction of the persons and the subject-matter of the controversy between John and Wathen; and from the judgment of said court in that action an appeal to this court was authorized by express statute. The death of John after judgment in the circuit court, and before the appeal was prosecuted, did not take away from this court the right to entertain it. Regularly a personal representative should have been appointed and the appeal prosecuted in his name, but we are not prepared to say that the want of a personal representative renders void the appeal and all the proceedings had under the same."

In the same case, when deciding the fact that the want of a personal representative did not render void the appeal and the proceedings had thereunder, the court said: "Such a conclusion might be insisted upon with some degree of plausibility in cases of the death before judgment of the defendant in the court below, or of the appellee in this court, as in such cases there would be no person in esse upon whom a judgment in personam could be made to operate, nor whose title to property could be divested by a judgment in rem; but even this proposition is by no means free from doubt."

We agree that in that case it might have been argued with great plausibility that the rule might have been different if Wathen, the appellee, had died before the appeal was taken, for in such case this court would not have obtained jurisdiction of the appellee, Wathen. But the intimation of the court in that case, to the effect that it might be argued with plausibility that the rule therein applied might not apply to an appellee, because there would be no one in esse against whom the decision could operate. This was an expression of an opinion outside the case, and one of great doubt as therein expressed. If the reason given for the doubt, to wit, there being no one in esse against whom the decision could operate," is sound, and applicable to the case at bar, then it would conflict with many decisions of this court, for it has been universally held, which is conceded by appellee, that if either party to an appeal in this court dies after a submission of the appeal and before opinion rendered, that it does not even amount to an error, and that same is as valid and binding as if the parties had survived until after the final decision. The reason stated would have the effect to conflict with these cases, for in them there was "no one in esse at the time the decisions were rendered upon whom they could operate."

This court does not in the ordinary sense render judgments, but reviews the action of the lower court, and determines whether it was correct or erroneous. In our opinion the reason for the necessity of a revivor on an appeal is to give the parties an opportunity to be heard upon the question involved on the appeal. But when the court has once obtained jurisdiction of the parties and the subject-matter, it may decide the case without giving either party a hearing, and its action would not be void, but would be flagrantly erroneous. The error could be corrected in this court only, but until so corrected the decision would be binding upon the parties and the lower court.

This court, in the case of *Spalding v. Wathen*, supra, after expressing the doubt of the applicability of the principle therein enunciated as applicable to appellees, quoted with approval the following language from an opinion in 1 J. J. M., 80: "Errors of fact or law may, and frequently do, occur in trials which can not be corrected by writ of error to this court. If, for instance, a judgment be rendered in favor of or against a feme covert suing or defending as a feme sole, or in favor of or against a dead man, which would be manifestly erroneous, as soon as the fact shall be made to appear the error could be corrected only by the court which rendered the judgment."

This answers the doubt expressed in the opinion, and shows conclusively that the rule applies equally to appellant or appellee, for it says "or a dead man," but the court continues to settle the doubt as follows: "John's death, if known, should have been taken advantage of in this court by a plea under the provisions of section 898 of the Code. As it was not known to Wathen prior to the reversal of the judgment appealed from, and as the judgment of reversal upon its face was regular, and its validity not a question which could be properly inquired into in a collateral proceeding, the only means by which Wathen could obtain relief against it was by an application to this court, upon the discovery of John's death, for the correction of its judgment, for the reason as held in the opinion cited above. It was an error which 'could be corrected (if at all) only by the court which rendered the judgment.' This conclusion is fortified by the sixth subsection of section 576 (now 518) of the Civil Code, which provides that the death of one of the parties before judgment shall be ground for the vacation of the judgment by the court in which it was rendered. It would have been an act of folly for the legislature to have enacted that the existence of a fact should constitute valid ground for the vacation of a judgment, which fact of itself rendered such judgment absolutely null and void."

The following authorities tend to support the principle above stated: *Hopkins v. Hopkins*, 91 Ky., 312; section 518 of the Code, subsection 6; *Freeman on Judgments*, sections 140 and 1153. The appellee cites as sustaining his position 20 Ky. Law Rep., 1; 83 Ky., 898; 89 Ky., 580, and 24 Ky. Law Rep., 704. These cases in effect decide that in the event of the death of a party to an appeal before submission it is necessary and proper to revive against the personal representative of the decedent. This is not in conflict, but in harmony, with the conclusion we have reached, that the revivor is necessary and proper to make the decision perfect or free from error, but even without a revivor the decision is erroneous only, and not void.

For the reasons indicated the judgment is reversed and cause remanded to the lower court for proceedings consistent herewith.

FUQUA, SUPERINTENDENT OF PUBLIC INSTRUCTION v. HAGER,
AUDITOR.

(Filed January 10, 1905.)

School fund—Taxation of foreign insurance companies—Money paid into the treasury by foreign insurance companies on account of the tax of \$2 upon each \$100 of premiums collected by them is no part of the annual tax

of 22 cents on each \$100 of value of real or personal estate or corporate franchises directed to be assessed for taxation, and is, therefore, not embraced by subdivision 5 of section 4370, Kentucky Statutes, specifying what shall constitute the school fund of the State.

J. H. Hazelrigg and N. B. Hays for appellant.

Lewis McQuown, E. H. Brown, Jr., and H. R. Prewitt for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hobson.

By the statutes of this State foreign insurance companies are required on the 1st day of July in each year to return to the auditor of public accounts a statement under oath of all premiums received since their last report and at the same time pay into the State treasury a tax of \$2 upon each \$100 of premiums received. The superintendent of public instruction conceiving that a part of the funds arising from this tax should be paid into the school fund, brought this action against the auditor, charging that something over \$180,000 was due on this account to the school fund for the present fiscal year, and praying judgment therefor. The circuit court sustained a demurrer to the petition and the superintendent appeals.

By section 4019, Kentucky Statutes, an annual tax of 50 cents is levied upon each \$100 of value of all property assessed for taxation, 22½ cents for the ordinary expenses of the government, 22 cents for the support of the common schools, 5 cents for the use of the sinking fund, and one-half of one cent for the agricultural and mechanical college. In section 4370, Kentucky Statutes, in specifying what shall constitute the school fund, after other provisions not here material, are the following:

"5th. The annual tax of 22 cents on each \$100 of value of all real and personal estate and corporate franchises directed to be assessed for taxation.

"6th. Such portions of fines, forfeitures and licenses which may be realized by the State as the amount of taxes for common school purposes bears to the whole State tax other than for the benefit of the Agricultural and Mechanical College."

The money paid into the treasury by the foreign insurance companies on account of the tax of \$2 upon each \$100 of premiums collected by them is no part of the annual tax of 22 cents on each \$100 of value of real or personal estate or corporate franchises directed to be assessed for taxation, but is an entirely different tax, and, therefore, subdivision 5 has no application. But it is earnestly argued that this tax is included by the words "fines, forfeitures and licenses," in subsection 6, and, therefore, the portion of the tax indicated in this subsection should be paid into the school fund. It is not contended that the tax is a fine or forfeiture, but it is insisted that it is in effect a license tax, and is, therefore, included within the statute. But it will be observed that the statute does not use the expression "license taxes;" its language is "licenses."

The statute provides for a number of licenses, such as for retailing liquors, selling playing cards, bowie knives; licenses to pawn brokers, bowling alleys, circuses, oil depots or wagons, standing a stud, jack or bull, peddling, rectifying, etc. In all these cases the license must be taken out in advance, and is required to be then paid for. A penalty is imposed if the

business is carried on without license. The word "licenses" in the statute before us would aptly refer to this fund, but the fund paid in by the insurance companies is paid in at the end of the year, and is directly a tax upon their receipts or income; and while it is in one sense a license tax we are satisfied it was not contemplated by the legislature when it used the word "licenses" in the statute above quoted. This mode of taxing foreign insurance companies has been in vogue in this State for about sixty years, and during all that time no part of the tax had ever been paid to the school fund. This has been the rule followed under several revisions of the statutes and was necessarily familiar to the legislature, and if it had contemplated a change of a rule so well understood it must be presumed it would have used language more clearly indicating such an intention. The present act was passed on July 6, 1898, and has been so construed by all the departments of the government from that time until the present controversy arose. The contemporaneous construction of the statute through several administrations is not without force. And besides all this, the present revenue act was passed by the general assembly in the year 1902, and in fixing the amount of the school tax and the tax for the general expense fund presumably the legislature acted in view of the construction of the statute then in force. As shown by the last auditor's report there was a considerable deficiency in the general expense fund, and if the money were now taken from the treasury and put into the school fund, as sought by appellant, the fiscal affairs of the State would be put in inextricable confusion and there would be a large deficiency in the general fund, perhaps for the whole time not less than a million dollars. It can not be presumed that the legislature in fixing the tax for the general expense of the government intended to fix an amount so inadequate as appellant's contention would require us to conclude.

Judgment affirmed.

COWPER v. WEAVER'S ADM'R, &c.

(Filed January 10, 1905.)

Judicial sale—Real estate—Purchaser—Refusal to execute bond—Failure of court to confirm bid—Resale—Liability of first bidder for deficit—Where a sale of real estate is made by the commissioner of the court under a decree of the court, the purchaser is only a preferred bidder until his bid is accepted by the court by confirming the sale, and when the purchaser refused to execute bond and the sale was reported to the court, which decided not to confirm it, but treated it as though it had not been made, and ordered a resale thereof, if upon a resale the land shall sell for less than was offered by the first purchaser, he can not be held liable for the deficiency.

Hendrick & Miller and J. C. Hodge for appellant.

C. H. Wilson, J. W. Bush and C. C. Grassham for appellees.

Appeal from Livingston Circuit Court.

Opinion of the court by Chief Justice Hobson.

D. B. Weaver died a resident of Livingston county, and his administrator brought this suit to sell the land owned by him for the payment of debts and for the settlement of his estate. At the April term, 1903, a judgment

was entered directing a sale of the real estate. The sale was made on June 1, and at it appellant, R. B. Cowper, bid in lots 67, 68, 69, 70, and a part of lot 17, for \$265. After the sale he seems to have concluded that the title of the intestate to the land was not good, and refused to execute a bond for the price. The commissioner on September 9 filed his report of sale, stating that Cowper had purchased the property at the sale and had refused to execute a sale bond. On this report, on September 25, the court, without taking any proceedings against Cowper or confirming the sale, entered the following order: "It appearing to the court by report of the master commissioner, W. I. Clarke, that he sold to R. B. Cowper lots 67, 68, 69, 70 and 71, and a part of out lot No. 17, as appears on the town plat of Smithland, Ky., and said Cowper having failed and refused to execute bonds therefor, and said fact being made known to this court as aforesaid, the said commissioner is here directed to treat said sale to Cowper as if it had not been made and re-advertise said property for sale and sell same in the full way and manner set out and directed in the judgment filed herein, and will in all respects comply with said judgment in taking bond, making report and so forth, and so on, as herein set out, and this cause is continued."

The resale was made on November 2, 1893, and at it the property brought the sum of \$32. Thereupon at the December term of the court the court awarded a rule against Cowper to show cause, if any he could, why he should not pay the difference between the bid made by him and the bid made at the second sale, which the court then confirmed. Appellant Cowper in response to this rule set out that the intestate had no title to the property, and also relied on various irregularities in the proceedings. He also set up the order above quoted by which the sale to him was ordered to be treated as a nullity, and pleaded it in bar of the rule in connection with the subsequent orders of the court confirming the second sale and conveying the property to the purchaser thereat. In *Makeson v. Brawn*, 18 Ky. Law Rep., 584, the commissioner sold a tract of land and the purchaser failing to execute bond re-advertised the property and made a second sale at the next county court. He then reported to the court both the sales. The court confirmed the second sale and ordered the property conveyed to the purchaser. After this a rule was taken out against the purchaser at the first sale to show cause why he should not pay the deficiency. It was held that he was not liable. The court said: "While an accepted bidder at a judicial sale who fails to comply with his bid may, by proper proceedings, be required to pay the damage resulting from such failure, which would include the difference between the bid, if any, and the amount realized on the final sale, if the property sold for less on that sale than at the former sale, yet where the commissioner has elected to treat the bid as a nullity, and has proceeded to advertise and resell the property, and the second sale has been confirmed without objection, it is then too late to proceed against the first purchaser for failure to comply with the terms of the sale."

The commissioner in making the sale is the agent of the court. His powers are limited by the orders of the court. He has no power to treat a sale as a nullity, and in the case cited the judgment of the court turned not on the action of the commissioner, but on the order of the court confirming the action of the commissioner, for the act of the agent amounted to nothing.

until it was ratified by the court. The commissioner is simply ordered to sell the property. He is without power to release the purchaser from his obligation. The liability of the purchaser depends upon the action of the court. In the case at bar the court ordered the sale to be treated as a nullity; he directed the land to be resold, and when that sale was made he confirmed it and directed the property to be conveyed to the purchaser. The purchaser at the first sale was only a preferred bidder until his bid was accepted by the court by confirming the sale. The contract was not complete, and when the court decided not to confirm the sale, but to treat it as though it had not been made, the purchaser stood simply as any other person who makes a proposition which is not accepted. When the purchaser fails to execute his bond it may be that the parties prefer another sale, thinking that the property will sell for more, and in this event the court may so order without taking any proceedings against the purchaser. But if it is desired to hold the purchaser, then his bid must be accepted by the court, and if he still refuses to give the bond a resale may be ordered or the purchaser may be dealt with as in cases of contempt, and in this state of case, if the land on the second sale sells for more than on the first, the surplus will belong to the purchaser. The court can not, however, treat the sale as a nullity and thus keep the surplus, if the land on the second sale sells for more than on the first, and at the same time hold the purchaser responsible for the deficiency if on the second sale it sells for less.

In *Shirley v. Shewmaker*, 23 Ky. Law Rep., 452, the first sale was confirmed by the court and a rule was taken against the purchaser to show cause why he should not give bond, which was made absolute. *Brassfield v. Burgees*, 10 Ky. Law Rep., 660, is in effect the same, and so is *Tyler v. Guthrie*, 17 Ky. Law Rep., 693. But in none of the cases is the court allowed to treat the sale as a nullity and still proceed to hold the purchaser liable.

Judgment reversed and cause remanded, with directions to discharge the rule against appellant.

WHITT V. COMMONWEALTH.

(Filed January 10, 1905—Not to be reported.)

Criminal law—Evidence—Impeachment of witness—Under section 596 of the Code, which applies to criminal trials as well as civil, a party introducing a witness may impeach him by showing that he has made statements different from his present testimony, but such evidence must be limited in its effect upon its impeachment of the witness, and in this prosecution the failure of the trial court to admonish the jury that testimony tending to prove that one of the prosecuting witnesses had made statements different upon the examining trial to those testified to by him upon the trial in the circuit court, should be considered solely as affecting his credibility and not as substantive testimony against the accused, was error.

A. F. Byrd for appellant.

N. B. Hays and D. D. Sublett for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, charged with the murder of Willie Reed, was convicted of manslaughter. There were a number of eyewitnesses, the weight of whose testimony seems to show a case of justifiable homicide. Only two witnesses gave testimony prejudicial to the accused, and they were so impeached as to raise not unreasonably a serious doubt of their story. In addition to them, the prosecution introduced one Clarence Harper, also an eyewitness, whose testimony showed clearly that appellant shot in his necessary self-defense. On cross-examination he was asked if he did not on the examining trial before the county judge testify to a materially different version of the affair, and if he had not then testified that appellant ran up to deceased and shot him while he was walking away from a fight he had been engaged in with Andy Whitt, brother of appellant, and Bud Brown. Harper denied having so testified. The witnesses were then introduced by the Commonwealth, who proved that they were present at the examining trial and heard Harper's testimony, and that he had then testified as last indicated. The court was asked to admonish the jury that the testimony was admitted solely as affecting the credibility of Harper as a witness, and not at all as substantive evidence against the accused. The court refused to so instruct or admonish the jury, which was error. Unless the two prosecuting witnesses first named, Burgett and wife, were corroborated, it looks like the case of the prosecution had failed. If, then, it were made to appear that another eyewitness had seen the occurrence as those two did, it was a most material point for the prosecution. The admission of the evidence showing that Harper had so testified on another trial, without admonition to the jury of the legal effect of such evidence, might have been construed by the jury as substantiating Burgett and wife's testimony. But when the court expressly declined to limit it to that effect, it went to the jury impressed with what was equivalent to an affirmation by the court that it was substantive evidence as to how the killing occurred.

Under section 596 of the Code of Practice, which applies to criminal trials as well as to civil, a party introducing a witness may impeach him by showing that he has made statements different from his present testimony. But such impeaching evidence must of necessity be limited in its effect to the impeachment of the witness, as otherwise it would result in admitting evidence of what one said out of court, when maybe he was not under oath. (Champ v. Commonwealth, 2 Met., 17; Mosely v. Commonwealth, 24 Ky. Law Rep., 1811; Loving v. Commonwealth, 80 Ky., 511.)

Judgment reversed and cause remanded, with direction to award appellant a new trial under proceedings not inconsistent herewith.

SMITH'S GUARDIAN v. HOLTHEIDE.

(Filed January 10, 1905—Not to be reported.)

1. Former appeal—Res judicata—In this action by an infant and its statutory guardian to recover certain mense profits growing out of a house and lot, the petition averring that the real estate descended to the infant as the only child and heir at law of its mother and that his father becam

entitled to the use of one-third of it for life, it was further averred that appellee, his grandmother, brought a suit in the Jefferson Circuit Court against the infant and his father to recover the real estate mentioned, upon the alleged ground that she had furnished the money to pay for the property with the understanding that the property should be conveyed to her, which action was decided in favor of appellant by the Court of Appeals, which court directed that the action be dismissed, which was done. The accounting in this action being for rents of this property, the defense being the same claim set up in appellant's former action, the plea of res judicata interposed by appellees was properly sustained.

2. Attorney's fee—The claim of appellants for an attorney's fee in this action was properly rejected. Whatever may have been the rule anciently, by our present statute the attorney's fee allowed to be taxed in favor of the successful party in cases involving the title to land is all that can be recovered in a case like the one at bar.

Win. Furlong and John Roberts for appellant.

Wilson & Gifford for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Settle.

This action was instituted in the lower court by the appellant, Frederick K. Smith, an infant, and the Louisville Trust Co., his statutory guardian, against the appellee, Eliza Holtheide, to recover two-thirds of the mesne profits upon a certain house and lot in the city of Louisville, described in the petition, of which he claims to have been wrongfully deprived of the possession by appellee from March 1, 1899, to November 1, 1903.

It was in substance averred in the petition that the real estate in question descended to the infant as the only child and heir at law of his mother, Lula Smith, who died in 1899, and that his father, R. T. Smith, Jr., became entitled to the use for life of one-third in value of the property. It was further averred in the petition that the appellee, who was the mother of Lula Smith, and is, therefore, the grandmother of the infant appellant, in September, 1901, brought suit in the Jefferson Circuit Court against appellant and his father to recover the real estate mentioned, upon the alleged ground that the property had been paid for by her through her daughter, Lula Smith, then Lula Holtheide, and with the understanding that the title to the property would be conveyed appellee by the vendors, but that without her knowledge or consent the daughter caused the deed thereto to be made to herself; that the recovery sought of the property by appellee in that action was resisted by the infant and his guardian and also by his father, R. T. Smith, Jr., and they by answer denied her right to the property and alleged ownership in themselves, notwithstanding which it was adjudged by the lower court that appellee was entitled to the same, and it was given her. Thereupon appellants took an appeal from the judgment depriving them of the property, and upon the hearing of the appeal it was decided by this court that the judgment giving appellee the property was erroneous, and consequently reversed and remanded the cause, with directions to the lower court to dismiss appellee's petition, which was accordingly done. (Smith's Guardian, &c. v. Holtheide, 25 Ky. Law Rep., 125.)

The accounting demanded by the infant appellant in this action is for the rents covering the time intervening between the death of his mother and the determination of the controversy over the title to the property in the Court of Appeals, and in addition an attorney's fee of \$500, which the infant was compelled to pay his attorney for his services rendered in the former case in the lower court and Court of Appeals. The answer of appellee denied the claim of appellant for an attorney's fee and rents, except to the amount of \$275, rents collected between the date of the decision in the former action of the lower court giving her the property and the date of the filing in that court of the mandate of this court depriving her of it; but it is averred in the answer that she should be credited upon the \$275 of rents with certain taxes and insurance paid by her upon the property during that time, amounting to \$114.69. The answer, by way of counterclaim, further seeks the recovery of the money claimed to have been paid by the appellee for the house and lot conveyed her daughter, Lula Smith, and which this court in the former action held to have been a gift to her daughter. Appellants, by reply, interposed the plea of res judicata to the last claim, which the lower court sustained.

The evidence heard upon the trial conclusively showed that the infant appellant and his father were living on the property with the appellee from the death of Lula Smith until the time of the decision by the lower court of the action brought by appellee to recover the property. Appellants appealed from that judgment without superseding it, and voluntarily left the property and remained out of its use until the mandate of this court reversing that judgment was entered in the lower court. During this time the appellee collected \$275 of rents upon the property and expended thereon in taxes, insurance and repairs \$114.69, as fully shown by the evidence. We think the court properly sustained the plea of res judicata, as the same demand set forth by the counterclaim was settled and rejected by this court in the former action. We also think the lower court properly rejected the claim for an attorney's fee set up by appellants. Whatever may have been the rule of law anciently, by our present statute the attorney's fee allowed to be taxed in favor of the successful party in cases involving the title to land is all that can be recovered in a case like the one at bar. We are also of opinion that the instruction given by the court presented the entire law of the case after eliminating, as was done, all false, immaterial and unsupported issues.

The instruction was as follows: "The court instructs the jury to find for the plaintiff a sum equal to two-thirds of the difference between \$275, the amount of rent collected by the defendant from the property involved herein, and the amount the jury believe from the evidence was reasonably expended by defendant during the time she collected said rent, for taxes, insurance and repairs on said property, and commissions for collecting said rent, this latter amount not to exceed the sum of \$114.69, the amount claimed by defendant to have been expended by her for said taxes, insurance, repairs and commissions. The jury may allow interest on the sum found by them from November 1, 1908."

Under this instruction the jury returned a verdict in appellee's favor for \$106.85, which was proper. We are further of opinion that the court did not

err in overruling the motions of appellant and appellee respectively for a new trial.

Wherefore, the judgment is affirmed on both the original and cross appeal.

LOUISVILLE RAILWAY CO. v. DeGORE.

(Filed January 10, 1905—Not to be reported.)

Affidavit for continuance—Grounds for new trial—A motion for a new trial in this action upon the ground that appellee made an affidavit for a continuance on the ground that an absent witness would swear to certain facts, if present, when after the trial was over appellant learned that the witness would have sworn to the reverse, was properly overruled in view of the ruling of this court in *Gibson v. Sutton*, 24 Ky. Law Rep., 868, where it is held that after admitting what an absent witness would prove as set out in an affidavit, it can not be seriously contended that a new trial should be granted after an adverse verdict was rendered on the ground that the witness would have made statements different from those recited in the affidavit, if the witness had been present.

Fairleigh, Straus & Fairleigh and R. L. Greene for appellant.

Edwards & Ogden, Loraine Mix and Sam D. Hines for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Nunn.

This appeal is from a judgment for \$4,000 in favor of appellee on account of alleged injuries she sustained by reason of the negligent management and operation of one of appellant's cars by its agents and servants in charge.

In her petition she alleged, in substance, that the employes in charge of the car brought it to a stop on the west side of Sixth street for the purpose of allowing her to alight, and that while she was attempting to get off the appellant's agents and servants in charge of and operating the car wrongfully, recklessly, carelessly and negligently put the car in motion, thereby throwing appellee with great force to the street; that by reason of her fall she was painfully and severely bruised and injured about her body and limbs, and suffered great mental and physical pain and anguish; that her hip and left limb were so bruised and injured that she would forever be lame; that her left lung was so injured that she suffered pain continuously, and frequent hemorrhages resulted therefrom.

The appellant controverted the petition and plead contributory negligence on her part, which was denied by appellee. The proof, without contradiction, shows that early on the morning of June 4, 1903, appellee fell on the street in alighting from one of appellant's cars at the crossing of Sixth and Market streets. Appellant's evidence conduces to show that her fall was caused by her own negligence in attempting to alight before the car had come to a stop, and that her injuries were only slight. Appellee's evidence tended to show that the car had stopped, but at the moment of alighting was suddenly started, which caused her to fall or be thrown to the street, and that her injuries were very severe, and permanent. The grounds presented for a new trial were few:

1st. That the verdict was flagrantly against the evidence.

2d. The damages awarded were excessive.

3d. The court erred in refusing a new trial on the ground that the affidavit of appellee for a continuance stated that one Dolan, an absent witness, would swear, if present, to certain facts, when after the trial was over appellant had learned that Dolan, if he had been present, would have sworn precisely the reverse of the statements contained in the affidavit.

This court in the case of *Gibson v. Sutton*, 24 Ky. Law Rep., 868, settled the last proposition against the appellant. In that case this court said: "And certainly it can not be seriously contended that, after admitting that an absent witness would prove the facts recited in an affidavit for a continuance in order to secure a trial, after an adverse verdict a new trial would be granted on the ground that the absent witness would have made statements different from those recited in the affidavit if he had been present."

Appellant admits this to be the rule under ordinary circumstances, but says that it should not be applied in this case for the reason that appellee knew when she swore to the affidavit for a continuance that Dolan would not make the statements as stated by her. If this were true, appellant's position would be correct. Such fraudulent practice and conduct should have been condemned by the court, and no judgment obtained in such manner should be permitted to stand. A party obtaining a judgment by such fraudulent conduct and impositions should not be permitted to reap any benefit therefrom. But the evidence on this point is overwhelming that appellee was entirely innocent of any wrongful or fraudulent conduct in the matter. The contention of appellee was that the car was negligently put in motion while she was alighting therefrom, and by reason thereof she was precipitated into the street, and injured. Appellant contends that she negligently attempted to alight from the car before it was stopped, and by reason thereof she was thrown to the street. Both parties introduced evidence tending to prove their respective versions. It was the province of the jury to weigh the evidence and determine upon which side the preponderance of the evidence is, and the jury in this case found it on the side of appellee. As to the extent of appellee's injuries, this is a more complicated and difficult question.

Appellee, her mother, and three ladies, who lived near neighbors and saw appellee almost daily, stated that from the time of her injury up to the time of trial, a period of about seven months, she suffered intense pains in the back on the left side of the spine and in the left hip; that she had not, during that period, been able to labor or care for herself, but was confined to her bed during most of that time, under the treatment of physicians. They, with other witnesses, proved that prior to her injuries appellee had been in good health, and labored daily for the support of herself and mother. The two physicians first called to see her testified in substance that appellee complained of many pains and much suffering, but could not detect the cause of the pains; that it was reported by appellee and her family that she had repeated hemorrhages; that they were shown the blood said to have been discharged by her, and that from its red and frothy appearance it looked as if it might have come from the lungs, but that they could not understand, nor detect, the cause of it.

Two other physicians followed them in the treatment of her. Both of these stated that they had seen the blood which was reported to have been ejected by appellee. One of the two physicians stated that he was present on one occasion when she had a hemorrhage. They gave it as their opinion that from the appearance of the blood it emanated from the lungs. They also testified that she claimed to suffer excruciating pains at the places located by the other physicians. They made repeated examinations and could not detect the direct cause of the pains, but were of the opinion, from examination and her appearance, that she suffered as she claimed. They found the left hip and limb slightly smaller and less firm than the other. One of the physicians, Dr. Samuels, gave it as his opinion that it was very probable that one of her ribs had been fractured near where it was attached to the spinal column, and that it had ruptured or torn the pleura, the description of which, in the language of the physician, is as follows: "The pleura is the thing that covers the lungs, a thin membrane; it also covers the chest wall, and where it is injured or torn it adheres to the structures thereabout, and those adhesions remain throughout life, and that may result in a chronic form of neuralgia, a painful condition."

"Q. Were the symptoms at that point such as to indicate that condition of affairs?"

"A. Yes, sir. That is, she had a pain on inspiration and pain on expiration. At least she complained of pain on inspiration and expiration. I determined that by making her take a very long breath. When she was breathing normally she did not complain of pain, but on taking a very deep inspiration, so as to bring the auxiliary ribs into play, it was painful, and she had the same pain in the same region that I pressed."

If appellee was not malingering, she is entitled to all that she recovered. The jury heard and saw all the witnesses and the appellee, and they were in a better position to judge of the fact whether her injuries and sufferings were real, or whether she was only feigning.

The judgment is affirmed.

ANNIS, &c. v. FERGUSON, &c.

(Filed January 10, 1905—Not to be reported.)

Contracts—Fraud and deceit—Rescission—Appellee inserted an advertisement in a newspaper for the sale of land and a house and lot, and appellant seeing the advertisement and desiring to buy such property as it was represented to be, went with appellee to see the place, and after showing her what he represented as the garden and outbuildings, etc., belonging to the premises, took her to the house, which was occupied by a tenant and which was locked, the tenants being absent. He represented to her that the house was in good condition on the inside and well finished, and that the schoolhouse was only a short distance away (indicating a nearby house as the schoolhouse), and that there were no negro families living nearby, etc., and she paid the money to the attorney who drew the deed, who was to keep it until some liens were released, when the remainder was to be paid to appellee. Held—That appellant finding out the next day after the purchase of the property that the tenants were negroes; that the garden and other places pointed out as belonging to the premises did not belong to it; that the house

indicated as the schoolhouse was not the schoolhouse, but that it was a mile further away; that the adjacent property owner was a negro, and that the property did not descend as it was represented to have done by appellee, it was error for the trial court to adjudge that the money be paid to appellee, the appellant is entitled to have the sale rescinded.

Turner & Turner, Wm. Carroll and N. C. Cureton for appellants.

R. D. Jackson and H. K. Bourne for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee, M. H. Ferguson, wishing to sell a tract of fifty-three acres of land lying near Jericho, Ky., and a town lot near by, but not adjoining, published in the Henry County Local the following advertisement:

"FARM FOR SALE.

"Fifty-five acres at Jericho, Ky. All in grass except fifteen acres. Some of it has not been plowed for sixty years. Good five-room frame house; two barns; other outbuildings; two good wells; good pool; nice young orchard, grape arbor, etc.; on railroad and turnpike, in fine community, near school, etc. This farm must be sold. It shall go at \$950; it is easily worth \$1,500.

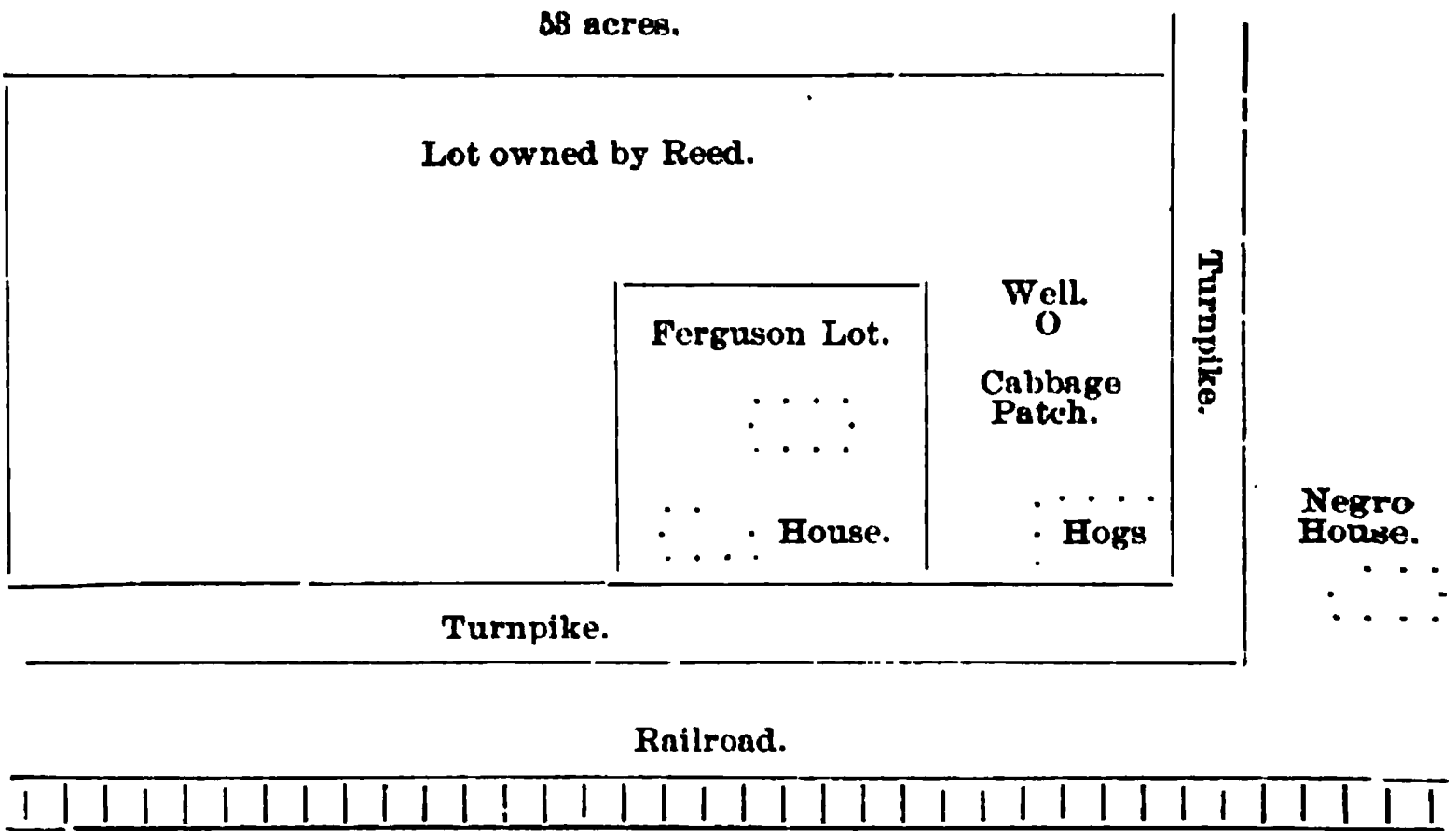
"Call on or address me at Lockport, Ky.

"M. H. FERGUSON."

Appellant, E. M. Annis, saw the advertisement, and desiring to buy such a property for a home, arranged with Ferguson to go with him to look at the property on Sunday, October 11, as they returned from church. They first looked at the fifty-three acres of land, and then came back to the lot to look at it, and the house. When they got close to a hog pen they stopped and he said it was a good piece of land, and would bring anything she wanted to put on it. Next they went into the yard. She asked him about the well, and he said it was a good well, pointing it out to her. She asked him about the garden, and he said: "Can't you see the nice green things growing in it. You know it is a good garden." He then tried to get in the house, but it was locked, as the tenants were absent. She then asked how it was fixed on the inside, telling him that she did not want to make any repairs on the house, but wanted to move right in. He said the rooms were all celled with nice ceiling except the walls of one room, and the floors were nice upper and lower, good bed rooms above, and he wished she could get in so she could see how nice he had it fixed inside. She asked if there were any negro neighbors, saying that she wanted property located in a white neighborhood. He said that there were but three negro families living any way near there, and they lived way down the railroad. She asked him how about the school, saying that she had a little girl to send to school, and would not buy property located away from a school building. He pointed out a house about a quarter of a mile away, and said that was the schoolhouse.

On the following Tuesday the parties met at New Castle, Ferguson having said to her that he had several other offers for the property and would not wait any longer than that to close up the trade. When they met there the lawyer whom Mrs. Annis employed to examine the title reported that the title to the fifty-three acres was all right, but that he could find no title

to the house and lot except a deed from Jacob Lieber to Ferguson. Ferguson said that Lieber inherited the property from an old aunt and was her only heir at law. The lawyer told Mrs. Annis that he did not know about this, and if she took the property she would take the risk, but that Ferguson looked like an honest man. She then said she would take the property on his statement, and the lawyer drew the deed, which Ferguson took home to be signed and acknowledged by his wife. This was done at once, and the deed was returned to the attorney, Mrs. Annis giving the attorney her check for \$950. On Tuesday evening she and her husband returned to New Castle and got the deed from the attorney. They stayed at New Castle that night, and Friday morning went out to look at the property. When they got there Mrs. Annis knocked, and a negro woman opening the door, asked for the lady of the house. The woman replied that she was the lady of the house. Mrs. Annis then told her of her purchase of the property, and said that she wished to examine it. The woman invited her in, and she found the interior of the house different from what it was represented. There were two rooms below, with a loft above, and a kitchen. The floors were rough, and the only ceiling on the walls was heavy paper tacked on the studding. There was no ceiling above. Mrs. Annis then said something about the well, and the woman told her that the well was not on the lot, and neither was the cabbage patch or garden or hog pen, but that these belonged to a negro named Reed, who owned all the land adjoining the lot on three sides, the situation being shown in the following plat:



When Ferguson was there with her he told her the lot contained an acre or an acre and a half, and he also told her that the statement in the advertisement that there were two barns was a mistake. The negro woman says that after Mrs. Annis examined the house she told her that with a little fixing up she could make it a good house and that she wanted possession by the first of the month, when she would ship her goods down and take possession. Mrs. Annis denies this, and says that she would then have gone

back to New Castle and sought a rescission of the contract, but her husband, who was with her, refused to take her, saying that they had gone too far and could not get out of it. They then went on to Eminence and stayed all night. The next morning, Saturday, they returned home, and on Sunday Mrs. Annis started with her son-in-law to New Castle, trying to reach there before the banks opened Monday morning, and stop her attorney from paying over the money. There were some liens on the property, and the agreement was that the attorney was to first pay these off, and then pay the balance of the money over to Ferguson. When they reached New Castle he had paid off the two liens, but had not paid over the balance of the money to Ferguson, amounting to something like \$600. Ferguson met her there, and she demanded of him to rescind the trade because he had sold her property that he did not own and had misled her as to the condition of the house and the situation of the property. The house which he pointed out to her was not the schoolhouse. The schoolhouse was a mile and a quarter away. Jacob Lieber did not inherit the property from an old aunt, nor was he the sole heir at law. Ferguson refused to rescind the trade, and the attorney declining to pay over the money against the orders of Mrs. Annis, he filed this suit to recover the amount, and on final hearing the court entered a judgment in his favor, from which she appeals.

The evidence leaves no doubt that the property was not as represented by Ferguson. He led Mrs. Annis to understand that the well was on the lot which he sold her. He pointed out the things growing in the garden, and referred to the hog pen, thus necessarily leading her to understand that she was buying the strip of ground on which the well, garden and hog pen were located, and this strip when added to the lot itself would make about an acre and a half. He had advertised fifty-five acres of land for sale, and as it was not claimed that there were more than fifty-three acres in the other tract, she had a right to understand that there was at least an acre and a half in the lot. He had advertised that there were two wells on the property. There was one on the fifty-three acres, and if the well which he showed her was not on the lot, it was incumbent on him to tell her so when he undertook to correct the other error which he said the editor had made in the printed advertisement. The fact that the house was occupied by a negro family, and that another negro owned the land all around the lot, with his garden and hog pen right by it, and owned the well which was pointed out to her, were all carefully concealed from her. The finishing of the house on the inside was also not what it was represented to be, and a house was pointed out to her as the schoolhouse which was a mile from the schoolhouse. Few persons would have bought the property if the real facts had been made known to them, and it is hard to believe that Ferguson did not know this, and, therefore, misled the woman as he did. But, however this may be, it was incumbent on him to know that his statements to her were in substance true, and if he in fact misled her by assertions which he did not know to be true, and which he made without taking care to inform himself, the sale can not be permitted to stand. There is no effort to show that his statement as to Jacob Lieber's being the only heir was correct, and the evidence fails to show any such title in Lieber or Ferguson as a vendee should be required to accept.

It was held by the learned circuit judge that the sale must be permitted to stand because Mrs. Annis, after learning from the negro woman of the condition of the house and premises, demanded possession by the first of the month, and said she wanted to move in and get straightened up before cold weather. 1 Bigelow on Frauds, 436, is relied on: "Any defrauded party to a contract has but one election to rescind the same. If he once determines his election it is determined forever. Hence, if it be shown that he has at any time knowledge of the fraud, and either by express words or by unequivocal acts confirmed the contract, his election is irrevocable."

We do not see that this principle should be applied. It is applied where the purchaser pays the price after he has knowledge of the fraud, or if he takes possession of the property thereafter, or does other unequivocal acts, showing that he intends to stand by the contract. Nothing of that sort was done here. If we accept as true the testimony of the negro woman, and disregard the testimony of Mrs. Annis, as to the conversation between them, still the proof is not sufficient, and the fact that something of the same tenor was said by her husband in her presence at Eminence that night is also insufficient, for her husband was under the impression that she had no right to rescind the contract, and it would seem that Mrs. Annis herself was in doubt as to her rights on the subject. An election to be binding must be made with knowledge of the legal rights of the person, or at least after a reasonable opportunity to learn his rights. While Mrs. Annis was at the house and talking to the negro woman about giving her possession, she had not learned that the well was not on her property, nor about the garden or hog pen. She had not learned about the schoolhouse, nor does it seem that she had then learned about the negroes owning the land on three sides of the lot. She had not then learned about the weakness of Lieber's title. She did not see the woman any more, and she never took possession of the property, but, on the contrary, she had a meeting with Ferguson on the following Monday, in which her position was clearly disclosed to him and a rescission demanded. She did not mislead him in any way. The statements relied on were made to strangers, who had no interest in the matter, and before she understood all the facts or was informed as to her legal rights.

Although she accepted the deed, if she was induced to accept it by fraud she may have the contract rescinded just as any other written contract may be rescinded for fraud. She promptly tendered Ferguson a deed to the property when she learned the facts. She is not required to resort to an action of damages. She has her election to ask a rescission of the contract.

On the return of the case the circuit court will adjudge Mrs. Annis the relief above indicated, decreeing her a lien on the land for the amount paid out by her on the incumbrances, with interest and costs.

Judgment reversed and cause remanded for a judgment and further proceedings consistent herewith.

HOLTBEIDE v. SMITH'S GUARDIAN, &c.

(Filed January 10, 1905—Not to be reported.)

Former appeal—Res judicata—The opinion of this court upon a former appeal (Smith's Guardian v. Holtheide, 25 Ky. Law Rep., 125) contains an

elaborate statement of the issues made by the pleadings and the facts declared by the record from which it appears that every material averment of fact contained in the petition in the case at bar was put in issue in that case, and this being true the chancellor properly sustained the demurrer to the petition because the cause of action relied on in this case is defeated by the plea of res judicata.

Wilson & Gifford for appellant.

John Roberts and Wm. Furlong for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Settle.

This action in equity against the appellees, R. T. Smith, Jr., Frederick K. Smith, the Louisville Trust Co., his statutory guardian, and the Aetna Indemnity Co., was instituted by appellant, Eliza K. Holtheide, in the Jefferson Circuit Court, Second Chancery Division.

The petition is quite voluminous, but it is in substance averred therein that the appellant on August 14, 1889, authorized her daughter, Lula Holtheide, to purchase for her a certain house and lot in the city of Louisville of A. F. Payne and wife, at the price of \$5,300, which purchase was made by the daughter, and \$3,800 of the purchase price being required in cash by the vendor at the time of the sale, \$2,000 thereof was paid by the appellant, and \$1,800 by her daughter, Lula Holtheide, as an accommodation and temporary loan to appellant; that for the remaining \$2,000 the daughter, also for the accommodation of appellant, executed to the vendor two notes of \$1,000 each, bearing 6 per cent. interest from date and payable one and two years after date respectively.

It is also averred in the petition that the \$1,800 advanced by Lula were repaid her by the appellant, who likewise paid and discharged the two notes for the remainder of the purchase money, but that the daughter, Lula Holtheide, without the knowledge or consent of appellant, caused the deed conveying the house and lot in question to be made by the vendors to her, thereby wrongfully investing herself with the title to the property; that the daughter, Lula Holtheide, thereafter became the wife of the appellee, R. T. Smith, Jr., and the infant appellee, Frederick R. Smith, is the only child born of their marriage; that Lula Smith died in 1899, intestate, and her husband, the appellee, R. T. Smith, Jr., soon thereafter was appointed by the Jefferson County Court and duly qualified as the administrator of her estate, and the Louisville Trust Co. was, by the same court, appointed statutory guardian of the infant, Frederick K. Smith, and duly qualified as such. It is further averred in the petition that the appellant did not discover until after the death of her daughter, Lula Smith, that she had taken to herself the deed and title to the house and lot purchased of the Paynes, and that upon her discovery of that fact she brought an action in the same court in which this one was later instituted, in which the appellees herein were made defendants, setting forth the facts in regard to her purchase of the house and lot of the Paynes, and the wrongful taking by Lula Smith of the title thereto to herself, and averring that in so doing Lula Smith became the holder of the title as trustee for appellant, and in the prayer of the petition the lower court was asked to substitute appellant's name in the

deed from the Paynes for that of Lula Smith, nee Holtheide, or cause the property to be conveyed to her and quiet her title thereto; and if neither could be done, to give her a lien upon the house and lot and adjudge its sale for the entire purchase price of \$5,800 appellant claimed to have furnished and paid the Paynes therefor; that notwithstanding the defense interposed by the appellees to the claim set up by appellant in that action to the house and lot in controversy, upon the submission of the case in the lower court, appellant was by its judgment granted the relief asked, and the title to the property conveyed her, but an appeal was taken from that judgment by the appellees, and upon the appeal it was decided by this court that the house and lot in controversy, and whatever part of the purchase price had been paid by appellant therefor, were gifts from appellant to her daughter, Lula Smith, and that she was not entitled to the relief sought, consequently the judgment of the lower court was reversed and the cause remanded, with instructions to set aside the judgment appealed from and dismiss her petition. (Smith's Guardian, &co. v. Holtheide, 25 Ky. Law Rep., 125.) And such was the judgment of the lower court entered after the filing of the mandate.

It is further averred in the petition that until the decision of this court to that effect was announced appellant did not understand that the transaction between the Paynes, herself and her daughter amounted to a gift from her to the latter, and that it was not so intended upon her part; that she and her daughter, Lula, were at that time living together, and after the purchase of the house and lot of the Paynes they together occupied the same until the death of the latter, during which time the daughter was entrusted by appellant with the management of her business and financial affairs, as appellant was advanced in years, had but little education, and was physically unable to manage her affairs, and her daughter was an intelligent, educated young woman, capable of attending to the business confided to her, by reason of which she had and exercised great influence over appellant; that at all times after the property in controversy was purchased, and until the death of Lula Smith, appellant claimed it as her own, in the presence of Lula, and without objection from her, and she expended large sums of money in repairing the house after it was greatly injured by a cyclone, and at other times in keeping it in repair. The prayer of the petition is as follows: "Wherefore, plaintiff prays judgment against defendants for the cancellation of said gift and a return to her of said property, or the amount expended by plaintiff in the purchase price thereof, namely, \$5,800, with interest thereon at the rate of 6 per cent. per annum from August 14, 1899, until paid, and she prays that the court direct its commissioner to make a deed in behalf of defendants conveying to her said property, or else that she be adjudged to have a lien on said property for said purchase price, with interest aforesaid, and that if the said Aetna Indemnity Co. has any lien on said property it be required before enforcing said lien to enforce its lien on the other lots of property mortgaged to it by the said R. T. Smith, Jr.; and further, she prays for her costs and all equitable relief."

Demurrers were filed to the petition by appellees, R. T. Smith, Jr., the infant, F. R. Smith, and his statutory guardian, and sustained by the lower court, and appellant failing to plead further her petition was dis-

missed, from which she has appealed. It appears from the briefs of counsel that the demurrers were sustained by the chancellor upon the ground that the relief sought by appellant in this case was refused by this court upon the former appeal. In other words, it was the opinion of the chancellor that the cause of action presented by the petition was *res judicata*. Ordinarily the defense of *res judicata* is required to be presented by plea, but it may be raised by demurrer when the pleading demurred to presents, as in this case, the facts showing the former adjudication.

The petition states with great particularity practically all the facts that appellees would have been required to plead in setting up the defense of *res judicata* by answer, for it shows the time of the institution of the former action; that it was brought in a court of competent jurisdiction; that appellant and appellees were parties thereto; that the cause of action in that case was based upon the same facts pleaded in this, and the relief sought substantially the same as asked in this case; and further, that the relief prayed for in the first case was granted by the lower court and upon appeal was refused by this court; and finally, that after the reversal by this court of the judgment of the lower court appellant's petition was dismissed as directed by the mandate of the higher court.

On this subject it is said in *Freeman on Judgments*, section 249, title "Extent of the Estoppel:" "There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of the fact is again in issue between them, not only when the subject-matter is the same but when the point comes incidentally in question in relation to a different matter in the same or any other court, except on appeal, writ of error or other proceeding provided for its revision."

Further on in the same section it is also said: "The judgments of appellate courts are as conclusive as those of any other court. They not only establish facts, but also settle the law so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause. * * * An adjudication is final and conclusive not only as to matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action both as to the matters of claim and defense." (*McDaniel v. Stum*, 23 Ky. Law Rep., 1935; *Bennett v. Ohio Valley B. & T. Co.*, 99 Ky., 115.)

The opinion of this court upon the former appeal (*Smith's Guardian v. Holtheide*, 25 Ky. Law Rep., 125) contains an elaborate statement of the issues made by the pleadings and of the facts declared by the record upon the former appeal, from which it appears that every material averment of fact contained in the petition in the case at bar was put in issue in that case. We think of the claim of appellant as now urged that it is, as was said in the opinion *supra*, a stale claim, and she is no more entitled to subject the house and lot to the payment of the money which she claims to have furnished her daughter to pay for them than she was to recover the house and lot in the former action. At any rate she has had her day in court, and will not be allowed in this action to resurrect a claim against

the estate of her deceased daughter which the court has, after full investigation, heretofore rejected as being not only stale, but otherwise without merit. The court did not err in sustaining the demurrers to the petition, and as the appellant's action is defeated by the defense of res judicata, raised by the demurrers, it will not be necessary to determine the question of limitation attempted to be urged upon our consideration.

Wherefore, the judgment is affirmed.

COCHRAN, &c. v. LEE'S ADM'R, &c.

(Filed January 11, 1905—Not to be reported.)

1. Willis—Construction of—Mrs. Belle Lee's will bequeathed her property to her four children, naming them, which estate was left her in trust by her father, with power to dispose of it by will. She provided that the property should be equally divided among her children and be kept in trust by the Fidelity Trust Co., or any other trust company preferred by them, and she further provided that if any of her children die without issue then the portion of the one so dying shall revert to her estate for the benefit of her living heirs. Held—From the instrument it is clearly apparent that she intended the property to be kept in trust that her children should have the privilege of selecting the trust company, and that should any of them die without issue such shares should revert to the estate for the benefit of the living heirs. The instrument is so clearly expressed that there is little room for the application for the technical rules of construction.

2. Oral statement—The evidence of one that testator stated before she made her will that she would never tie her property up as her father tied his up, can not be considered in construing the will. The rights of the parties must be determined from the will itself, and not from testator's oral statement as to what kind of a will was intended to be made.

R. L. Page for appellants.

McDermott & Ray for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Hobson.

Mrs. Belle B. Lee died a resident of Jefferson county in November, 1903, leaving an estate worth about \$38,000. She owned real estate worth about \$6,000, and the balance of the property consisted of stocks and bonds. She left surviving her four children: A son, Wm. B. Lee, who was unmarried; two daughters, Margaret Cochran and Anna Belle Young, each of whom were married, and had three children, and a son, Philip Lee, who was married, and had one child.

The property which she had was received by her from her father, James Bridgeford, and was held in trust for her by the Fidelity Trust Co. of Louisville under the terms of her father's will, which, so far as material, is as follows: "The net annual income from the part allotted to Mrs. Lee shall be, during each year during her natural life, paid to her for her sole and separate use, free from any interest therein or control thereof by any husband that she may have. At her death, if she should die intestate, leaving issue surviving her, the said fund shall pass and belong to her descend-

ants, they taking per stirpes: if she should die intestate and without issue surviving her, the said fund shall go to and be equally distributed among my then surviving descendants, they taking per stirpes; but said Belle shall have power to dispose of said estate by last will and testament."

On April 3, 1903, Mrs. Lee wrote with her own hand her will, which was admitted to probate after her death, and is in these words:

"I bequeath to my four children, Margaret, Annabel, William and Philip the estate left me by my father, to be equally divided among them and to be kept in trust by the Fidelity Trust Co., or any other trust company they may prefer. If any of my children die without issue of their body, his or her portion shall revert to my estate for the benefit of the living heirs. I wish my children to be allowed the privilege of conferring with the trust company in regard to their estate, and to receive a statement of their affairs whenever they desire it.

"Signed by my own hand.

BELLE B. LEE.

"April 3, 1902.

"State of Kentucky."

The four children claim that they take under the will the property devised to them in fee simple, and that the words "die without issue of their body" refer to a death in the lifetime of the testatrix. The guardian for the infants, however, maintains that they take under the will only a defeasible fee, which will be defeated by their death at any time without issue of their body. The circuit court held that they took in fee simple, and the guardian appeals for the infants.

The deposition of John T. Malone, an officer of the Fidelity Trust Co., which was the trustee under the father's will, was taken, in which he testified that Mrs. Lee told him that if she ever made a will she would never tie her property up; that her father tied his up, and that she did not get any benefit from it when she needed it. This talk occurred before she made a will, and not at the time the will was made. This evidence, however, can not be considered in construing her will. The rights of the parties must be determined from the will itself, and not from the oral statements of the testatrix as to what sort of a will she intended to make, for the meaning of the writing must be determined from its own language, otherwise the rights of the parties would not be settled by the written will which the law authorized to be probated, but by the parol declarations of the testatrix.

The meaning of the will must be determined from all its provisions, for the object of all construction is to enforce the intention of the testator as shown by his entire will. In the will before us it will be observed that the testatrix uses the words "the estate left me by my father," thus referring to her father's will by which the estate had been placed in the hands of a trustee, and then she adds: "To be equally divided among them, and to be kept in trust by the Fidelity Trust Co., or any other trust company they may prefer." The word "kept" here is material. The estate had been in trust, and she directs that it shall be equally divided and kept in trust, thus clearly indicating an intention to continue the holding of the estate in trust after her death, and for this reason it is added that if the children prefer it some other trust company may act. Then follow these words: "If

any of my children die without issue of their bodies, his or her portion shall revert to my estate for the benefit of the living heirs." The words "revert to my estate" are very material. Revert means to come back or return and so by this provision the testatrix directed that if any of the children died without issue of their bodies his or her portion should return to her estate for the benefit of the living heirs. This can not refer to the death of one of her children in her lifetime. The reversion provided for must be a reversion to her estate after her death; that this is her meaning is also shown by the concluding words of the will by which she directs that the children are to be allowed the privilege of conferring with the trust company in regard to their estate, and to receive a statement of their affairs whenever they may desire it. They would have no estate until she died, and if only an executor was contemplated to settle up the estate and divide the property among the children, there was no need for such a provision. From the whole will it is, therefore, apparent that she intended the property to be kept in trust; that the children were to have the privilege of selecting the trust company, if they preferred another to the one that she had named, and that they were also to have the privilege of conferring with the trust company in regard to the estate, and to receive a statement of their affairs whenever they desired it; but that if any of them died without issue of their bodies, that share should revert to the estate for the benefit of the living heirs. The instrument is clearly expressed and its meaning as a whole so definitely appears from its face that there is little room for the application of technical rules of construction.

The rule laid down in *Birney v. Richardson*, 5 Dana, 424, and *Wren v. Hynes*, 2 Metc., 129, is recognized as sound as applied by the court to the cases then before it, but has no application to a case like this, where the language used by the testatrix forbids the inference that she referred to the death of the legatee in her lifetime. (*Harvey v. Bell*, 26 Ky. Law Rep., 381.)

Judgment reversed and cause remanded for a judgment as herein indicated.

FIDELITY AND DEPOSIT CO. OF MARYLAND v. LOGAN COUNTY.

(Filed January 10, 1905.)

1. Sheriffs—Action on official and county levy bonds—Liability of surety—Remedy—In an action by a county against the surety on the official and county levy bonds of the sheriff for failing to collect and account for taxes due the county, such county is not limited in its remedy to a proceeding under section 4146, Kentucky Statutes, which authorizes the fiscal court at its October term to appoint commissioners to settle with the sheriff, where the sheriff refuses to settle or absconds and fails to settle.

2. Settlement with fiscal court—Effect—Collateral attack—Where for some of the years it was shown that the sheriff had made settlement as required by Kentucky Statutes, section 4146, and that such settlements had not been appealed from or otherwise set aside, such settlements are binding on the county and are not subject to collateral attack.

3. Penalties—On all taxes not paid before December 1 of the year in which they are due a penalty of 6 per cent. is added, which penalty goes to the county under Kentucky Statutes, section 1885, and when collected or col-

Acceptable the sheriff is liable for it to the county precisely as he is for the taxes.

4. Additional penalty against sheriff—Under section 4147, Kentucky Statutes, if the sheriff does not collect and pay over to the county all the collectable taxes in his hands by January 1 after the year in which they were due and payable, he is liable to the county for a penalty of 6 per cent. on the amount so collected or collectable by him and not paid over, which penalty is against the sheriff, and is calculated upon the total sum due the county by him on January 1, after it became due, whether for taxes and penalties against the taxpayer collected or collectable.

5. Interest—Upon what computed—The money collected by the sheriff upon taxes and penalties due the county, and taxes and penalties collectable, but not collected, are treated as a debt due by the sheriff to the county on January 1, after they become due, and upon their total amount the sheriff is liable to the county for interest at 6 per cent. from that date until paid, which interest is in addition to the 6 per cent. penalty upon the gross sum due and unpaid on January 1.

6. Same—While it is proper to charge the sheriff with interest on the penalty due the county by taxpayers who fail to pay their taxes by December 1 of the year in which such tax is due, there should be no interest computed on the additional penalty due by the sheriff to the county for his failure to pay over all the taxes collected or collectable on January 1 thereafter, said penalty against the sheriff, although a liability for which he is bound on his bond, is not a debt upon which interest can be computed.

7. Ex parte settlement—An ex parte settlement made by commissioners after the sheriff's term of office had expired, and after he had left the State, and of which he had no notice, though filed in the county clerk's office and recorded, can not be treated as a confirmed settlement made under the statute.

8. Railroad taxes—Settlement by treasurer of Sinking Fund Commissioners—A settlement made by the treasurer of the commissioners of the sinking fund of the railroad taxes received by him from the sheriff, although confirmed by the county court, is not conclusive, and does not bind the county.

9. Same—It was the duty of the sheriff to pay the railroad taxes which he collected to the treasurer of the sinking fund commissioners of the railroad taxes, who is shown to have demanded them, and by his failure to do so he has incurred the penalty fixed by the statute, and such duty is not in abeyance until he has settled.

10. Whole liability—Judgment therefor—When the whole of the sheriff's liabilities are ascertained it is competent to reduce them to a single sum and to render judgment for that sum which will bear interest from the date of the judgment, for then penalties and interest already accrued are merged into the judgment which must bear interest.

Fairleigh, Straus & Fairleigh and Browder & Browder for appellant.

S. R. Crewdson and James H. Bowden for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge O'Rear.

M. A. Neely was sheriff of Logan county for the years 1898, 1899, 1900 and 1901. Having executed bonds, he was the collector of the county levy for those years. He also executed bond each year as collector of a railroad tax levied to pay the interest and to create a sinking fund to pay a railroad

bonded debt owing by the county. Appellant was sole surety upon each of these bonds. Neely defaulted. This suit was brought by the county against the surety to recover on the several bonds the sums alleged to be due as balances of the taxes for each of the years named. The suit was to recover \$28,445.81 in the aggregate, but the judgment was for \$17,414.81. Both parties have appealed.

Appellant contends that the petition is insufficient to uphold any judgment. This argument rests upon the assertion that until the sheriff has settled his accounts with commissioners appointed by the fiscal court, and until such settlement is confirmed, no action will lie against the sheriff; that the county is limited in its remedy to a proceeding under section 4146, Kentucky Statutes, which authorizes the fiscal court at its October term to appoint commissioners to settle with the sheriff, and provides that such settlement shall be filed in the county court clerk's office, and then lie over for exceptions to be tried by the county court, with right of appeal to the circuit court to either party. But this section is not exclusive of all other proceedings where the sheriff refuses to settle at all, or absconds and fails to settle. Excepting two of the years in suit, the circuit court found, and we think correctly so, that there had been no such settlement and no settlement whatever by the sheriff. He had left the State and kept beyond its jurisdiction. This suit, brought against the surety to have the circuit court determine and adjudge the true amount due by the sheriff, was a proper proceeding. The petition stated fully every essential of a cause of action on the bonds.

The record shows the amount of taxable property assessed in Logan county for each of the years, and the number of tithes. The rate of levies made by the fiscal court for each year makes it a simple matter of calculation to find the total sum chargeable to the sheriff for each year. Exonerations and delinquents allowed are also shown, which deducted from the total of taxable property assessed, leaves the sum upon which the sheriff's statutory commissions are calculated, except where he collects penalties from taxpayers, or is being charged with them as being collectable, in which event he ought of course to be credited with commission for collecting them, as if they were taxes. Deducting the credits named leaves the sum payable by the sheriff, not counting penalties and interest chargeable to him for his own failure to pay over the taxes as required by the statutes. Receipts from the treasurer or other persons to whom the fiscal court had ordered the money paid deducted from the last named remainder show the net amount of taxes collected and collectable for any one year for which the sheriff and his surety are liable to the county, if the sheriff pays it over when due.

The foregoing is the basis upon which the circuit court proceeded. For the years 1898 and 1899 it appears that the sheriff actually made settlements with commissioners, or committees, appointed by the fiscal court concerning the county levy and poll taxes, but not including the railroad tax. For the year 1898 the settlement was filed in the county court clerk's office, where it was excepted to by the sheriff. The sum finally found due upon that settlement the sheriff paid to the county to the persons as ordered by the fiscal court. The same is true as to the year 1899, except the record does not show the settlement made and filed in the county court clerk's office.

But it is shown by the record that the fiscal court, by an order entered upon its order book, recited that such settlement had been made and recorded, and directed the sheriff to pay the balance stated as having been found due the county, and the sheriff paid it. The circuit court found that the settlement had in fact been made and recorded, as required by the statute (section 4146), and as it had not been appealed from or otherwise set aside in any suit or proceeding appropriate for the purpose, was binding on the county. We think the circuit court gave to this statute its true meaning. It is necessary that these settlements concerning the fiscal affairs of the county be conducted in some forum where expedition in closing them may be had. Unless when so completed they are to have some other effect than mere memoranda, subject to be ignored or collaterally attacked by either party at any time, they are worse than useless. While the settlements might be subject to be re-opened and surcharged for fraud practiced, or other ground for a new trial after the expiration of the term of the court adjudging them to record, if asserted within seasonable time, yet after the time allowed for a review, upon appeal they are final. Although it is shown that the commissioners making the settlements for the years 1898 and 1899 allowed errors against the county, the settlements when so recorded are not subject to the collateral attack attempted by this suit.

For the year 1900 no such settlement was made and filed, though a settlement was made and filed in the fiscal court. But it was ordered by the court to be withdrawn on the same day it was filed, and was never filed in the county court for exceptions, nor ordered to record by that tribunal. The legislature has provided an expeditious and simple method of carrying such settlements into a concluded state. Where the proceedings stop short of the course fixed by the statute they can have none of the benefits or presumptions accorded to them as are to those which do conform to the statute. The public, as well as the county, as a corporation are interested in the prompt collection and honest and legal disbursement of the county revenues. These settlements, when so recorded, are valuable checks upon the fiscal agents of the public, as well as constituting conclusive evidence of fixed indebtedness or of discharge from liability. To give to other settlements, though completed as between the parties, but not recorded as required by the statute, the same effect would be to thwart the good purpose of the statute by rendering it useless. For the year 1900 the circuit court, therefore, proceeded as if no settlement had been attempted. For the year 1901 there was no settlement. Thus the original indebtedness of the sheriff to the county on account of the county levy and poll taxes for the years in suit was fixed by the circuit court upon the proper basis. In addition to the foregoing was the question of penalties and interest.

For the year 1898 the commissioners had charged penalties against the sheriff for taxes not collected and paid over within the time fixed by statute. The sheriff filed exceptions in the county court, where the judgment was against him. Upon appeal to the circuit court it was adjudged that the sheriff was not liable for the penalties. In this action the trial court held that inasmuch as that judgment on the appeal had not been reversed or vacated, it was binding upon the county as *res adjudicata*. In this we concur. But the circuit court adjudged that for other years the question of

the sheriff's liability for penalties was not affected by the judgment alluded to. In that conclusion we concur also. If the taxpayer does not pay his taxes on or before December 1 of the year in which they are due a penalty of 6 per cent. is added against him, which must be collected by the sheriff as the taxes are. The penalty goes to the county (section 1885, Kentucky Statutes), and when collected or collectable the sheriff is liable for it to the county precisely as he is for the taxes.

By section 4147, Kentucky Statutes, if the sheriff does not collect and pay over to the county all the collectable taxes in his hands by January 1, after the year in which they were due and payable, he is liable to the county for a penalty of 6 per cent. on the amount so collected or collectable by him and not paid over. This last-named penalty is against the sheriff, and is calculated upon the total sum due the county by him on January 1 after it became due, whether for taxes and penalties against the taxpayer collected, or for taxes and penalties collectable, but not collected. The money collected by the sheriff upon taxes and penalties due the county, and taxes and penalties collectable, but not collected, are treated as debt due by the sheriff to the county on January 1 after they become due. They constitute then an obligation to pay money, and upon their total the sheriff is liable for interest to the county at 6 per cent. per annum from that date until paid. The interest is entirely different from and is in addition to the penalty of 6 per cent. upon the gross sum due and unpaid on January 1. The penalty is a cumulative remedy, imposed by statute as additional incentive to the prompt payment of the county revenues by the collecting officer. So far the trial court proceeded in accord with what has just been said in entering judgment herein. In addition, the court adjudged interest at 6 per cent. per annum upon the penalties adjudged against the sheriff for his nonpayment of the sums due January 1 of each of the years in suit as to the railroad taxes, and like interest upon the penalty adjudged upon the county levy for the year 1901. The penalty of 6 per cent. against the sheriff is not a debt, though it is a liability covered by the bond. The statute does not make it bear interest, and the general rule is that statutory penalties do not bear interest.

Counsel for appellee urge that the interest upon the penalties is too small to justify a reversal of the judgment, for, he says, payments were made in so short a time after the penalties against the sheriff attached which more than satisfied them that the amount of interest accumulated is inconsiderable. Payments applied by operation of law must first go to extinguish interest-bearing liabilities. As the payments made were not sufficient to discharge the interest-bearing obligation of the sheriff, it follows that by adjudging interest upon the penalties, where all were calculated as of the same rank, and added together when payments were credited, the effect is that the interest continues even until now upon the penalties, under the form of the judgment. The penalties amount to several thousand dollars, and the interest carried into the judgment on their account is too considerable to pass unnoticed.

For the year 1900 the court did not adjudge a penalty against the sheriff for his failure to pay over the county levy and poll taxes to the county, because there was no person to whom he was ordered to pay them, there-

being no treasurer at that time. This was in accord with the decisions in: *Bates v. Knott County*, 24 Ky. Law Rep., 73, and *Pence's Adm'r v. Nelson County*, 21 Ky. Law Rep., 724.

After the sheriff had made default, and after the expiration of his term of office and probably after he had left the State, the fiscal court appointed commissioners, Clark and Milliken, to make settlement with the sheriff for all the years of his term. They proceeded to do so, ignoring all the previous settlements. They charged the sheriff with all the penalties and interest herein discussed, calculating the interest to the date of their report, which was the 1st day of June, 1902. The court corrected the report as indicated above as to the years 1898, 1899 and 1900, as well as allowed the credit for 1901, discussed below, but in other respects adopted the report as the basis of the judgment, bringing the whole indebtedness, including that for railroad taxes collected and hereinafter discussed, down to that date, June 1, 1902. Interest at 6 per cent. per annum on this total sum was then calculated to the date of the judgment, 23d February, 1904, and judgment entered for that gross sum, and interest from the last-named date till paid.

We are of opinion this was error. Not only was it improper to adjudge interest upon the penalties against the sheriff for nonpayment of what he owed, but it was not proper to compound interest. The Clark and Milliken settlement was made after the sheriff left the State, or at, any rate, after his term of office expired and after the time fixed in the statute. This attempted and ex parte settlement was no more than a carefully prepared estimate by capable accountants of what they deemed to be due the county by the sheriff. It was not a settlement as contemplated by the statute, where both sides were represented, in an effort to arrive at the true amount of the indebtedness. It can not, though filed in the county clerk's office and recorded, be treated as a confirmed settlement made under the statute. The sheriff not being a party to it, can not be cut off without "his day in court," from presenting his side of the account. (*Commonwealth v. Moren*, 25 Ky. Law Rep., 1635.) The circuit court took this view of the Clark and Milliken settlement.

For the year 1900 the sheriff is shown to have paid to various persons to whom allowances had been made by the fiscal court sums aggregating \$6,654.50, represented by 111 fiscal court warrants, or orders of allowance. The evidence is uncontradicted that the sheriff paid these sums for the county. Their validity is nowhere questioned. For that year, there being no county treasurer, it was the sheriff's duty to have paid them out of the county levy funds in his hands, and he should have been credited accordingly. The circuit court properly allowed the sheriff credit for them.

The railroad taxes form a separate basis of contention in this case. The tax was levied originally by virtue of a special statute applicable alone to Logan county, approved April 7, 1886. (1 Acts of 1885-6, pages 1212-1217.) That act provided for the selection of three sinking fund commissioners by the county court of claims, the one of whom whose term of office was shortest being ex-officio treasurer of the sinking fund. It directed the levy of a tax sufficient to pay the interest semiannually, and to create a sinking fund for the ultimate payment of the bonds which had been executed by the county in settlement of a railroad subscription made by it. The act

provided that the sheriff should be collector of this tax, for a settlement by the sheriff with the sinking fund commissioners, and that he should pay the taxes collected by him on account of the railroad debt to the sinking fund treasurer at certain intervals. What happened is, the sheriff collected these taxes and paid them over, some part of them for each year, to the treasurer of the sinking fund. But he never paid all collected or collectable by him for any one year within the time specified in the act, or at all. Nor did he ever settle his accounts for those taxes with the sinking fund commissioners, nor were commissioners appointed for that purpose by the fiscal court. He made no settlement whatever of his railroad tax with the fiscal court. If he settled with the treasurer of the sinking fund, such settlement is not produced nor accounted for, though various settlements of the treasurer's accounts made annually, stating that he had received so much from the sheriff on account of taxes collected by him, and indicating some sort of settlement or accounting between him and the sheriff by which the amount due by the sheriff for such years was arrived at, are shown in the record. It is the contention of appellant that these treasurer's settlements—of his own accounts, not the sheriff's—when received by the fiscal court and ordered to record, were conclusive against the county of the state of the sheriff's accounts for each of the years for the railroad taxes collected or collectable by him. The treasurer of the sinking fund did not charge the sheriff with any penalties or interest in his so-called settlements. These alleged settlements between the treasurer of the sinking fund and the sheriff are not binding upon the county, nor conclusive in any sense of the state of the sheriff's accounts. In the first place, there was no authority, statutory or otherwise, for the treasurer of the sinking fund to make such settlements. If the commissioners were authorized to do so, they did not. In the next place, the treasurer's settlement of his own accounts, which was confirmed by the county court and approved by the fiscal court, merely recited what sums he had received from the sheriff. The further statement that the sheriff owed so much and no more in addition, was wholly outside of the scope of the treasurer's own accounts, and formed no part of his settlement. The confirmation of the report on this point meant no more than that the treasurer had received only the sums charged against him in the settlement as having been paid by the sheriff.

Appellee contends, and the circuit court so adjudged, that the act of 1886 was superseded by the Constitution of 1891, and sections 1833 to 1885, passed in conformity thereto, creating the fiscal court, and regulating the matter of levying and collecting county taxes.

Prior to the Constitution of 1891 the county court, or the county court of claims as it was sometimes called to distinguish it from the county court presided over by the county judge alone, had jurisdiction of the fiscal affairs of the county. Under the present Constitution, and sections 1833-1894, Kentucky Statutes, sole and exclusive jurisdiction is given the fiscal courts of the several counties of the levy and collection of the county taxes for whatever purpose they may be imposed. If the debt were created under a previous general or local act, it remained an obligation of the county till discharged. No subsequent statute could impair its validity. Yet it was within the power of the legislature to change the method and time of col-

lecting taxes for paying the debt. It was also competent to change the rate of taxation, and regulations affecting penalties for nonpayment of taxes, as well as all matters pertaining to tax collectors' liabilities and duties, so long as the change did not impair the obligation of the contract by which the original debt was created. When the legislature, by sections 1838 to 1885, Kentucky Statutes, made it the duty of the fiscal court to levy the tax, and to provide for its collection and proper application, as well as the manner and time of its collection, those provisions must be deemed as creating a new and comprehensive system of law on the subject, superseding preceding general and local statutes covering the same subject. Although section 1882 of Kentucky Statutes, as compiled by Carroll, contains what might seem to be a prohibition against the levying of taxes to pay off railroad bonded indebtedness and interest, yet it must be read in connection with section 1839, which does authorize the levying of taxes to pay off all debts existing prior to September 28, 1891, the date of the adoption of the new Constitution. Section 1882 was adopted first, by several months, though both it and section 1839 were adopted by the same legislature. Section 1882 limits the imposition of a tax to not more than 50 cents on the \$100, and \$1.50 poll for county purposes. No part of this tax, it seems, was intended to be applied to the payment of railroad bonded debts and interest. But section 1839 permits, as does section 157 of the Constitution, the levy of an additional sum for the purpose of discharging all debts incurred prior to September 28, 1891.

Section 1884, Kentucky Statutes, makes the sheriff the collecting officer of all county taxes, if he execute bond therefor. It fixes his compensation, though it increases it as compared to that allowed by the special act of 1886. Section 1885, Kentucky Statutes, applies to the collection of county taxes the same penalties for nonpayment both as to the taxpayer and the collecting officer, as pertain to State taxes. It also makes county taxes due at the same time as State taxes. The local act of 1886 had different provisions on these subjects. The taxes were due at different periods, and the penalties were not the same for their nonpayment, so far as the act applied to the collecting officer. We think the Kentucky Statutes were intended to cover all these matters, and to do away with the irregular and special proceedings previously existing. One of the most prominent features of the new Constitution is its effort to establish a uniformity of the law throughout the State. One of the main abuses that brought the convention into being was the great confusion arising from the mass of special and local statutes which had been passed under the old Constitution. This manifest purpose should be given full effect in the construction of laws passed to carry it into force. There is no part of the act of 1886, concerning the collection of the railroad tax in Logan county, not covered by the present general law. The appointment of sinking fund commissioners, and the exercise of duties to be performed by them, are not prohibited by anything in the general law. But if it be thought that there was anything in the local statute that gave the county the right to avail itself of the service of commissioners for its sinking fund, which by the general law is not given, then by the closing sentence of section 1840, Kentucky Statutes, concerning the jurisdiction and powers of the fiscal courts, generally, it is provided: "And (the fiscal court)

shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court of levy and claims."

The existence of a valid debt owing by the county, and the express authority to levy taxes to pay it, involves and allows the right to create a sinking fund to meet the debt when it matures. If it be deemed expedient by the fiscal court to avail itself of the services of other persons as commissioners to hold and employ such funds unto the day when they may be required to discharge the debt for which they have been raised, we see nothing in the statute to prohibit it. On the contrary, it seems to be well within the expression in section 1840, Kentucky Statutes, concerning the jurisdiction of fiscal courts, "to regulate and control the fiscal affairs and property of the county, * * * and to execute all of its orders consistent with law and within its jurisdiction."

The act of 1866 making it the duty of the sheriff to settle his accounts with the sinking fund commissioners is superseded by sections 1884 and 4146, Kentucky Statutes, making it his duty to settle once each year, at the October term of the fiscal court, and as often as that court may require. By section 1884, Kentucky Statutes, the sheriff is required to pay over all taxes and penalties collected by him "in due time to the proper party as directed by the court." Where there is a county treasurer, this must be done every sixty days without demand. (Section 932, Kentucky Statutes.) By section 4147 the sheriff is required to pay a penalty of 6 per cent. on taxes collected or collectable, which "shall not have been paid by him on proper demand to the parties or funds entitled thereto, on the first day of January in each year after he was required to collect such taxes."

In this case it appears that the sheriff's bond required him to pay over the money collected by him as stipulated in the special act of May, 1866, which was a sufficient designation by the fiscal court, so far as the sheriff and his surety are concerned, of the person to whom to pay it. The annual election of a sinking fund commissioner of railroad taxes is also shown. The treasurer of the sinking fund says he demanded of the sheriff the payment of the taxes. There being a person designated by the county to receive the money for it from the sheriff, it was his duty, under the statute, to pay it over on demand after it was due. By his failure to do so he has incurred the penalty fixed by the statute. The sheriff's duty to pay over the taxes collected by him is not in abeyance till he has settled. The settlement might precede or follow the payment.

The circuit court in its judgment seems to have proceeded upon the foregoing basis in the adjustment of the sheriff's liabilities for the railroad taxes. When the whole of the sheriff's liability is ascertained under the foregoing principles it is competent to reduce them to a single sum, and to render judgment for that sum, which will bear interest from the date of the judgment. (Section 2220, Kentucky Statutes.) For then penalties and interest already accrued are merged, as is the principal adjudged, into the judgment for money, which must bear interest.

The judgment of the circuit court is affirmed on the cross appeal, but is reversed on the direct appeal. The cause is remanded that a judgment may be entered in conformity herewith.

CAMDEN INTERSTATE RY. CO. v. LEE, & CO.

(Filed January 11, 1905—Not to be reported.)

1. Corporations—Merger of—Judgment against—In this action appellee seeks to recover against appellants the amount of judgments recovered by them against the Ashland and Catlettsburg Street Railway Co. which, after these judgments were rendered and a return of no property found, was merged in appellant company. The fact that the former company was insolvent when the transfer was made is not a material inquiry. The rule is that where one corporation goes out of existence by being merged into another, the liabilities of the old corporation are enforceable against the new one, just as if no change had been made.

2. Practice—The fact that one of the judgments appealed from has been reversed does not affect this appeal. The case must be tried here as presented in the lower court, and sections 757 and 758, relied on by appellant, have no application here as they relate to new matter to be set up in this court.

J. R. Brown for appellant.

J. A. Scott, Scott & Dinkle and P. K. Malin for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee, Warfield Lee, filed suit in the Boyd Circuit Court, on March 17, 1900, to recover judgment against the Ashland and Catlettsburg Street Railway Co. for injuries sustained by him in attempting to board one of its cars, and on February 16, 1901, recovered judgment against it for the sum of \$1,000 and costs, and on June 20, 1901, had an execution issued on the judgment, which was returned no property found. Appellee, Rosa Hoffman, filed suit against the railway company on May 27, 1899, to recover damages for ejection from a park by the agents of the company, and on February 13, 1901, recovered judgment against it for \$500 and costs. On this judgment execution was also issued, and returned no property found.

While these suits were pending Senator J. M. Camden bought a controlling interest in the Ashland Electric Light and Power Co., which owned a majority of the stock of the Ashland and Catlettsburg Street Railway Co., and in the summer of the year 1900 he bought about \$15,000 of the remaining stock of the street railway company at 50 or 60 cents on the \$1, and made an arrangement with the other stockholders by which they agreed to take stock in the Camden Interstate Railway Co., share for share, for the stock they held in the Ashland and Catlettsburg Street Railway Co. All the stock in the street railway company being thus controlled by Camden in December, 1900, a deed was made by the Ashland and Catlettsburg Street Railway Co. to the Camden Interstate Railway Co. of all its property and franchises in consideration of \$1. After this deed was made the stock of the Camden Interstate Railway Co. was delivered to the stockholders of the Ashland and Catlettsburg Street Railway Co., who had not sold to Camden, share for share, as had been agreed. The result was that when Lee and Miss Hoffman obtained their judgments against the street railway company their executions against that company were fruitless, and they thereupon filed this suit against the Camden Interstate Railway Co. and the stockholders in the Ashland and Catlettsburg Street Railway Co., seeking in equity

upon their returns of no property found to compel them to pay their judgments. After preparation of the case the circuit court entered a judgment against Camden Interstate Railway Co., from which it appeals. No final judgment has been entered as to the stockholders, and they are not parties to the appeal.

At the time the conveyance was made by the street railway company of all its property and franchises to the Camden Interstate Railway Co. the capital stock of the street railway company amounted to \$50,000, and it owed debts amounting to over \$70,000. It had made a mortgage on its property and issued bonds to the extent of \$75,000, but these bonds had not been sold; they had been used only as collateral for the debts the company owed. After the purchase of the property and franchises Camden spent something like \$30,000 in extending the line to connect at Huntington, W. V., with a line running from Guyandotte to Huntington, the purpose being also to extend it across the Ohio river to certain towns in Ohio. It is insisted that the judgment against the Camden Interstate Railway Co. is wrong, because the Ashland and Catlettsburg Street Railway Co. was in fact insolvent when the transfer was made, and must have failed but for the new arrangement. We do not think this is a material inquiry. Camden paid for all the stock which he bought in the street railway company 50 or 60 cents on the \$1. and for the stock which he did not buy he issued stock in the interstate railway company share for share. The sum of the transaction was that Camden either owned in his own right all the stock of the street railway company by way of purchase, or controlled it under contracts by which the stockholders agreed to take stock in the new company for the stock which they held in the old, and while he thus controlled all the stock in the street railway company, he caused that company to deed all of its property and franchises to the Camden Interstate Railway Co., and thus the stockholders in the street railway company became stockholders in the interstate railway company. In this way the stockholders in the street railway company put all of their property and franchises in the hands of the interstate railway company, and became stockholders in that company in lieu of the street railway company. By this means the interstate railway company swallowed up or absorbed the street railway company.

While there was no stipulation in the deed that the new company should answer for the liabilities of the old, the law will not allow the stockholders in a corporation thus to change the name in which their property is held and defeat the claims of creditors. The rule is that where one corporation goes entirely out of existence by being merged into another, the liabilities of the old corporation are enforceable against the new one, just as if no change had been made. (Thompson on Corporations, section 372; 6 Am. & Eng. Ency. of Law, 818; 10 Cyc., 306, 314.)

It is held by some authorities that one corporation can not become a permanent shareholder in another, unless the right is conferred by statute, and, therefore, the more usual form of merging one corporation with another is for the new corporation to issue its own shares to the stockholders of the old company in exchange for their stock in that company. For this reason the agreements with the stockholders of the old company were all made in the name of Camden, and the agreement was carried out in his

name, he being apparently the owner of the controlling interest in the new company. But the law will not look merely at the form of the transaction: it looks through the form to the substance of it. The sum of it here was that Camden controlling the stock of the old company, transferred its property to the new and issued the stock in the new to take the place of that in the old company. This was not a purchase of the stock of the old company: it was simply an absorption of the old company into the new, and the new became answerable for all the liabilities of the old company which it absorbed, and will not be heard now to say that the assets of that company were worthless, or that the stock, which was selling at 50 or 60 cents on the \$1, was of no value.

The question of the liability of the stockholders in the old company is not now presented, as they are not parties to the appeal, and no final judgment has been rendered on that branch of the case.

Since the judgment has been rendered in the circuit court appeals pending in this court from the original judgments in favor of Lee and Miss Hoffman have been determined. The judgment in Lee's case was affirmed; the judgment in Miss Hoffman's case was reversed and the cause remanded for a new trial. Our attention is called to this by a plea filed in this court setting up the reversal of her judgment against the street railway company. By section 757 of the Code of Practice, when the appellant's right to prosecute an appeal has ceased to exist, the appellee may move the court to dismiss the appeal, and by section 758, if the facts relied on are not shown by the record, the appellee may plead them by a verified answer. These are the only provisions in the Code allowing new matter to be set up in this court, and they have no application in this case as Miss Hoffman is the appellee. The case must be tried here upon the record as it was presented to the circuit court, and the affirmance of the judgment here adds nothing to its force, and presents no obstacle to its being opened in the circuit court on account of a defense arising since the judgment was rendered.

Judgment affirmed.

PREWITT, COMMISSIONER v. SECURITY MUTUAL LIFE INSURANCE CO.

THE TRAVELERS INSURANCE CO. v. PREWITT, COMMISSIONER.

(Filed January 19, 1905.)

Majority opinion in 26 Ky. Law Rep., 1239.

Hazelrigg, Chenault & Hazelrigg, N. B. Hays and Henry R. Prewitt for Insurance Commissioner.

Wm. Marshall Bullitt for Security, & Co., Ins. Co.

Pirtle, Trabue, Doolan & Cox and Wm. Bro. Smith for Travelers Ins. Co.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Judge Barker delivered the following dissenting opinion:

Believing that the conclusion reached by the majority of the court in these cases can not be justified either by reason or upon authority, I feel it my

duty to present my views in a dissenting opinion. I do this with great modesty and with great reluctance; the first from solicitude lest I fail to do justice to the importance of the subject, and the second from my disinclination to differ from the opinions of those whose attainments I hold in so high esteem.

The question presented by these records is whether a State may enact a valid law, which shall present to a foreign corporation the alternative either of surrendering its right, under the provisions of the Constitution and laws of the United States, to remove to the Federal court an action instituted against it by a citizen in the State court, or of not being permitted to do business in the State. The proper solution of this question is essential to the orderly adjustment of the conflicting spheres of our dual system of jurisprudence—National and State.

When our complex form of government was established the national Constitution, and the laws enacted in pursuance thereto, were made the supreme law of the land (U. S. Constitution, article 6); and it must necessarily follow, as a logical and legal sequence, that whenever a State law comes in conflict with a national law the former must give way, it is void. The statutes of the United States, in pursuance of a settled national policy of affording to citizens of each State the means of escaping the dangers of local prejudice in favor of home litigants, prescribe the conditions and terms under which such actions may be removed to the Federal courts. This is done in the interest of fair and impartial trials, or, in other words, in the interest of justice.

The laws of our Commonwealth bearing upon the question under investigation are divided into two branches, although the intent of each is the same, the divergence being merely in the particular manner of enforcing the same principle against different classes of corporations. Sections 572 and 573 of the Kentucky Statutes apply to all foreign corporations doing business in the State, except insurance companies, and are as follows:

"Section 572. If any foreign corporation shall, without the consent of the adverse party, remove to the Federal court any action pending against it in any court of this State, or institute an action against a citizen of this State in a Federal court of this State, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation, and any officer, agent or employe thereof, who shall thereafter transact or engage in any business or employment for such corporation in this State shall be severally guilty of a misdemeanor, and upon indictment and conviction in the circuit court of any county in which such corporation, or any officer, agent or employe thereof transacts or engages in any business, be fined for each offense not less than \$500 nor more than \$1,000.

"Section 573. The provisions of all charters and articles of incorporation, whether granted by special act of the general assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agent

of such corporation shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offense not less than \$100 nor more than \$1,000, and upon the conviction of the corporation the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the 28th day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

The statute applicable to foreign insurance corporations is to be found in sections 631 and 633 of the Kentucky Statutes, and is as follows:

"Section 631. Before authority is granted to any foreign insurance company to do business in this State it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State.

"Section 633. Licenses to agents of foreign companies must be renewed annually in the same manner as original licenses, upon a finding by the commissioner that the company represented by the agent has fully complied with the law, and maintains its required capital or reserve; and whoever solicits and receives application for insurance on behalf of any insurance company, or transmits for any person other than himself an application for insurance, or a policy of insurance to or from such company, or advertises that he will receive or transmit the same, or who shall, in any manner, directly or indirectly, aid or assist in transacting the insurance business of any insurance company, shall be held to be an agent of such company within the meaning of this article, anything in the policy or application to the contrary notwithstanding; and any person acting as the agent of any company within the meaning of this section, without first procuring and having a license from the commissioner to act as such agent, or, after such license has expired, been suspended or revoked, or who shall procure any premium or obligation therefor by fraudulent representations, shall be deemed and held guilty of a misdemeanor, and upon conviction for such offense shall be fined not less than \$50 nor more than \$100 for each offense."

The question involved here was presented for adjudication in this State for the first time in *Commonwealth v. East Tennessee Coal Co.*, 97 Ky., 238,

and *Commonwealth v. Jellico Coal Co., Id.*, 246. These cases arose under section 572 of the Kentucky Statutes, the two corporations, as their names import, being coal companies. The opinions in both were delivered by the court through Judge Eastin, and contain a learned and thorough discussion of the question at bar. In both section 572, which, as said before, applies to foreign corporations (except insurance) doing business in the State, was held to be void, because in contravention of the Constitution and laws of the United States. These cases are both practically overruled by the opinion of the majority, although this has not been done in express language; the court, as it seems to me, unsuccessfully seeking to distinguish them from the cases at bar, and in so doing inadvertently, of course, misstating the question involved in them. The following is the language of the opinion with reference to the case containing the reasoning on the constitutional question: "The case of *Commonwealth v. East Tennessee Coal Co.*, 97 Ky., 238, did not involve the revocation of a license granted by the State, but was in effect similar to *Barron v. Burnside*, above cited, being a proceeding to impose a fine on the defendant after it removed a case from the State court."

Judge Eastin commences his opinion with the following language: "This appeal involves the constitutionality of section 572 of the Kentucky Statutes, which is in these words, to wit:" * * * Then, after citing section 572, he said: "Under this provision of the statutes this action was brought by appellant in the Whitley Circuit Court for the purpose of having it judicially declared that appellee had forfeited its right to carry on business in Kentucky, and of enjoining it from doing so. In the petition it is alleged that appellee is a foreign corporation, created by the laws of the State of Tennessee, but engaged for several years past in carrying on business in Whitley county in this State, and that on May 14, 1894, it had, by proper proceedings, procured the removal from the Whitley Circuit Court, of an action therein pending against it, to the Federal court sitting at Frankfort, Ky., on the alleged ground that said suit involved a controversy between citizens of different States, and that this was done without the consent of the adverse party to said action. It is further alleged that by this action appellee has forfeited its right to carry on business in this State, but that, notwithstanding this fact, it is still engaged in carrying on its business in Whitley county, Kentucky, and the court below is asked to decree the existence of the alleged forfeiture and to enjoin appellee from further continuing its said business in Kentucky."

So that the court are mistaken in supposing that the case explained simply involved the imposition of a fine. It was nothing more or less than a proceeding to revoke the license or right to do business in Kentucky of a foreign corporation for the sole reason that it had exercised its privilege of removing an action, instituted against it by a citizen of this State, to the Federal court. In principle the questions involved there and here are identical. With this question before it the court there held that section 572 was unconstitutional, after a review of all the Federal decisions on the subject. The opinion concludes in these words: "From this review of the decisions of the Supreme Court of the United States it would seem that there is no longer any question as to the invalidity of legislation such as this act

we are now considering. Those decisions establish the doctrine that this right of removal is a constitutional privilege conferred by the Constitution, and laws of the United States upon every citizen of a State, foreign to the State in which the suit is brought, which would clearly embrace all foreign corporations; and any legislation on part of the State, by which it is proposed or designed to take away that privilege, even under the power of the State to fix the terms upon which the corporation may enter that State, for the purpose of doing business, is unconstitutional and void. In accordance with these views we adjudge that section 572 of the Kentucky Statutes is unconstitutional, and that the demurrer of appellee to the petition filed, against it by appellant was properly sustained."

The case of *Commonwealth v. Jellico Coal Co.* did involve the right to fine a foreign corporation for removing an action instituted against it by a citizen of the State to the Federal court, and the right to impose this fine was denied upon a simple question of procedure under the statute; however, the court did not rest here, but, after deciding the case adversely to the Commonwealth on the first ground, said: * * * "But, in addition to this, and for the reasons fully set forth in the opinion this day delivered in the case of *Commonwealth v. East Tennessee Coal Co.*, ante, page 246, with which this appeal was heard, it is the opinion of this court that the section of the statute above referred to is in conflict with the Constitution and laws of the United States, and, therefore, void."

So that it is plain that this court, as then constituted, were of opinion that section 572 was unconstitutional, and under its provisions neither a fine could be imposed for a violation of its terms, nor the right to do business by a foreign corporation prevented in a direct proceeding had for that purpose.

These cases, and especially the first one, so far as the principle involved is concerned, are identical with that in the case at bar. Of course I recognize the inutility of pointing out a conflict between older and later opinions of the same court on the same question; the last is always the law. But I deeply regret that an opinion showing such painstaking labor and learning, as does that in *Commonwealth v. East Tennessee Coal Co.*, should receive no better fate at the hands of the court, as at present constituted, than to be silently ignored, or, worse still, should only have been thought worthy of a casual line, which wholly misstates the question involved. But there are cases which can not be so lightly thrust aside, being the utterances of the Supreme Court of the United States, which is the final expositor of all questions arising under the Constitution and the laws of the United States.

The question in hand, so far as I am advised, was adjudicated by the Supreme Court of the United States for the first time in *Insurance Co. v. Morse*, 87 U. S. (20 Wall.), 445. This case went up from the State of Wisconsin under a statute, the pertinent part of which is as follows: "It shall not be lawful for any fire insurance company, association or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to take risks or transact any business of insurance in this State unless possessed of the amount of actual capital required of

similar companies formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid by any agent or agents in this State shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

The question arose in this way: The Home Insurance Co. of New York having been sued in Wisconsin by a citizen of that State, undertook to remove the action under the Federal statute to the Federal court. This was resisted because the company had agreed, in compliance with the statute above quoted, not to remove such actions to the Federal courts, and this fact being established, the State court refused to permit the removal, and entered judgment on final hearing against the company. The Supreme Court of the United States, on writ of error, reversed the Supreme Court of Wisconsin, and returned the case, with directions to grant the removal in accordance with the prayer of the petition. This was done on two grounds: First, that the agreement was void at common law; and, second, it was void because it was in contravention of the national Constitution, and statutes passed pursuant thereto, permitting the removal in question. The court said (page 458): "We are not able to discover in this case any countenance for the statute of Wisconsin which we are considering.

"On this branch of the case the conclusion is this;

"1st. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court upon compliance with the terms of the act of 1789.

"2d. The statute of Wisconsin is an obstruction to this right, and is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3d. The agreement of the insurance company derived no support from an unconstitutional statute and is void, as it would be had no such statute been passed."

The case of *Doyle v. Continental Insurance Co.* afterwards went up from the Supreme Court of Wisconsin to the Supreme Court of the United States on a different phase of the same statute. In that case the insurance company removed the cause, and the State authorities undertook to revoke the license to do business in the State for this violation of the statute. The company instituted a suit in equity for an injunction restraining the secretary of state from this alleged wrongful act. A temporary restraining order was entered, and upon final hearing was made perpetual. On appeal the Supreme Court held that the foreign insurance company was without remedy under the circumstances, and that the State could revoke the license even under an unconstitutional law. There can be no doubt that the opinion in this case fully sustains that of the majority in the case at bar, and if it still expresses the law my brethren are correct in the conclusion they have reached in the cases under consideration. But afterwards the case of *Barron v. Burnside*, 121 U. S., 186, came on for adjudication, and involved

a still different phrase of a similar statute. This case arose in Iowa, under a statute not differing in principle from any of the statutes hereinbefore stated or discussed. The law denounced a fine against any foreign corporation doing business in Iowa without a permit or license sections 8 and 4 being as follows:

"Section 8. Any foreign corporation sued or impleaded in any of the courts of this State upon any contract made or executed in this State, or to be performed in this State, or for any act or omission, public or private, arising, originating or happening in the State, who shall remove any such cause from such State court into any of the Federal courts held or sitting in this State, for the cause that such corporation is a nonresident of this State or a resident of another State than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this State; such forfeiture to be determined from the record of removal, and to date from the date of filing of the application on which such removal is affected, and whenever any corporation shall thus forfeit its said permit no new permit shall be issued to it for the space of three months, unless the executive council shall for satisfactory reasons cause it to be issued sooner.

"Section 4. Any foreign corporation that shall carry on its business and transact the same on and after September 1, 1886, in the State of Iowa by its officers, agents, or otherwise, without having complied with this statute, and taken out and having a valid permit, shall forfeit and pay to the State for each and every day in which such business is transacted and carried on the sum of \$100, to be recovered by suit in any court having jurisdiction. And any agent, officer or employe who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein shall be guilty of a misdemeanor, and for each offense shall be fined not to exceed \$100, or imprisoned in the county jail not to exceed thirty days, and pay all costs of prosecution."

The Chicago & Northwestern Railroad Co. was an Illinois corporation doing business in Iowa without the permit or license required by the statute. One of its engineers was arrested and fined for carrying on the business of the corporation when it had no permit to do business in the State. When this case came to the Supreme Court both of its former adjudications on this subject were reviewed, and the conclusion reached that the whole statute was void, because of the unconstitutionality of that part which undertook to prohibit foreign corporations from removing causes against them to the Federal court. On the subject of *Doyle v. Continental Insurance Co.*, after thoroughly discussing it, the court said (page 199): "The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co. v. Morse*, must be regarded as not in judgment."

I differ from the majority in construing this language of the opinion. It seems to me that it was meant to overrule the opinion then under review.

Any other conclusion would make it meaningless. There is no doubt but that the Iowa statute applied to the foreign insurance company involved in the litigation. Mr. Justice Blatchford opens his opinion with the following sentence: "The statute manifestly applies to the Northwestern Railway Co. as an Illinois corporation;" so that if the statute was valid the proceeding against the offending engineer was also valid, as there was no question in the opinion as to the commission of the acts which contravened the statute. The court concludes its review of the two cases in the following language: "In both of the cases referred to, the foreign corporation had made the agreement not to remove into the Federal court suits to be brought against it in the State court. In the present case no such agreement has been made, but the locomotive engineer is arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the Federal court suits brought against it in the State courts, as a condition of obtaining a permit, and consequently has not obtained such permit. Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statutes is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove such suits. As the Iowa statute made the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

The inherent infirmity of the majority opinion lies in the effect it gives to an unconstitutional statute. The Supreme Court, in the case of *Norton v. Shelby County*, 118 U. S. Rep., 442, on this subject, says: "An unconstitutional act is not a law; it confers no right; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

In Cooley's Constitutional Limitations (page 188) it is said: "When a statute is adjudged to be unconstitutional it is as if it has never been. Rights can not be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."

If this be the law, then so much of the statute under consideration as is admitted to be unconstitutional is as if it had never been enacted by the legislature. Where, then, is the warrant of the insurance commissioner for the revocation of the licenses in these cases? It is no answer to say that if a State may refuse to permit a foreign corporation to do business in the State, or to arbitrarily revoke its license so to do (or, in other words, revoke it for no reason), that, therefore, it may do this for an invalid reason, or under the authority of an unconstitutional statute. A State can only speak through its laws, and if the law is invalid, then the State has not spoken at all. The Commonwealth has not undertaken to prevent foreign corporations from doing business in the State, or to revoke their license so to do "for no reason," or arbitrarily; it has said to its insurance commissioner that he must grant foreign insurance companies license to transact business

In this State when they comply with certain requirements, and that he must revoke this license if they remove to the Federal court a suit against them by a citizen of the State. Now this latter part of the statute is conceded to be void, being in contravention of the laws of the United States, therefore, in reading the statute it must be omitted, and when this is done we find no warrant for the action of the commissioner. To illustrate this, take a pen and erase from the face of the statute those parts which are admitted to be invalid, and then it will present its legal attitude towards foreign corporations; and nothing will be left which authorizes the revocation of the license. Of course this view is predicated upon the theory that the statute is separable, and that the valid part may be segregated from the invalid. If this can not be done, then the whole statute is void, and there is no law whatever on the subject, and, as a consequence, still less authority (if that were possible) for the revocation.

No practical difference can be pointed out between the statutes of Wisconsin, Iowa or Kentucky on the subject under discussion. They were all enacted for the same purpose, and even the verbiage is remarkable in its similarity. In the case at bar the corporations bear the same attitude towards the laws of the State of Kentucky as did the corporation toward the laws of the State of Iowa, and the analogy is complete when the license is revoked by the commissioner, for a corporation whose license is revoked is in precisely the same relation towards the law as one which never had a license. If this be so (and it seems axiomatic), of what avail is the conclusion of the majority, if it results that the revocation of the license is a mere *brutum fulmen*, and that the State is unable to invoke the vindicatory part of the statute because of its invalidity? Is so fine a distinction worth the drawing? It seems to me this must be answered in the negative. And yet this is the precise result of the revocation of the insurance commissioner in these cases if the opinion in *Barron v. Burnside* expresses the law.

The opinion of the majority, as said heretofore, is not only contrary to authority, but also to reason. The policy of the national law under discussion is to place, as far as possible, a citizen of one State engaged in litigation with a citizen of another State on a plane of equality before the law; in other words, to make it possible that the stranger may defend his property or rights, free from the bias of local prejudice or passion. No disinterested mind will deny that this is a just policy. The question then is, whether this beneficent policy, in the interest of a fair and impartial trial to the foreign citizen, may be nullified by a statute enacted for the selfish purpose of giving the citizen the advantage of a trial close to his home (to put the most favorable construction on it), without any regard to the still greater distance of the stranger from his home, and his inconvenience on that score, or of the danger of his suffering from local prejudice or passion in a suit with the citizen. The State statute considers only the convenience of the citizen as measured by the additional distance to the place of trial after removal of the case to the Federal court, and ignores the danger to the foreigner of a miscarriage of justice, on the merits of the controversy, arising from local prejudice or passion in the State tribunal. The existence of such a statute, in itself, affords a justification of the national policy, as expressed in the removal statutes, if such justification were needed.

It may not be altogether impertinent to the subject in hand to say, in conclusion, that it would be well to remember that it is a narrow and provincial view, to regard these national laws as harsh and severe edicts imposed by a foreign suzerain, instead of benignant laws imposed by ourselves in the interest of a broad and national justice; and that in their practical operation many more of our own citizens are benefited by them in their litigation in other States than are inconvenienced by them in favor of citizens of foreign States litigating in our Commonwealth.

For the foregoing reasons I dissent from the opinion of the majority of the court in these cases.

COMMONWEALTH v. DUNCAN, &c.

(Filed January 11, 1905—Not to be reported.)

Lien—The lien provided for in section 2557, Kentucky Statutes, only affects the property of one who knowingly rents his property for the illegal sale of liquor, and in this action the property belonging to the seller, the demurrer to the petition was properly sustained in an action to enforce a lien upon it for the payment of fines assessed against him for the illegal sale of liquor.

J. N. Sharp and N. B. Hays for appellant.

T. Z. Morrow for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Paynter.

Fines amounting to \$1,550 were assessed in favor of the Commonwealth against the appellee, Joe Duncan, under indictments charging him with selling liquor in violation of an act approved May 15, 1884, which prohibited the sale of spirituous, vinous and malt liquors in the counties of Knox and Whitley. The appellee failing to pay the fines, this, an action in equity, was instituted in the name of the Commonwealth, in which it is averred that there is a lien upon the real property of the appellee where the liquor was sold to secure the payment of the fines and costs. A demurrer was sustained to the petition, and this appeal brings here for review that action of the court.

It is urged that section 2557, Kentucky Statutes, gives the lien sought to be enforced in this case. In the first part of this section the penalty is denounced against one who sells, barter, loans, etc., liquor in violation of law. There is another part of the section which reads as follows: "And any person who knowingly furnishes or rents a house, room, wagon, or any conveyance or thing, in which spirituous, vinous or malt liquors are sold, bartered or loaned, in violation of this act, shall, upon conviction thereof, be fined not less than \$60 nor more than \$100, and the house, wagon, vehicle, land or other thing in which the liquors were sold, bartered or loaned shall be liable for all fines adjudged against the person selling, bartering or loaning the same."

From the averments of the petition the house where the liquors were sold belonged to the seller, therefore, he was not a renter of the premises. The clause quoted was for the purpose of preventing persons from knowingly

furnishing or renting a house or room to one for the purpose of selling liquors in violation of law. There is no lien created by statute upon property, except that of the person who knowingly rents his property for the illegal uses mentioned. The court would be adding a clause to the section if it should hold that there was a lien upon the property of one who illegally sold liquors thereon. The court is not concerned with the purpose of the legislature in not inserting a provision in the statute which would give a lien for the fines sought to be recovered. The legislature thought it wise to give such a lien against the property of one who knowingly furnished or rented property for the illegal sale of liquor for only the fines assessed against the seller. Without deciding the question, we have assumed the section of the statute quoted applies to special prohibitory acts, because if it does the alleged lien does not exist. There are other questions raised in the case which we do not deem necessary to discuss here, because the conclusion we have reached obviates the necessity of a consideration of them.

The judgment is affirmed.

TUDOR v. COMMONWEALTH.

(Filed January 11, 1905—Not to be reported.)

Attorneys at law—Proceedings to disbar—A lawyer should never be disbarred upon testimony of a doubtful character, and in this action the prosecuting witness admitting that appellee had rendered him legal services, his testimony sustains appellee's in that the latter testified that the witness owed him, and that the amount paid was a payment upon that debt.

Tobias Gibson and Hobbs & Farmer for appellant.

N. B. Hays, Loraine Mix, John R. Allen and Samuel M. Wilson for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

Based upon the affidavit of R. E. Smith an information was filed against the appellant, S. M. Tudor, for the purpose of disbarring him as an attorney at law. There is really but one charge sufficiently averred against appellant, and that may be stated by a quotation from the finding of the court, which is as follows: "The court finds from the evidence that the defendant, S. M. Tudor, an attorney at law of the bar of Fayette county, has been, and is, guilty of malpractice as an attorney, and of conduct such as is unbecoming and improper in an attorney at law, and that renders him unworthy and unfit to be or remain an attorney at law, in that, after being employed by one M. A. Pharis to prosecute and to aid in the prosecution of one R. F. Smith upon the charge of obtaining money under false pretenses, as charged in the information, and while he was so employed, and after said prosecution had been instituted, and while same was still pending, the said S. M. Tudor, as the court finds from the evidence, entered into an agreement with said R. E. Smith, whereby, in consideration of \$10, agreed to be paid by said Smith to said Tudor, and of which \$5 was in fact then and there paid to him, said Tudor agreed and undertook to have said criminal proceeding dismissed and no prosecution had against said Smith."

We do not reach the same conclusion that the lower court did on the question of fact. If Tudor was employed by Pharis to represent him in the prosecution, and he accepted money from Smith in consideration that he would dismiss it, he was thereby guilty of malpractice, and should for that reason have been suspended from practicing or disbarred, as the court thought proper under all the facts of the case. The charge, if at all, must have been sustained by the testimony of R. E. Smith, who confesses his own shame and wrongdoing in an effort to gratify his ill-will toward the appellant, not to conserve the morals of the community, or to uplift the legal profession. Tudor says that Smith owed him a fee, and that the money was paid on that, and not for the purpose stated by Smith. Smith admitted that Tudor had rendered legal services for him. In this respect he sustains Tudor. While it was unfortunate for Tudor that he collected his fee at the time and under the circumstances detailed, still we can not find from the evidence that he used the prosecution for the purpose of aiding him in the collection of his fee. He did not look up Smith and demand his fee, but Smith admits that he sought and obtained the interview with Tudor at which time he says Tudor was guilty of the wrongdoing. We do not think that Smith's evidence sustains the charge against Tudor. The court should never disbar a lawyer, and thus deprive him of his chosen profession, and perhaps his only means of a livelihood, on testimony of a doubtful character.

The judgment is reversed for proceedings consistent with this opinion.

WOLFORD v. STEELE.

(Filed January 11, 1905—Not to be reported.)

Contracts for the sale of mineral rights—Fraud—Evidence—The evidence conducing to show that appellee was seventy-four years of age, in infirm health and illiterate; that the mineral rights were worth much in excess of the amount appellant agreed to pay for them; that appellee had another tract of land which was the one he thought he was selling, the mineral rights in; that he was induced by the nephew of appellant, who was a secret partner of appellant's in the transaction, to go over to appellant's house where the conveyance was signed, and there given whisky, the lower court improperly adjudged a specific performance. The purchase money paid should be returned appellee and the action dismissed.

Roscoe Vanover and J. F. Butler for appellant.

James M. Roberson for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellee, R. Steele, in the Pike Circuit Court for a specific performance of a contract for the sale to him by appellant of all the coal and other mineral rights underlying two hundred acres of land in Pike county, Kentucky. The consideration for the conveyance was \$60 cash in hand paid, and the agreement on the part of Steele to pay \$1.50 per acre for the mineral rights as soon as the land could be surveyed.

By the terms of the contract Steele was to have ingress and egress over and under the land for the purpose of mining and marketing the coal and minerals, with the right to build tramroads, railroads and switches, and erect tipples and other buildings necessary to mine coal and minerals, with timber for all mining purposes, and with the right to use stone and water for mining purposes.

Among other defenses appellant set up the fact that he was seventy-four years of age, of infirm health, and without any education whatever, being unable either to read or write; that he did not agree to sell and convey the mineral rights under the land described in the petition, and the contract filed an exhibit herewith, but that his agreement was to sell to appellee the mineral rights under two hundred acres of land, the most of which was other than the land described; that he did not agree to allow his vendee the right to build tipples, houses and railroads on his land, or to allow him the unlimited right to take timber for the purpose of operating the mine; that the contract, after it was written, was not read to him in whole, and was a fraud in the way it was written; that R. D. Wolford, who wrote the contract, was his nephew, and was a silent partner with Steele in the purchase of the mineral rights in question; that this fact was concealed from him, and that he would not have permitted his nephew to write the contract had he known that he was interested in the bargain; that the coal and mineral rights described in the petition and contract were worth many times the sum of \$1.50 per acre; that the contract was a fraud upon his rights, and does not represent the true agreement between him and appellee.

The evidence shows that the mineral rights under the land in question are far more valuable than the contract price, being worth anywhere from \$15 to \$25 per acre; that appellant is an old, infirm and ignorant man, unused to the ways of the world; that his nephew, D. F. Wolford, is an educated, bright, wide-awake real estate agent; that just prior to the transaction here involved he was engaged in buying up the mineral rights of the surrounding land for a foreign corporation or company, and that he entered into an arrangement with the appellee, Steele, by which the mineral rights under the land in question were to be purchased of appellant, the title to be held by Steele, but of which Wolford was to be an equal, but secret, partner. In pursuance of this agreement Wolford gave appellant's son \$5 to bring him (appellant) over to Wolford's house, a distance of three or four miles. There appellant was given a drink or two of whisky, and the trade was made, being reduced to writing by the nephew, and witnessed by him. It is admitted that D. F. Wolford desired to keep the fact that he was a partner secret, the reason being given by him that he did not desire his company to know that he was buying this very valuable tract of mineral land on his own account.

We think the evidence shows that the land was far more valuable than the average mineral land in the neighborhood, there being five distinct seams of coal, one above the other, in the same hillside, several of them exceedingly valuable; and this, doubtless, was the reason that the well-informed real estate agent was anxious to acquire title to himself, and to keep the matter secret from his employer; at any rate, he was buying his old uncle's property, and wrote the contract without acquainting him with his

interest in the transaction. Of necessity, his aged relative relied upon him with more confidence, he being disinterested, than if he were one of the purchasers.

The evidence as to whether the writing sets forth the real contract is very conflicting. Appellant and his son swear positively that it does not; whereas Steele and D. F. Wolford are equally positive in their testimony that it does truly show the contract as made. Ordinarily, where the evidence is so nearly equi-ponderant, we would leave the chancellor's conclusion on the facts undisturbed; but we are impressed with the belief that the facts of this case bring it within the purview of *Wollums v. Horsley*, 93 Ky., 582, a case very similar to this in the facts as well as the legal proposition involved. In that case we laid down the principle, based upon undoubted authority, that we would not specifically enforce a hard and unconscionable bargain where the ability and knowledge of the contracting parties was so unequal as to result in one being overreached, and his property sacrificed by the inadequacy of the consideration. In that case, as in this, the real estate man was a bright, wide-awake, alert trader, and the vendor an old, uneducated, afflicted man, and, as in this, the consideration was several times less than the real value of the property sold. We said: "A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought ethics are considered, and a court of equity will sometimes refuse to set aside a contract, and yet refuse its specific performance. * * * The contract was not equitable or reasonable, or grounded upon sufficient consideration, and no interest has arisen in any third party. A court of equity should, therefore, refuse its specific enforcement, but the appellant should have what was in fact paid, with its interest; and when this is done his petition should be dismissed."

We do not think that the fact that nearly or quite all of the purchase money was paid distinguishes the case at bar from that cited. In this, as in that, whatever has been paid must be returned, with interest, and when this is done, the parallel between them will be complete. Upon the authority of the case cited, when this returns to the circuit court, the purchase money received by appellant should be repaid, with interest, and when this is done the petition should be dismissed.

Wherefore, the judgment is reversed for proceedings consistent herewith.

CAMPBELLSVILLE TELEPHONE CO. v. LEBANON, LOUISVILLE
AND LEXINGTON TELEPHONE CO.

(Filed January 18, 1905—Not to be reported.)

Helm, Bruce & Helm for appellant.

Humphrey, Burnett & Humphrey and Fairleigh, Straus & Fairleigh for appellee.

Appeal from Marion Circuit Court.

The following extension of opinion was delivered by Judge O'Rear:

Lest the expression in the original opinion, that the duration of the contract between appellant and appellee must continue during the corporate

existence of the two companies, should be misleading, we extend the opinion so as to express more clearly what was meant. The contract should endure so long as the parties to it, and their successors continue to maintain an exchange or public station at the cities of Lebanon and Campbellsville, or at the intermediate point of Phillipsburg. Should either of the parties elect to withdraw from the city of Lebanon or Campbellsville, and quit doing telephone business or operating public station or exchange at either of those points, then the contract would be terminable by that fact, although the company so withdrawing might continue its corporate existence, and do a telephone business elsewhere. But so long as it exercises its franchise in maintaining an exchange or public station as a telephone corporation in the cities or at the station now served in that community, they must observe the constitutional requirement and maintain the connection and transmit messages between their respective lines.

ILLINOIS CENTRAL R. R. CO. v. HAYS' ADM'R.

(Filed January 11, 1905—Not to be reported.)

Railroads—Damages—Instructions—The verdict and judgment in this action for \$2,000 for damages against appellant for the killing of appellee's intestate will not be disturbed where the evidence shows that deceased was either on the crossing or near it, so near as for all practical purposes to be on it; that it was about dusk; that deceased stopped on a spur so as to allow a freight train to pass when the engine with the tender towards him, backing towards the public crossing, ran over him. If signals were given the noise occasioned by the passing train; its exhausting its steam; the ringing of its bell were well calculated to drown whatever sounds were made in the way of warnings by those in charge of the engine which ran over deceased. Upon this state of case the court below was authorized to refuse an instruction asked by appellant, based upon the idea that deceased was a trespasser.

Robbins & Thomas, J. M. Dickinson and Pirtle & Trabue for appellant.

H. T. Smith for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Barker.

Armstead Hays, a negro man, was run over and killed by one of appellant's engines in Fulton, Ky., at or near the intersection of Walnut street with its right of way. To recover damages for this injury this action was instituted, it being alleged that the accident was caused by the gross negligence of appellant's employees in charge of the engine. The answer placed in issue all of the affirmative allegations of the petition, and also contained an affirmative plea of contributory negligence, which, by consent, was controverted of record, thus completing the issues. A trial resulted in a judgment of \$2,000 in favor of appellee (plaintiff). To reverse the judgment based on this verdict this appeal is prosecuted.

The facts are substantially these: Fulton is a city of some 3,500 or 4,000 inhabitants. Walnut street is one of the public thoroughfares, and is crossed from north to south by appellant's right of way. The intersection made between the street and the right of way was occupied by appellant's main

track and a switch which separates into two spurs. The three tracks are spread out over the intersection in a fan-like shape, occupying a large part of it. The accident occurred about 7 o'clock in the evening, it being about dusk, and just before the electric lights of the city were turned on. As Armstead Hays was crossing the intersection of the street and right of way from west to east he encountered a long line of freight cars being backed from north to south across the street, completely blocking the highway, and forcing him to stop, which he did on spur No. 1. About twenty feet south of the crossing on spur No. 1 one of appellant's engines was standing with its tender towards the point where Hays was standing, and some fifteen or twenty feet from him. This engine had been run in on the spur in order to give the freight train, which was passing at the time, the right of way on the main track, and it was the purpose of those in charge of it to back down on the main line as soon as the track was clear of the passing freight train. Before the freight train passed the point opposite to where Hays was standing it had cleared the switch further north, so that the engine, by backing down, could regain the main track, and this the employees undertook to do, and, in so doing, backed over Hays, killing him instantly.

The evidence shows, without contradiction, that there was no light on the tender, or any person there to see that the way was clear as it crossed the highway. As to whether or not the bell was rung, or whistle blown, before the engine was started on its course the evidence is somewhat conflicting; but we are of opinion that at least the bell was tapped several times, and perhaps the whistle blown. At the time this was done, however, the heavy freight train was passing immediately in front of Hays, and the bell on its engine was being rung, and the engine was exhausting loudly, and these sounds, together with those rumblings usually resulting from the passing of heavy trains, were well calculated to drown whatever sounds of warning were made by those in charge of the engine immediately prior to the time it started.

We can not agree with learned counsel for appellant that the fact that Hays stopped in front of the passing freight train, although he was standing on the spur of the track upon which was the engine in question, was per se negligence on his part. For the purposes of this case, it may be conceded that he was some eight or ten feet south of the south crossing instead of being precisely on it. The uncontradicted evidence shows that the crossing of Walnut street and the right of way was one of the most popular thoroughfares of the city, and that many people passed and repassed there daily; that these passers did not always confine themselves to the mathematical line of the crossings, but constantly quartered across the street as convenience and inclination dictated. We think it is immaterial whether the decedent stood precisely on the crossing, or whether he was a few feet to the south of it. This was a place which the public constantly used, and appellant was bound by this habitual use to expect persons to be there. Common experience teaches that at such crossings the traveling public is not, and can not be, restricted to precise mathematical lines in crossing; therefore, the decedent was not a trespasser so as to bring him within the principle that appellant's servants owed him no duty except to refrain from injuring him after his peril was discovered. The tender of the engine was within

twenty feet of the crossing; there was no light on it, and nothing to attract the attention of Hays as he stood waiting for the freight train to pass so that he could cross the street. From their position in the cab of the engine appellant's servants could not see a man standing on the track within less than sixty or sixty-five feet from the rear of the tender. This was demonstrated by actual experiment afterwards: so that when the engine commenced to back across the highway those in charge could not see whether there was any one on the crossing or not; and, although they were bound to know that the noise of the passing freight train was calculated to drown the signals given by themselves, they, without light or an attendant on the tender, backed over one of the most constantly used thoroughfares in the city. A glance at the map filed with the transcript convinces us that Hays, as he stood waiting for the passing of the freight train with all of its noises, was in a veritable death trap if the engine on the spur commenced backing before the freight train cleared the crossing in front of him; and, under all the circumstances of this case, we are impressed with the conviction that the employees in charge of the engine on the spur, taking into consideration the dusk of the evening, the noise of the passing freight train, the absence of light on the tender, or of an attendant there to give warning of danger, were guilty of at least ordinary negligence in running over the deceased in the manner in which they did.

We have said so often and so uniformly that where the tracks of a railroad run through cities, and especially at public crossings, those in charge of its trains owe to the public a vigilant lookout to prevent accidents that it is not worth while to cite those cases here. We do not mean to in anywise abate the doctrine, that one who is unlawfully or without right on a railroad track is a trespasser, and that the corporation owes him no other duty than the exercise of a reasonable care to avoid injuring him after his peril is discovered; but this doctrine has no place where the accident occurs at, or so near as to be practically at, a public crossing in a city. At such a place we do not believe that the operators of an engine can back it over the crossing without some one in charge who can see the danger ahead, and so control the engine as to prevent injury, without being guilty of negligence. Let us suppose that some misfortune happened to one at a crossing; that he had caught his foot in such a way as to be enabled to get off the track; or that his horse had become frightened and balked, and he was unable to control it; or that any one of a great number of possible accidents of this nature had occurred; of what avail then would it have been to have blown the whistle or rung the bell, if those in charge could not see the danger ahead, and those in peril were unable to save themselves by getting off the track? We think, under these circumstances, no one would claim that the employees were free from negligence, although they had rung a bell and given the "back-up signal."

The same principle applies where the circumstances are such that the one in danger either can not hear the signals by reason of other noises made by the defendant's employees and cars, or, for the same reason, becomes confused and does not understand them. As the tender of the engine was turned towards the public crossing, with no light on it, the passerby, without his attention being particularly called to it, would not notice its pres-

ence, or perhaps would not know it was an engine at all, and he certainly would not expect it to be backed along the switch over the public crossing while a heavy train was being operated along the main line over the same crossing. It seems to us that this act in itself was negligent, as one so caught between the trains, even if he saw the coming engine, might by the confusion of fright and excitement be rendered helpless. We do not think the court erred in refusing to give instruction "D.." asked for by appellant, which was based upon the decedent's 'being a trespasser at the time he was killed, for the reason that the evidence shows (stating it most favorably to appellant) that he was either on the crossing, or so near it as for all practical purposes to be on it; that the general public often made the same use of the right of way as did the decedent, assuming him to have been eight or ten feet south of the crossing, and appellant's employees had a right to expect that persons would at any time be on the right of way near the crossing where the decedent, according to Mr. Bennett's testimony, was standing. The decedent's standing there was not a mere arbitrary use of appellant's right of way, but he was stopped there by the freight train passing along the main track, and, as said before, we think it was negligence in the operators of the engine to have backed it blindly over the public crossing in the manner that is conceded to have been done in this case. The questions of law arising from the facts were fully and fairly presented by the instructions.

The judgment is affirmed.

VOGEL, &c. v. MOORE, &c.

(Filed January 12, 1905—Not to be reported.)

1. Sales of merchandise—Where the evidence in this action showed that the goods were sold in the usual course of trade and without other warranty than the law implies in such sales; that the goods were retained by the purchasers for about seven months, before offering to return them; that one of the partners asked indulgence on the claim, never complaining of the goods or offering to return them, and most of the goods being sold, it is manifest that the defense is an afterthought and without merit.

2. Evidence—It was error for the lower court to exclude the testimony of appellant's salesman, to the effect that the goods of which appellees complain to him in their store were not a part of those sold by him, but were bought by another dealer.

John W. Rodman for appellants.

B. G. Williams for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Settle.

Appellants on June 22, 1903, sued appellees in the Franklin Circuit Court for \$259.81, balance due upon account for merchandise, consisting of boots and shoes, sold and delivered them in the months of August and September, 1902.

The statement of account filed with the petition indicates that appellees purchased of appellants, August 19, 1902, a bill of goods mentioned, amount-

ing to \$180.85; September 12, 1902, another of \$182.36, and yet another of \$23.40 September 15, 1902, making altogether \$385.71, and appellees are credited in the account by \$26.40, paid February 3, 1903, and \$50, paid May 18, 1903, leaving unpaid the sum of \$259.31 sued for. The purchase of the foregoing bills of merchandise, as well as the correctness of the respective amounts charged therefor, were admitted by the answer of appellees. It is averred in the answer that in addition to the several bills of merchandise mentioned in the petition appellees purchased of appellants two others, one of \$754.50, July 11, and one of \$187.20, August 5, 1902; that at the time of making the order of July 11, 1902, appellees being ignorant as to the quality and workmanship of such boots and shoes as were sold by appellants, the latter gave an express warranty to the effect, first, that the boots and shoes they would furnish them should be of first class quality and workmanship; second, that they would be satisfactory to appellees and adapted to their trade; third, that if the goods were found to be unsatisfactory to appellees, and unsuited to their trade, appellants would take back such of them as were not of the quality warranted, and give appellees credit therefor.

It was further averred in the answer that the boots and shoes furnished appellees by appellants under the foregoing alleged contract of sale and warranty were discovered by appellees to be of inferior quality and workmanship, unsalable and unsuited to appellees' trade, and consequently unsatisfactory to them; that many of the boots and shoes sold by appellees to their customers out of the stock bought by them of appellants were soon returned to them as worthless, and that by reason of the inferior quality of the boots and shoes sold them by appellants, and their unsuitableness to appellees' trade, they were unsalable, and the bulk thereof were left upon their hands, or had to be sold at great loss, instead of profit, whereas if they had been of the quality and workmanship represented by appellants and suitable for appellees' trade, as warranted, they would have readily sold in great numbers and at a profit to appellees of not less than 25 per cent., amounting in the aggregate to \$318.75.

It was further averred that at the date of the filing of the answer appellees had on hand \$496.55 worth of the boots and shoes sold them by appellants, which they expressed a willingness to return to appellants. The answer was made a counterclaim and judgment was asked thereon against appellants for \$551.16 damages on account of the alleged breach of warranty complained of, which sum was made up of the \$318.75, alleged loss of profits, and \$237.41, the amount of the difference between \$496.55, the alleged value of the unsold goods purchased by appellees of appellants, and the \$259.14 claimed by appellants in their petition.

By an amended answer, which, though objected to, appellees were permitted to file, they averred that upon their discovery of the alleged defective quality and workmanship of the boots and shoes purchased of appellants, they offered to return them, but that appellants refused to accept them. A demurrer was filed by appellants to the answer and counterclaim as amended, but overruled by the court, to which they excepted. Thereupon they filed a reply, controverting the material averments of the original and amended answer and counterclaim. Upon the trial of the issues thus formed the jury returned a verdict for appellees, which in effect allowed

only so much of their counterclaim for damages as equalled in amount the balance of \$259.14 due appellants upon account as claimed in the petition.

Judgment was entered upon the verdict dismissing the petition and allowing appellees their costs. Appellants filed motion and grounds for a new trial, but the motion was overruled, and the record brought to this court by appeal presents for our consideration the judgment and rulings of the lower court complained of. We think the trial court erred in overruling the demurrer to the answer and counterclaim as amended, as the facts stated therein do not constitute a good defense, or cause of action upon the counterclaim.

It will be observed that the answer expressly admits the appellees' indebtedness for the amount claimed in the petition, and that this amount, \$259.14, is all that remained unpaid of an indebtedness of \$1,255.09, contracted by them for goods purchased of appellants between July 11 and September 15, 1902. It is averred in the answer and counterclaim that \$942 worth of the goods received by appellees of appellants were purchased prior to August 19, 1902, and that the contract containing the alleged warranty from appellants set out in the answer was made when the orders of July 11 and August 8, 1902, for goods were made by appellees. It is not, however, averred in the answer and counterclaim that the warranty of appellants extended to or embraced the subsequent sales of goods of August 19, September 12 and September 15, 1902, and yet the goods purchased by appellees at the three sales last named are the goods for the price of which appellants sued in this case. In other words, the language of the answer and counterclaim seem to confine the alleged warranty to the two sales of July 11 and August 5, 1902.

It is not averred in the answer and counterclaim in what respect the boots and shoes were defective, or why they were unsalable, and the statement of the pleaders that they were not adapted to the trade, or satisfactory to appellees or their patrons, is a mere conclusion.

It is not alleged in the pleading in question when or in what manner it was to be ascertained whether or not the boots and shoes purchased by them of appellants were of first-class quality and workmanship and suited to their trade. It should have been averred when these facts were to be determined whether by an agreed date, or within a reasonable time. Nor is it alleged when or how the goods were to be received by appellants or returned to them in the event they were found to be of defective or of unsalable quality. Were they to be shipped to appellants, or were the latter to receive them at appellees' place of business? It is true the averment is made that when appellees discovered the defects in the goods they notified appellants of that fact and offered to return them, but when was the discovery made? Was it within a time fixed by the contract of sale, or in a reasonable time? The answer is silent on these points.

We can not look to the evidence for the facts omitted from the answer. They must be alleged because they are essential, and the counterclaim will not present a cause of action without them. But it will be found that the evidence heard in the trial threw little, if any, light upon these questions; that of appellees conduced to show that many of the boots and shoes sold by them to their customers did not give satisfaction, and were returned. It is

not altogether certain, however, that those sales were from the goods purchased by appellees of appellants. Indeed there was evidence to the effect that appellees while holding appellants' goods had other shoes purchased of a different dealer, which were of very inferior quality, and all the evidence in behalf of appellants tended to show that their goods sold appellees were of good quality and workmanship, and such as were adapted to the local trade of a country store.

While it does appear that appellees at one time in the fall of 1902, expressed to appellants' salesman, Johnson, dissatisfaction with a small lot of goods shipped them by appellants, they, by Johnson's direction, reshipped them to appellants, and the latter gave them credit therefor, amounting to \$26.40. It further appears that in the latter part of August, 1902, and about two months after ordering the first bill of goods of appellants, appellee Moore paid to J. J. Vogel, one of the appellants, \$940 upon account, which payment was made in appellees' store at Elmore, in Franklin county, as Vogel was on his way to Frankfort from the Lawrenceburg Fair and according to the testimony of Vogel and Johnson, who was with him, the appellee, Moore, then made no complaint about the goods sold his firm by appellants; upon the contrary, after that time they purchased of appellants two of the bills of goods to recover the prices of which this action was brought. At the time of the payment of \$940 appellees had had about two months' time in which to ascertain the quality of the goods theretofore sold them by appellants, and it is not reasonable that they would have made such a large payment, which in fact amounted to about all they were owing appellants at the time, if they were dissatisfied with the goods, or they were not of the quality represented by the sellers.

The evidence introduced by appellants further conduced to prove that the goods sold by them to appellees were purchased by the latter in the usual course of trade, and without any other warranty than that implied by law in such sales, and we think the circumstances attending the following sales support this theory. But if it be conceded that the purchases of goods made by appellees of appellants were under such a contract and warranty as contended by them, it not being alleged or proved by appellees when the quality of the goods were to be ascertained by them or when they were to be returned to the sellers if found defective and unsuited to appellees' trade, it was the duty of the latter, as a matter of law, to ascertain these facts within a reasonable time after receiving the goods, and in like reasonable time to return or offer to return them. If this was not done, the law presumes, and appellants had the right to conclude, that appellees were satisfied with the goods, or if they were not of the quality and description contracted for, that the defects were waived. (Dana v. Boyd, 2 J. J. M., 594; O'Bannon v. Rief, 7 Dana, 320; Kerr v. Smith, 5 B. M., 553; Jones Bros. v. McEwan, 91 Ky., 373; Benjamin on Sales, 4th edition, sections 600 to 609.)

The reason for this rule is a sound and equitable one. It is that "when the vendor tenders (or delivers) the goods in discharge of the contract and they do not come up to the stipulation, if the vendee, after having inspected them, or after having a fair opportunity to do so, would reject them, the vendor, in many cases, could comply with his contract by delivering other

goods of the contract description or quality; or, in the absence of such right or opportunity, he would have the opportunity to take charge of them and dispose of them himself, rather than confide the sale of them to the vendee, whose interest might be to have recourse on the vendor and to handle the goods with that view alone, or his business capacity might be such that the vendor would not be willing to trust him. But if the vendee, after inspecting, or having a fair opportunity to inspect, the goods, were allowed to receive them in discharge of the contract, and then hold the vendor responsible for actual or supposed defects by exposing him to actions on the warranty on account of defects, but really to cover losses resulting from short-sighted speculation, or the wayward changes in the market after he had been led to believe that all was satisfactory, would be most inequitable." (Jones Bros. v. McEwan, supra, 91 Ky., 373.)

It is disclosed by the record in this case that appellees retained the goods shipped them by appellants from the time they were received until May 19 of the following year, a period of about seven months, before offering to return them. On that day appellees sent their attorney, W. L. Jett, to Louisville to see appellants, and he testified that he made them a tender of the goods then on hand, amounting in value to \$496, in discharge of the debt named in the petition, and demanded in money the difference between the debt and the value of the goods. This statement was denied by appellant, J. J. Vogel, and his clerk, they stating that Jett only offered a compromise by paying their debt with some of the goods in appellees' possession, which they refused. But assuming that the conversation occurred as stated by Jett, it is nevertheless evident that the offer to return the goods came too late.

During the seven months they were held by appellees all of the goods except \$496 worth were sold by them during the month of February, 1903, and later the appellee, Moore, repeatedly wrote appellants begging indulgence upon the debt sued on, and never once complaining in these letters of the goods, or offering to return them. In fact, on May 18, 1903, the day before they sent Jett to Louisville with the offer to return the goods, he paid appellants' Frankfort attorney \$50 on his indebtedness to appellants, and after he was sued mortgaged the goods in controversy with his entire stock to his brothers, and still later made a deed of assignment of them to his brothers, thereby putting it out of his power ever to return the goods. It is manifest from the evidence that the defense interposed by the appellees to the claim sued on was, and is, an afterthought, and without merit. Under the uncontradicted facts of this case as presented by the record the trial court ought to have held as a matter of law that the defense relied on was not good, as appellees were too late in offering to return the goods, and should have peremptorily instructed the jury to find for the appellants the amount of the debt sued on. It follows from this conclusion that the instructions given were improper and erroneous.

The trial court erred in excluding the testimony of the appellants' salesman, Johnson, to the effect that the goods of which appellees complained to him in their store were not a part of those sold them by appellants, but were bought by appellees of another dealer. The excluded testimony was clearly competent.

Wherefore, the judgment is reversed and cause remanded, with directions to the lower court to grant appellants a new trial and for further proceedings consistent with this opinion.

HALL v. CONTINENTAL INSURANCE CO. OF NEW YORK.

(Filed January 17, 1905—Not to be reported.)

Insurance—Assignment and transfer of policy—In this action to recover upon a policy of insurance, where it is apparent that the agent undertook to facilitate the transfer of the policy to appellant, and for this purpose mailed him a blank application for the consent of the company, and that appellant failed to sign and forward the necessary application, and pending the negotiations the property burned, the court correctly awarded a peremptory instruction to find for appellee.

Bloomfield & Crice for appellant.

W. M. Oliver and Oliver & McGregor for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barker.

Mrs. Eliza Sanderson was the owner of a farm, with a dwelling house and other improvements thereon, in McCracken county, Kentucky. While the title to the property was in her she secured a five years' term fire insurance policy from the appellant company on the dwelling and its contents, the risk being distributed as follows: Three hundred dollars on the household effects and six hundred dollars on the dwelling. The insured had paid an annual premium January 1, 1901, which kept the policy in force until January 1, 1902.

On October 16, 1901, she sold and conveyed the property to appellant, T. E. Hall, the money consideration being part cash, lien reserved for the remainder; she also agreed to assign the policy to her vendee. On November 6, 1901, she did assign the policy by a writing on the back thereof, and delivered it to the agent of the insurance company, Joe W. Hughes, for the purpose of having the company consent to the assignment. Thereupon the agent entered into a correspondence with Hall on the subject, and their letters constitute all the evidence of what took place between them, and are as follows:

“November 23, 1901.

“Mr. Hall, Milburn, Ky.:

“Dear Sir—Enclosed find application that you will fill out, showing your relationship to the property, in regard to the title, encumbrances, etc.; also a guarantee that you will pay the remaining installments as they fall due, \$9.60 January 1, 1902, and January 1, 1903.

“As we haven't your address we will have to use an indirect way of reaching you through mail.

Very truly yours,

“JOE W. HUGHES, Agent.”

“Milburn, Ky., December 16, 1901.

“Dear Sir—Your letter has been received. I understand that part of that policy is on household goods. I have nothing to do with anything but the amount on the house. If it is all right I am willing to assume the payment

of premium if transfer is properly made. Please let me hear from you in regard to the matter.

Respectfully yours,

"T. E. HALL."

"December 18, 1901.

"Mr. T. E. Hall, Milburn, Ky :

"Dear Sir—Yours of the 16th to hand. In regard to the matter, I will say that in the policy there is \$500 on the dwelling house, \$100 smokehouse and \$200 on personal property in dwelling. Where the house is occupied by a tenant the rate is higher, and to cancel the personal property of \$200 it would make the premium just about the same as if you was taking a new policy, so if you will simply fill out the blanks and send them to me, the policies will be properly transferred and forwarded to you.

"Please attend to the matter and oblige,

"Very truly yours,

"JOE W. HUGHES, Agent."

"Milburn, Ky., December 12 21-01.

"Dear Sir—Answering your letter of —, will say, I expect to occupy the place after one year. Would be willing to pay the premium you demand for that time, but no longer. Let me hear from you at once, and oblige,

"Yours,

"T. E. HALL."

"December 23, 1901.

"Mr. T. E. Hall, Melber, Ky. :

"Dear Sir—Yours of the 21st to hand. Will say in regard to policy No. 283144-5 saying that you guarantee the payment for one year, that would not be be satisfactory to the company. The policy is written to expire January 20, 1904. However, you have the right to cancel the policy at any time you desire by paying the company a short term rate for cancellation, but I will say that from the time you occupy the place yourself that it will reduce the rate 25 per cent. I guarantee to furnish you as cheap insurance on the property as any company would do.

"Trusting that upon receipt of this that I will receive the necessary blanks filled out and executed as I have heretofore sent you.

"Yours very truly,

"JOE W. HUGHES, Agent."

On the back of the policy, and immediately underneath the blanks provided for the assignment by the original insured and for the consent of the company thereto, is the following stipulation: "No local agent or other representative, except the general manager, has the power to consent to the assignment of this policy or any indorsement thereon.

"All assignments or indorsements must be made by the duly authorized general manager of this company at Chicago, Ill."

It is apparent from the correspondence between the agent and the vendee, Hall, that the former undertook to facilitate the transfer to the latter of the policy, and for this purpose mailed him a blank application for the consent of the company, together with a statement showing his relationship to the property, its title and encumbrances, etc.; also a guarantee that he would pay the remaining installments of premium as they fell due. The

correspondence speaks for itself, and shows beyond question that Hall failed to sign and forward the necessary application, which was required before the company would agree to accept him as the insured under the assignment. Pending the negotiations the house burned.

There can be no question as to the rule of law that before a policy of insurance secured by the owner of property can be transferred or assigned to his vendee the consent of the company must be obtained; and this is the plain stipulation on the face of the contract involved in this litigation. Usually the question of consent is a matter of dispute, and very intricate and troublesome questions of fact arise as to whether or not the company has consented. In this case, however, there is no such difficulty; it is not pretended that the vendee, Hall, ever had communication with any agent of the company, except the correspondence above given, and this conclusively shows, as before stated, that he failed to comply with the terms of the company, and was not accepted by it as an insured; and that, therefore, he had no contractual relations with it. The following authorities support the views here expressed: *Hays v. Continental Insurance Co.*, 7 Ky. Law Rep., 524 (Superior Court, Bowden, J.); *Green v. Kenton Insurance Co.*, 12 Ky. Law Rep., 750 (Superior Court, Barbour, J.), and *Queen Insurance Co. of America v. Block*, 22 Ky. Law Rep., 626, Hobson, J.

The facts above detailed appearing in the evidence of appellant (plaintiff), the court correctly awarded a peremptory instruction to the jury to find for appellee (defendant) at the close of the testimony for appellant.

The judgment is affirmed.

HARMON v. STUART.

(Filed January 18, 1905—Not to be reported.)

Practice—Setting aside submission—Where appellant had been absent in South America and in England during the period of the litigation, and the letters of his attorneys had failed to reach him apprising him of its condition and status, and reached this country just a few weeks after the submission, when he found papers and memoranda which were of vital importance to him in his case, the ends of substantial justice require that the submission should be set aside, and that he be allowed time to take proof to enable him to prepare his case.

J. M. Benton for appellant.

G. B. Nelson for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Hobson.

On the former appeal of this case the judgment in favor of the plaintiff was reversed and the cause remanded for a settlement of the partnership between appellant and appellee. (*Stuart v. Harmon*, 24 Ky. Law Rep., 1820.) The mandate having been filed in the lower court an order of reference was entered on October 24, 1903, for the settlement of the partnership as directed in the opinion. At the February term, 1904, the master commissioner filed his report of settlement showing a balance in the hands of

Harmon due the firm of \$29,955.50. Both sides filed exceptions to the report and the case was submitted on the exceptions, little proof having been taken after the return of the case from this court. On May 2, 1904, and before the case had been heard, Harmon filed the affidavits of himself, Tazewell Ellett, William Beckner, John Stokes Adams and W. W. Weigly, with four exhibits, and moved the court to set aside the order of submission and permit him to retake his own deposition and the depositions of the witnesses named. In these affidavits Harmon showed that he had been absent from this country during the past twelve months, and had not been advised of the progress or condition of the litigation. He had just learned that a settlement as to disbursements made by him and expenses incurred was required.

On the original hearing Stuart produced a letter from Harmon, stating that when the deal was closed he could show the whole thing up through the Union Trust Co. of Philadelphia. His attorney in preparing his case had written to this trust company to get the information which it had, and receiving no answer and Harmon being in South America, the attorney went to Philadelphia and applied to the trust company for the information, but was informed by it that the officers of the company had changed; that they knew nothing about the matters and were satisfied the papers had been turned over to the parties in interest. Shortly before the May term Harmon, by employing counsel in the East, had procured the trust company to look up the papers and it had found papers which would enable Harmon to show the court the condition of the account, and from these papers the recollection of the witnesses whose depositions were proposed to be retaken were unfinished so that now, with the aid of the papers, he would be able to establish the facts which theretofore he had been unable to establish. He also showed by the affidavits of Ellett, Weigly and John Stokes Adams that he could prove by them facts of vital importance in his behalf. The court overruled his motion to set aside the submission and gave judgment against him for something over \$13,000, with interest from January 1, 1887.

Whether or not the submission should be set aside and a further opportunity given the defendant to take proof is within the sound discretion of the court, and is to be determined by it under all the facts and circumstances in aid of substantial justice. Harmon had been in South America and after this in London; the letters of his attorneys had failed to reach him; their efforts to obtain the evidence had also failed, and when he reached this country a few weeks before the May term, and after the submission of his case, he succeeded for the first time in finding the papers and producing the memoranda which were of vital importance to him in getting his case properly before the court. In view of the large amount involved and the importance of the evidence, and in view of the fact that Harmon had been absent from this country since the reversal of the case in this court, and that the letters of his attorneys had failed to reach him, and he was unapprised of the condition of the litigation, we think that the ends of substantial justice require that the submission of the case should be set aside and a reasonable opportunity given him to take his proof. But in view of the length of time the litigation has been pending, and the fact that the case had been submitted on the merits after a report from the commissioner on the proof before the court, the submission must be set aside on the condition

that Harmon, within thirty days after the entry of the order, pay the costs of the action up to May 2, 1904. If he fails to pay the costs within that time the judgment will stand. He should be allowed sixty days to take such further proof as he may desire, after the payment of the cost of the action.

Judgment reversed and cause remanded for further proceedings consistent herewith.

MAHAN v. DOGGETT.

(Filed January 18, 1905—Not to be reported.)

1. Damages—Evidence—In this action to recover damages for the injury to his property by appellant's sawmill, the evidence showing that the chute that carried off the dust was so built as to deposit the saw dust within a few feet of appellee's lot; that finer particles of it invaded his house, injuring his furniture, clothing, etc., killed his garden, it was not improper to permit the plaintiff upon the trial to prove that other mills burnt their dust as the tendency of this evidence was to show that there was another and a proper way to dispose of the saw dust.

2. Instructions—An instruction telling the jury that they should find for plaintiff such sum in damages as would compensate him for injury sustained by deposit of saw mill dust upon his premises, in injuring his trees, garden, furniture, etc., was not only right as far as it went, but it might have gone further, and defined that plaintiff was not only entitled to the use of his property, but that he had the right to enjoy it in peace and comfort.

R. C. Burns for appellant.

R. L. Greene and Montague & Williams for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant operates a large steam sawmill on his lot in Catlettsburg, adjacent to the lot of appellee. Appellee has a dwelling house on his lot which he occupies with his family as a residence. Appellant, in disposing of the saw dust from his mill, built a chute through which the sawdust was forced by a machine, called a cyclone, creating a powerful draft by which the saw dust was thrown and scattered with great force. The chute was so built as to deposit the saw dust within a few feet of appellee's lot. The force by which it was driven was so great that the finer dust was scattered all over appellee's premises, and invaded his house, settled upon his furniture, carpets, bed clothing, wearing apparel, upon the dishes, on the victuals that were being cooked for the family. It so filled the atmosphere that it was breathed by the family. It settled upon his garden and killed it. It made his home almost uninhabitable for a time. Appellee sued to recover the damages. The verdict of the jury gave him \$500.

The allegation of the petition was that appellee's property was worth \$1,740. Appellant complained that the verdict allowing appellee \$500 as damages is excessive. He also complains that there is no evidence whatever as to the value of appellee's property. However, the allegation in the petition of its value is not denied by the answer. Appellant also complains that the court erred in failing to define a correct measure of damages, or

any measure of damages, to the jury, and that they were consequently left to conjecture in fixing them. In instructing the jury the court told them that if they found for the plaintiff that they would find for him such reasonable sum in damages as they may believe from the evidence would compensate him for the injury done to his house, lot, fruit trees, ornamental trees, shrubbery, grape vines, garden, furniture, beds or clothing, or any of it that was injured by the saw dust of defendant's mill, being carried through the chute and caused to deposit or settle upon plaintiff's property.

So far as the instruction went it was right. It stopped short of giving the plaintiff as much as he was entitled to. Of this appellant, the defendant, can not be heard to complain. The plaintiff was entitled not only to use his own property without its being injured by defendant, but he had the right to enjoy it in peace and in comfort, free from such molestation. If appellee's complaint was true, and the verdict of the jury found that it was, he was entitled to recover for the discomforts suffered by him and his family in addition to the actual damage done to his property, or he was entitled to recover for such discomforts even though his property sustained no actual damage.

Appellant's suggestion that the measure to recover was the difference between the rental value of the property for the length of time that the nuisance continued, whether for several weeks or months, and for such sum as would compensate the plaintiff to remove from his property during that time, is wholly untenable. Appellant's use of his mill in the manner in which it deposited the saw dust constituted a nuisance to the plaintiff's premises, sounding in trespass. It was a willful and high-handed disregard of the rights of the adjacent property owner. All the damages occasioned by it ought to have been recovered by the injured party. The complaint is also made that the court erred in admitting evidence to the jury that other sawmills burnt their surplus sawdust instead of scattering it, or depositing it where it would not become a nuisance in the neighborhood. It was objected that this fact was irrelevant. Its tendency was to show that there was another, and a proper, way of disposing of that article so that it would not work an injury to others. That fact was clearly relevant to have been shown. The manner of showing it, even though irregular, could not have been prejudicial to appellant in this case. His own witnesses proved that he himself had had a blast or furnace for consuming his own saw dust, and rebuilt another immediately after the injury complained of in this suit, and that that was done because it was the best way of disposing of the saw dust; that the acts complained of were committed while appellant's furnace for burning the saw dust was out of repair, and the chute was only a temporary affair. Furthermore, it was such an obvious fact, and one so well known, that it may be fairly presumed that a jury of ordinary intelligence was aware of it. We see nothing in the record in the nature of a prejudicial error to appellant's substantial rights.

Therefore, the judgment is affirmed, with damages.

GERMAN-AMERICAN INSURANCE CO. v. YELLOW POPLAR LUMBER CO.

(Filed January 18, 1905—Not to be reported.)

1. Insurance—Abrogation of clause—In this action for the recovery of insurance upon appellee's lumber there is some conflict in the evidence as to whether or not what is known as the "clear space clause" was abrogated before the loss, but the question was submitted to a jury, who found for appellee, and the preponderance of the evidence appears to sustain the verdict on this point.

2. Authority of agent—Where the agent of an insurance company had the power to issue a policy of insurance no reason can be seen why he could not make a new contract by annulling a space clause upon receiving additional premiums. A contract of insurance is not within the statute of frauds. It is not necessary that it should be in writing, it may be changed by parol, even though the contract provides that it shall only be changed by writing. The act of the agent in abrogating the contract was not a waiver of its provisions, but a new contract, and the court below was correct in so holding.

T. R. Brown for appellant.

Hager & Stewart and Robert L. Greene for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted upon two policies of insurance, appellee suing to recover damages for loss occasioned to, and sustained by, appellee by reason of a fire occurring on September 8, 1900, resulting in the destruction and loss of a stock of lumber in its lumber yard at Scranton, Ky.

One of the policies was for \$2,500, dated 21st day of April, 1900, the other for \$3,000, dated June 7, 1900, each extending for one year. The issuance of the policies, the company's authority to do business in Kentucky, and the authority of its agent at Ashland to issue policies, was admitted by appellant's answer. The answer also admits the description of the property covered by the insurance, notice of loss, proofs and acceptance thereof, and failure to pay for the loss. While the answer denied total loss and the value of the property destroyed, and denied the ownership by appellee of the same, these facts were proven on the trial, and were virtually abandoned by appellant, and are not urged as causes for reversal on this appeal.

Each of the policies in suit when issued contained what is known in lumber insurance as a "clear space clause," appearing on slips annexed to and forming a part of the policy. The clause is as follows: "Warranted by the assured that a continued clear space of 150 feet shall hereafter be maintained between the property hereby insured and any wood working or manufacturing establishment, and that said space shall not be used for the handling of lumber thereon for temporary purposes, tramways, upon which lumber is not piled, alone being excepted. But this shall not be construed to prohibit loading or unloading within, or the transportation of lumber and timber products across, such space, it being especially understood and agreed by the assured that any violation of this warranty shall render this policy null and void."

It appears from the petition that the space named in this clause was not

maintained at the time, and for some period prior to the fire and destruction of the lumber, and in avoidance of the effect of this clause it was in substance alleged that after the policies were issued and delivered it was ascertained that appellee could not maintain or keep clear the space required, and it, on or about the 16th day of July, 1900, made and entered into an agreement and contract with appellant's agent at Ashland, Ky., who was authorized to make the contract, by which, in consideration of additional sums named, to be paid as premiums on each of the policies, "the clear space clause" was abrogated, and appellee was from that date not required to maintain the clear space of 150 feet around the lumber insured. It was also agreed at the time that appellant's agent should prepare a slip evidencing this contract, to be attached to the policies and forward same to the office of appellee, which, on account of the neglect of appellant's agent, was not done until the day after the fire.

Appellant, by pleading, denied such a contract, or any contract, with reference to the abrogation of the clear space clause, and denied the power or authority of its agent to make such a contract, and alleged that the contracts of insurance or policies filed with appellee's petition were made and accepted upon these terms, to wit: It was agreed between the parties thereto, and made a part of the policies, that no officer or agent, or other representative of the insurance company, had power to waive any provision or condition of same, except such provisions or conditions as by the terms thereof might be subject of agreement endorsed thereon, and as to such provisions or conditions it was agreed between the parties that no such officer or agent or other representative of the company had power or authority to waive such provisions or conditions, unless such waiver be written upon, or attached to, said policy, and that no privilege or permission affecting the insurance under the policies should exist or be claimed by the insured unless so written or attached, and denied that it or its agents at any time wrote upon, or attached to, the policies any agreement of waiver or abrogation of the agreement for maintaining the "clear space" clause, and in apt terms denied all allegations as to breach of the contract of insurance.

There is some conflict in the evidence as to whether or not the alleged abrogation of the clear space clause in the policies was made before the loss. The question was submitted to the jury, and it found in favor of appellee, and we are of the opinion the preponderance of the evidence sustains the verdict on this point. The only remaining alleged error complained of by appellant which we deem necessary to notice is the question whether or not the agent of appellant had the power and authority to make the contract referred to in the manner stated, and bind the appellant. This court has repeatedly decided that an agent's acts within the general scope of his authority binds his principal. (87 Ky., 285; 90 Ky., 89; 87 Ky., 539; 91 Ky., 208; 94 Ky., 197; 98 Ky., 305; 17 Ky. Law Rep., 619; 24 Ky. Law Rep., 57; May on Insurance, sections 126 and 144; Joyce on Insurance, sections 395, 398 and 425.)

It was proven that Davis, appellant's agent at Ashland, had authority to accept fire insurance risks on its behalf, countersign and issue and deliver its policies of insurance, renew risks, and collect and receive premiums therefor; and before the loss of the property by fire agreed with appellee, in

consideration of its (appellee's) agreement to pay therefor additional premiums of \$87.50 on one policy, and \$70 on the other, to abrogate and waive the agreement as to maintaining the clear space clause, and also agreed that this abrogation and waiver should take effect and be in force from that day, to wit, 16th of July, 1900. Upon the principles of the foregoing authorities and facts proven we find that the agent of appellant was its general agent in the transaction in question; that he made the agreement for insurance to apply upon abolition of the clear space clause. He represented the appellant in effecting the insurance originally, signed and delivered the policies covering the risk at the premium rate of 2 per cent. on the hundred. It was within his power and authority as agent to have written the insurance, in the first place, without the "space clause" at the premium rate of $5\frac{1}{4}$ per cent., and having such power we can see no reason why he could not make a new contract and annul the space clause upon receiving additional premium sufficient to make the sum $5\frac{1}{4}$ per cent. on the \$100.

He could have, by agreement with the appellee, annulled these policies and immediately made another contract, either written or verbal, with appellee, insuring the property for a like amount for the premium of $5\frac{1}{4}$ per cent., leaving out the "clear space" clause, and the contract would have been binding upon appellant. Appellant claims that this new contract of its agent is not binding upon it because it was not evidenced by a writing endorsed or attached to the policies in the manner required in a printed condition of the policy. A contract of insurance is not within the statute of frauds. It is not necessary that it should be in writing, and although in writing, it may be changed by parol, even though the contract provides that it shall only be changed by writing. (Phoenix Ins. Co. v. Splers, &c., 87 Ky., 285; Baldwin v. Fire Ins. Co., 107 Ky., 356; Howard Ins. Co. v. Owens, 91 Ky., 199; Mattingly v. Springfield Fire and Marine Ins. Co., 26 Ky. Law Rep., —.)

In the last-named case this court said: "A contract of insurance is not within the statute of frauds. It may be oral as well as in writing, and although it is in writing like any other contract, it may be modified by a subsequent agreement between the parties. The fact that the contract provides that no subsequent agreement shall be valid unless in writing and endorsed on the policy, does not change the rule, for this part of the contract stands like any other part of it, and may be changed by a subsequent parol agreement, just as any other provision of the contract may be subsequently modified."

This rule is supported by the previous cases referred to, and by the decisions of a majority of the States. Appellant relies very strenuously upon an opinion of the Supreme Court of the United States, the case of Northern Ins. Co. v. Grand View, &c., Ass'n, 183 U. S., —. Deference and great respect is always due this exalted tribunal, but in this case it should be borne in mind that the Supreme Court was not construing a provision of the Constitution of the United States, an act of congress, a treaty, or giving an exposition of law upon which its judgment would be final and conclusive here and elsewhere. The court was dealing with a question of general jurisdiction, upon which it was privileged, as this court is privileged, to exercise an independent judgment. It is no new thing for this court and the honor-

able Supreme Court to be in disagreement upon questions of general law. To review the long line of authorities in Kentucky, and bring them in accord with the conclusion reached by the Supreme Court of the United States in the case quoted above would be to confess previous inability of this court to make and declare the law governing the rights and responsibilities of insurance companies and their patrons in this State. This would amount to an abdication of duty by the supreme judicial power of this State. We refer to a few cases in distinct opposition to the holding of the Supreme Court in that case: *German-American Ins. Co. v. Norris*, 100 Ky., 33; *Queen Fire Ins. Co. v. Kline*, 17 Ky. Law Rep., 620; *Ætna Ins. Co. v. Hartley*, 24 Ky. Law Rep., 57; *National Ins. Co. v. Tweedle*, 22 Ky. Law Rep., 881; *Hartford Fire Ins. Co. v. Trimble*, 25 Ky. Law Rep., 1497; *Mattingly v. Springfield Fire and Marine Ins. Co.*, supra.)

We are of the opinion that the act of appellant's agent in abrogating the clear space clause was not a waiver of the provisions of the original contract, but it was an additional contract, made upon a valuable consideration, was binding upon appellant, and the lower court did not err in so holding.

For the reasons indicated the judgment is affirmed.

COUCHMAN v. BUSH, &c.

(Filed January 11, 1905—Not to be reported.)

Beckner & Jouett and Hazelrigg, Chenault & Hazelrigg for appellant.

Geo. B. Nelson, J. M. Benton, J. T. Shelby and D. L. Pendleton for appellees.

Appeal from Clark Circuit Court.

The court delivered the following extension of opinion:

Mrs. Couchman rendered some services as executrix; besides, the record fails to show she was not willing to render services as such. She is entitled to share in the commissions allowed the executors. (*Garr, Ex'or, &c. v. Roy*, 20 Ky. Law Rep., 1697.) This question was overlooked in the consideration of the case, hence the opinion is extended.

ERWIN v. BENTON, &c.

(Filed January 19, 1905—Not to be reported.)

Sweeney, Ellis & Sweeney and D. H. Kincheloe for appellant.

Appeal from McLean Circuit Court.

Chief Justice Hobson delivered the following response to motion to advance:

There is a motion to docket and advance this case, apparently on the idea that it is governed by the provisions of the act of 1900 for the trial of contested election cases. But it was held in *Shindler v. Floyd*, 26 Ky. Law Rep., 882, that the act of 1900 does not apply to contests of local option

election. The appeal before us is from the judgment of the circuit court in a local option contest, and as the act of 1900 does not apply to it and the rule of the court is not to docket cases except by consent before the term at which they stand for trial under the Code, the motion to docket and advance this case must be overruled.

BERRY v. LEWIS, &c.

(Filed January 19, 1905—Not to be reported.)

Reed & Berry for appellant.

Husbands & Caldwell for appellees.

Appeal from McCracken Circuit Court.

Chief Justice Hobson delivered the following response to petition for rehearing:

In the petition for rehearing counsel call our attention to subsection 2, section 496 of the Code, which reads as follows: "If the share of a joint owner be of less probable value than \$100, a sale of it may be ordered, although the owner of a share worth more than \$100 may not consent to a sale."

We are unable to see that this provision has any application to the case before us. The purpose of the provision is to protect the owner of a share worth less than \$100, for it applies where the owner of a share worth more than \$100 may not consent to a sale; that is not this case. The grammatical construction of the provision would seem to be that the sale of the share of a joint owner which is of less probable value than \$100 may be ordered, though the owner of a share worth more than \$100 may not consent to a sale of the property.

Petition overruled.

ROGERS v. CONGLETON, &c.

(Filed January 19, 1905—Not to be reported.)

Office and officer—Removal of officer by council—The assessors of cities of the third class are by the provisions of the charter elected by the council, and under the provision of section 3249 may be removed by the council at pleasure; and the fact that section 3254 provides for impeachment of other officers only accentuates and makes clear that those officers elected by the council are not intended to be removed by impeachment.

G. H. Briggs, Eli H. Brown, Jr., and Sam'l D. Hines for appellant.

John W. Ray for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Barker.

Frank Rogers was elected by the council of Frankfort, Ky., city assessor for a term of two years. Before his term expired the council, without notice or trial, by a majority vote, undertook to remove him from his office, and were proceeding to elect a successor when this action was instituted for

the purpose of obtaining an injunction restraining them from so doing. The question presented is whether or not such a municipal officer as was appellant can be removed by the council of a city of the third class in the manner in which the removal under discussion was had.

The statutory law bearing upon the subject in hand is contained in the following sections of the Kentucky Statutes:

"Section 3404. Each council shall, at its first regular meeting, or within one month thereafter, elect a city assessor, who shall hold his office two years, and until his successor is elected and qualified.

"Section 3249. All officers, agents or employes elected, appointed or employed by the council may be removed by the council at pleasure."

Section 3297 authorizes the mayor to appoint all police by and with the advice and consent of the common council, and he "may remove same at pleasure, and shall designate one of their number to act as chief of police, and change same at pleasure."

"Section 3254. Except as herein otherwise provided, any officer of the city, whether elected or appointed, may be impeached and removed from office by the common council, by a three-fourth vote of all the members elected, the ayes and nays being called and entered upon the journal, for incompetency, inefficiency, neglect of duty or misconduct in office. The method of procedure shall be prescribed by ordinance."

The assessors of cities of the third class are, by the charter, elected by the council, and, therefore, under the provision of section 3249 may be removed by the council at pleasure. The fact that section 3254 provides for impeachment of other officers than those elected by the council only accentuates and makes clear the provision that those officers elected by the council are not intended to be removed by impeachment; and the fact that the charter shows that the legislature had in its mind two different modes of removing municipal officers makes it entirely plain that the different language used in describing the mode of removal of the two classes of officers meant different things. We can not presume that the legislature, in using the words as to those officers elected by the council, that they might be removed by the council at its pleasure, meant the same thing as the impeachment proceedings provided for in section 3297. This very question arose in the case of *London v. City of Franklin, &c.*, 25 Ky. Law Rep., 2306. The officer there involved was the marshal of the city, and the law regulating his removal was as follows:

"Section 3619, Kentucky Statutes. The marshal, assessor, treasurer, clerk and city attorney shall be appointed for a term of two years by the city council, but may be removed at the pleasure of the city council."

In that case the city council removed the officer without notice or trial, as in the case at bar, and this court, in the opinion, speaking through Judge Hobson, held that the city council had a right to remove the officer by the proceedings adopted. It is said in the opinion: "It is insisted for appellant that under the constitutional provision officers of cities and towns may be only removed for cause, and that section 3619 of the statute above quoted must be construed to refer only to removals for cause, or, if not so construed, is unconstitutional. The language of the statute is that the officers named may be removed at the pleasure of the city council. These words

have a well-defined legal meaning. The right to remove at pleasure is an entirely different thing from the right to remove for cause. To hold that the statute only authorizes the council to remove for cause would be to deny the words used by the legislature their ordinary meaning. This can not be done." (Kentucky Statutes, section 460.)

The opinion in the case cited is conclusive of that at bar, and the judgment dismissing appellant's petition is affirmed.

SUTTON, &c. v. GIBSON, &c.

(Filed January 10, 1905.)

1. Deed by husband to wife—Delivery—Acceptance—What constitutes—Where a husband made a deed conveying one-half of certain real estate to his wife and the other half to his stepdaughter, reserving a life estate therein in all of the property, but did not deliver the deed to either of the grantees, nor apprise either of them of its execution, but did subsequently give his wife a sealed envelope containing said deed with the request to hold it for him until he called for it, but without informing her of its contents, such acts did not divest the grantor of control or dominion over the deed, and was not an acceptance by the wife of the deed either for herself or for the other grantee.

2. Conveyance by father to daughter—Redelivery of deed by daughter—Effect—Where a father conveyed a house and lot to his daughter and delivered her a deed thereto, and later induced her to redeliver the deed to him, which he, with the understanding that he would convey other property to her in exchange therefor, and afterwards sold and conveyed said property to another, but did not convey to the daughter any property in lieu thereof, it is equitable that said daughter should be reimbursed out of her father's estate for the value of the house and lot at the time she redelivered the deed to him.

Yeaman & Yeaman for appellants.

Montgomery Merritt, Lockett & Lockett and F. J. Pentecost for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge O'Rear.

Nathan A. Gibson was four times married. The last marriage was a few months before his death, and after he was seventy years old. He had but one child, appellant, Susan E. Sutton, who was issue of his second marriage. The second wife had been a widow, and had other children, Mary E. Sutton being one of them. Shortly before his last marriage Nathan A. Gibson signed a deed conveying to Nannie H. Buller (whom he was then about to marry and did marry within a few days) a house and lot in Corydon, and one-half of a tract of ninety acres of land in Henderson county, to her in remainder after his death, and so long as she might remain his widow. The other half of the ninety acres was by the same deed conveyed to Mary E. Sutton, his stepdaughter, and to her two children, Oscar Sutton and Eliza Jane Buchanan, the grantor reserving a life estate in all the property. At the time he executed the deed by signing it the grantor did not deliver it, nor did he apprise the grantees of the fact of its execution. After his mar-

riage with Mrs. Buller he gave her a sealed envelope containing this deed, with the request to hold it for him till he called for it. He did not then tell her, nor indicate to her, what the package contained, nor did she know what it contained till after his death. The deed appears to have been acknowledged by the grantor before a deputy county court clerk May 18, 1903. During Nathan A. Gibson's last illness his wife was requested to produce the package, which she did, and sent it into the room where her husband and his physician were. After an hour or so it was returned to her without comment, and she put it away without knowledge of its contents. Gibson died shortly thereafter. A paper purporting to be his last will was produced for probate, evidently prepared when the deed was called for. But on a trial of the will this paper was rejected.

This suit was brought by appellant, the only child and heir at law of Nathan A. Gibson, against his widow, and the other grantees named in the deed, to set it aside on the ground of undue influence exerted on the grantor in its execution, as well as upon the ground that it was never delivered by the grantor, nor accepted by the grantees or any of them, nor by any one for them. The circuit court adjudged that the deed was invalid as to the grantee, Nannie R. Gibson, the widow, because she had elected not to take under it, or, as the court said, had renounced it. The judgment further was that the deed was effective as to the other grantees, and the petition of appellants was dismissed. A deed conveying the title to real estate to be effective must be fully executed between the parties, that is, it must be signed and delivered by the grantor, and accepted by the grantee. Any of these elements lacking, the deed is not a complete instrument. While it is true that a delivery may be by word, or act, or both, by which a grantor expresses a present intention to divest himself of title to property in an appropriate deed, yet his conduct must be such as to indicate the intention to divest himself of the title and all further control over the document purporting to convey it. (*Hudson v. Redford*, 23 Ky. Law Rep., 2347.) It is likewise true that the grantee must generally evince a purpose to accept the conveyance, as it is not competent for the grantor by his act alone to impose a title or the conditions of a conveyance upon an unwilling grantee. An exception to this rule is where the grantee is an infant, or under disability, and the conveyance is beneficial to the grantee. No such conditions exist in the case at bar.

The state of the record before us discloses that the grantor, instead of intending to divest himself of control or dominion over the deed, expressly reserved such by committing the document in a sealed envelope to the care of his wife, with the request that she keep it for him until he called for it. The case is materially different upon its facts and principle from *Shoptaw v. Ridgeway*, 22 Ky. Law Rep., 1495, and *Bunnell v. Bunnell*, 23 Ky. Law Rep., 800.

Mrs. Buller, as one of the grantees and the one to whom the deed was delivered to hold, was not aware, as stated, of its contents, nor of the fact that it was a deed. Her subsequent refusal to accept it, when made acquainted with its nature, is in itself a declination to become a party to it in any sense. As she did not accept it for herself, and it is not claimed that she was either authorized to, or attempted to, accept it on behalf of the other

grantees named, at best it was an unexecuted purpose of the grantor to convey the title to his property. There is another feature of the case, however, which we think should be a condition to the granting of relief in equity to appellants. It is shown in the record that the grantor's stepdaughter, Mary E. Sutton, had lived in his family a number of years, and had, even after she left his family, been a faithful and dutiful attendant upon him in his illness and after the death of his wife; and further, he had received considerable estate from her mother, and frequently acknowledged that he was indebted to appellee, Mary E. Sutton, on that account, and had agreed with his deceased wife, her mother, that he would make provision for Mary E. Sutton out of his estate. Some years prior to the transaction now in suit he had conveyed to Mary E. Sutton a house and lot in Corydon, the value of which is not shown in the record. She was unable to have the deed recorded at the time, and later he induced her to redeliver to him the deed with the understanding that he would convey, or have conveyed, to her other property which he was to get in exchange for that lot. She did redeliver to him the deed, which he destroyed. He subsequently sold and conveyed that property, but he did not convey her any other property. It was to carry out this agreement, as well as the one with her mother that has been mentioned, that the grantor was attempting undoubtedly by the deed now in suit. When he delivered to her the deed to the house and lot in Corydon his title to it passed to her, and became vested in her by its acceptance. It may be seriously questioned whether a redelivery of the deed by her to him operated of itself to divest her of her title. The conveyance of this lot, however, to an innocent purchaser would preclude its recovery by her now.

It is equitable that he should comply with his agreement with her. While it is not in such form that the court could specifically enforce its execution, yet as between her and his heir at law the court may, and will require as a condition precedent to equitable relief in this action, that she be reimbursed the value of that house and lot. The lot taken back by Nathan A. Gibson was exchanged in part for the land undertaken to be conveyed to Mary E. Gibson by the deed in question. Upon a return of the case the chancellor ought to direct further pleadings so as to show the value of the house and lot at the time the deed therefor was redelivered to Nathan A. Gibson, and then adjudge to Mary E. Sutton a lien upon the half interest in the ninety acres of land now in suit to reimburse her for that value.

The judgment as to Nannie R. Gibson is affirmed. As to the other appellees it is reversed and the cause is remanded for further proceedings consistent herewith.

DUNN v. COMMONWEALTH.

(Filed January 12, 1905.)

Indictment—Breaking smokehouse—Insufficient allegations—An indictment against one for breaking into a smokehouse and stealing therefrom, which fails to charge that the smokehouse belonged to or was used with a

dwelling house, is insufficient to sustain a charge of felony under Kentucky Statutes, section 1162, which provides that "if any person * * * shall feloniously break any dwelling house, or any part thereof, or any outhouse belonging to or used with any dwelling house, and feloniously carry away anything of value, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years."

A. F. Byrd for appellant.

N. B. Hays for appellee.

Appeal from Wolfe Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant Dunn was convicted of the offense of housebreaking, and his punishment fixed at two and one-half years' confinement in the penitentiary. He demurred to the indictment against him. His demurrer was overruled, and the sufficiency of the indictment is the first question to be determined on the appeal. The charge of the indictment is that the defendant, Dunn, "did unlawfully, willfully, maliciously, feloniously and forcibly break open and enter into the smokehouse of J. N. Chambers, for the purpose of taking, stealing and carrying away therefrom money, property and things of value, and pursuant to said breaking and entry did take, steal and carry away therefrom about ten gallons of molasses, of the value of \$5," etc.

The indictment is based upon section 1162, Kentucky Statutes, which is as follows: "If any person * * * shall feloniously break in any dwelling house, or any part thereof, or any outhouse belonging to or used with any dwelling house, and feloniously take away anything of value, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years."

It will be observed that the charge in the indictment is that the defendant feloniously broke and entered the smokehouse of J. N. Chambers, and that the statute punishes the breaking of any dwelling house or any outhouse belonging to or used with any dwelling house. It is not charged in the indictment that the house broken belonged to or was used with any dwelling house. It is said that a smokehouse is used with a dwelling house, and, therefore, the charge that the defendant broke the smokehouse is sufficient. But the court can not so declare as a matter of law. A smokehouse is not necessarily an outhouse belonging to or used with a dwelling house. True, it usually is used with a dwelling house, but is not always so. The smokehouse may be at one place and the dwelling house at another. The owner, as where his dwelling house is burned, or where he has moved to another, may still retain the smokehouse at the old site. The charge in the indictment that it was a smokehouse which was broken is not, therefore, equivalent to the words of the statute punishing the breaking of "any outhouse belonging to or used with any dwelling house." The indictment is, therefore, insufficient, and the court should have sustained the demurrer to it.

J. N. Chambers should not have been permitted to state what was told him at John Hatton's further than that they received information there

that the molasses came from Dunn's, and this only for the purpose of explaining why they went to Dunn's. The admissions of the defendant are always competent evidence against him, and, therefore, T. C. Holland was properly allowed to state what the defendant said to him about Boyd Hatton. This admission served to confirm the testimony of Boyd Hatton, and was, therefore, material. Where a witness is introduced to impeach another witness by evidence that his general moral character is bad, the opposite party may in reply attack the general character of the impeaching witness. (1 Greenleaf on Evidence, section 461; Code of Practice, section 597.)

John Patton, a member of the grand jury, might properly testify that a bottle of molasses which he saw did or did not correspond with the molasses which Dunn made, and it was not material where Patton saw the bottle of molasses, whether in the grand jury room or elsewhere; but before this evidence was admitted it should have been shown that the bottle contained molasses taken from the barrel in controversy.

Judgment reversed and cause remanded for further proceedings consistent herewith.

HELLARD v. COMMONWEALTH.

(Filed January 12, 1905.)

1. Homicide—Mutual combat—On the trial of one for homicide, where the evidence shows that deceased accosted defendant with an insulting remark, and invited him to "come out and take his medicine," whereupon defendant went into his house, got a pistol and returned, when he and deceased engaged in a shooting match till deceased threw down his gun, picked up an axe and continued the fight with it, defendant retreating and shooting as he went, the evidence justified the submission to the jury the question of a mutual and willing combat, as was done by the trial court.

2. Retreating—Abandonment of fight—That the defendant retreated during the conflict seems certain, but a retreat is not necessarily an abandonment. It may be only a falling back on a better position. In order to excuse one who begins a conflict the fight must be abandoned in good faith and in fact. It must be something more than a mental determination to quit. It ought to apprise the other party that his assailant has quit the fight and has relieved him of the necessity for defense which had been imposed on him by the assailant's conduct.

3. Self-defense—The doctrine of self-defense rests both upon actual necessity and apparent necessity. An abandonment of a fight must, therefore, relieve the other party of both actual and apparent danger, and if the person assaulted thereafter renew the conflict or continue it, then the original assailant's right of self-defense attaches as if he had not begun it.

4. While the accused was testifying he was asked the question whether he knew the character of deceased for peace and quiet, to which the court sustained an objection, he was permitted, however, to testify that he was acquainted with his general reputation for peace or violence, and that it was bad, which served every purpose of the excluded question.

R. M. Johnson and C. C. Williams for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant appeals from a judgment convicting him of manslaughter. The case as made out by the prosecution is that appellant either began an assault on the man he killed, Abe Drew, and prosecuted it up to the fatal shooting, or that he and the deceased mutually and willingly engaged in the affray resulting in the homicide. In either state of case appellant would be guilty of murder or manslaughter, dependent upon the presence or absence of malice on his part in engaging in the fight. Appellant's version is that he was assaulted by the decedent, and had to shoot, and did shoot, his assailant in his necessary self-defense. The conflicting theories were submitted to the jury under appropriate instructions. It was the jury's province, in no sense ours, to pass upon the credibility of the witnesses, and the weight to be attached to their testimony. The evidence on behalf of the prosecution is abundant to sustain the verdict. Whether there was any evidence to justify submitting to the jury the question of a mutual and willing affray, it seems to us sufficient to say that there was considerable evidence to the effect that Drew, the man killed, accosted appellant with an insulting remark, and invited him to "come out and take his medicine," meaning that the speaker was prepared to fight, and was challenging appellant to a combat. Appellant, without saying anything, went into his house, got a pistol and returned, when he and Drew engaged in a shooting match till Drew threw down his gun, when he picked up an axe and continued to fight with it, appellant retreating and shooting as he went. The evidence justified the submission of that phase of the case to the jury as was done.

Appellant contends that he abandoned the fight in good faith, even if it be considered that he begun or mutually and willingly engaged in it. That he retreated seems certain. But a retreat is not necessarily an abandonment. It may be only the falling back on a better position, or for strategic reasons, with intention to continue the battle when the advantage warranted it. In such case an assailant who has wrongfully begun a fight can not disarm his adversary of his legal right to pursue his own advantage till his safety is assured. The fight must be abandoned in good faith and in fact. It must be something more than a mere mental determination to quit, even though accompanied with a retrograde movement. It ought to apprise the other party that his assailant has quit the fight, and has relieved him of the necessity for defense which had been imposed upon him by the assailant's conduct. If this were not so, then one in the wrong who has put in jeopardy the life of one assaulted by him, and by appearances has produced upon the assaulted a reasonable apprehension of such danger, under which he has the legal right to fight to the death in his defense, could by his thought change the rightful defense to a criminal act, for changing position alone, may not at all indicate that there is to be a cessation of hostilities. The person who has been assaulted, and who under stress of necessity must act quickly and certainly, ought not to be subjected to the further hazard by his wrongful adversary of having to guess correctly whether a retreating movement is to better the latter's position in the fight, or is an abandonment of it. He who creates appearances of necessity for action should bear the burden of relieving the situation of its threatening aspect by appearances equally reasonable in their assurance. The doctrine

of self-defense, it must be remembered, rests both upon actual necessity and apparent necessity. An abandonment of a fight must, therefore, relieve the other party of both actual danger and of such appearance of danger as, operating upon a reasonable mind similarly situated, ought to relieve it of apprehension of immediate or impending danger from that assault. If the person assaulted thereafter renew the conflict, or continue it, then the original assailant's right of self-defense attaches as if he had not begun it. In this case the instruction merely left to the jury whether appellant had abandoned the fight, if he had begun it, mutually and willingly engaged in it. In this it was more favorable to appellant than he was entitled to, as indicated above.

While testifying for himself appellant was asked whether or not he knew Abe Drew's "character as to peace and quiet." The court sustained an objection to the question. Appellant avowed that his answer would have been that he knew him to be a dangerous man. Appellant was permitted, however, to testify that he was acquainted with Drew's general reputation for peace and violence, and that it was bad. This got before the jury all that was involved in the other question. If Drew was notoriously a dangerous, quarrelsome man, and if appellant knew that fact, all of which was thus placed before the jury, every purpose that could have been served by the excluded evidence, had it been admitted, is answered. The general rule is that the general reputation only of the party can be inquired into. Had it not appeared by appellant's testimony that Drew was a violent and dangerous man, or had it appeared on the contrary that he was a peaceable man, it might have been permissible for the accused to show that he personally knew that he was a man of violent passion and temper, and that he always went armed. (1 Roberson's Criminal Law and Pro., 303; Payne v. Commonwealth, 1 Met., 373.)

A number of witnesses testified to appellant's general reputation, tending to impeach him as a witness. Among the number was one John Martin, who was asked on cross examination: "Is it not a fact that you have been impeached three times in Jackson county?"

To impeach an impeaching witness, by proof that he has likewise a bad moral reputation, it is not competent to do so in the manner attempted. If one without personal knowledge of the witness' general reputation had undertaken to say that he had heard that he had been impeached in some other proceeding, manifestly the testimony would be incompetent in form, but not more so than that rejected above. It must be deemed as collateral matter to the issue of the suit on trial. Appellant was also asked while testifying as a witness for himself whether any one had told him, or informed him, that Drew would kill him. An objection to the question was sustained. As put, it does not appear but what it was intended to evoke from the witness whether some person had not told appellant, as a matter of opinion or belief, that Drew would kill him, which was clearly irrelevant; that Drew made threats against appellant's life, and that they were communicated to him were allowed to be proved by appellant and by his informants.

The witness, Hubbard, did finally testify to the facts which the court re-

fused when he was asked certain leading questions concerning them by appellant, whose witness he was. So, although under the rule that a hostile witness may have leading questions put to him, the question excluded ought to have been allowed. Appellant was not prejudiced by the court's ruling.

Whereupon the judgment is affirmed.

ILLINOIS CENTRAL R. R. CO. v. JOLLY.

(Filed January 12, 1905.)

1. Railroads—Action for personal injury—Misconduct of plaintiff's counsel—On a retrial of this case, which had been reversed by the Court of Appeals, it was improper and prejudicial error for counsel for the plaintiff to be allowed to say to the jury against the objection of the defendant that "this case had been once reversed by the Court of Appeals on a technicality, and that the railroad company was furnished with skilled lawyers and stenographer's for the purpose of catching at every little thing in order to again reverse the judgment."

2. Same—On such trial it was also error for the court to permit counsel for the plaintiff against the objection of the defendant to say to the jury that "when railroad accidents occur railroad employees are furnished with statements already prepared, and such employees are required to answer each of the statements 'yes,' in order to hold their job, and if they answered 'no,' they walk a plank," there being no evidence in the case to authorize such a statement.

H. P. Taylor, J. M. Dickinson and Pirtle & Trabue for appellant.

Glenn & Ringo, E. E. Kelley and John B. Wilson for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case. The opinion in the first appeal is published in 25 Ky. Law Rep., 1735. The case was then reversed for an erroneous instruction, and for the failure to give an instruction for contributory neglect.

Another trial was had in the lower court, and appellee obtained a verdict for \$1,400, from which appellant appeals, and assigns many reasons for a reversal. The facts with reference to the extent of appellee's injuries and the manner and circumstances under which she received same are stated in the former opinion, and we deem it unnecessary to reiterate same. The instructions given by the court on the last trial were in conformity with the former opinion. We deem it unnecessary to here consider any of the many reasons advanced by appellant for a reversal, all of them being without merit, except as to the amount of the verdict and the conduct of appellee's counsel during the trial, and especially in his closing argument to the jury. It appears from the bill of exceptions that during the taking of testimony appellant's counsel made objection to a certain question and answer, when counsel for appellee arose with the remark: "It is the purpose of the plaintiff to follow this defendant to the Court of Appeals again."

In the closing argument appellee's counsel used the following language: "That it had been some four or five years since this suit was brought; that

the action had been once reversed in the Court of Appeals on a technicality, and that the railroad company was furnished with skilled lawyers and stenographers for the purpose of catching at every little thing, not larger than that (demonstrating upon his finger's end) for the purpose of again taking the case to the Court of Appeals and reversing the judgment."

Counsel further stated to the jury as a fact in his closing argument as follows: "When railroad accidents occur railroad employes are furnished with statements already prepared, and that such employes are required to answer each of the statements 'yes' in order to hold their job, and if they answer 'no,' they walk a plank."

And again, counsel for appellee used the following language: "That this action had been in the courts some four or five years, and that the railroad company was furnished with lawyers and stenographers for the purpose of catching at every little thing to take the case to the Court of Appeals again, in order to defeat the claim by reversing it, it having heretofore been reversed in the Court of Appeals on a technicality."

It appears from the bill of exceptions that appellant's counsel objected to the foregoing remarks made by appellee's counsel, and asked the court to exclude the same from the jury, which the court refused to do, and appellant excepted. Every case in court should be tried upon the law as given by the court and the facts adduced by the evidence. Every litigant is entitled to this character of trial. The courts should be careful to prevent improper conduct and language of counsel for either side for the purpose of unduly influencing the minds, or inflaming the passions and prejudices of the jury trying the case. Counsel have the right, of course, to argue the evidence, and give their opinion and construction thereof if within the pale of reason. But when counsel in the heat of argument overstep the bounds, and objection is made by the opposing side, the court should exclude the improper matter. The remarks of appellee's counsel, that this lady had obtained a judgment on the former trial; that it had been appealed from and reversed by this court upon a technicality, and that appellant was then preparing, with the assistance of skilled lawyers and stenographers, to appeal from any verdict that might be rendered and obtain another reversal, were improper. The case should have been tried without the jury being apprised of the result of the previous trial and the action of the Court of Appeals thereon.

The statement of appellee's counsel to the jury, "that when railroad accidents occur railroad employes are furnished with statements already prepared, and that such employes are required to answer each of the statements," was not improper, for the evidence tended to show this fact. At least there was some evidence upon this subject. But the latter part of the statement, to the effect "they must answer 'yes' in order to hold thier job, and if they answer 'no,' they walk a plank," was wholly unwarranted, there being no evidence in the record to authorize it. Appellee's counsel stated this as a fact. He did not profess that it was merely an opinion or impression of his own, and such language was calculated to inflame the minds of the jury against appellant and to weaken the strength of the evidence of its employes who had testified before them. (L., H. & St. L. Ry. Co. v. Morgan, 23 Ky. Law Rep., 121.) In that case appellee's counsel in

the closing argument made use of the following language: "The railroad can appeal this case, but the plaintiff, Morgan, is a poor man, and has no money to appeal with, and will have to accept what you do; but the railroad has the money to appeal this case, and will do so."

Commenting on these remarks this court said: "The court can not afford to take notice of all remarks of counsel that are not strictly within the record. There is a latitude allowed in oral argument, but it should not extend as far as was done in the quotation." (L. & N. R. R. Co. v. Hull, 24 Ky. Law Rep., 375.)

In that case the court reversed the judgment on account of improper remarks of counsel for appellee in his closing argument, the language used being somewhat similar to that in the case at bar. The court, in that case, said: "It was improper for the attorney to go outside of the evidence heard by the jury and the law of the case as given by the court. It was especially improper for him to state of his personal experiences which had not been testified to and were calculated to prejudice the jury against the defendant or swell the amount of the verdict. Considering the size of the verdict in connection with the argument of the counsel, we are clearly of the opinion that a new trial should be granted."

On the first trial of this case appellee obtained a verdict for \$881; on the last for \$1,400. Considering the increase in the amount of the last verdict and the remarks quoted, we are constrained to believe that these improper remarks in all probability prejudiced the minds of the jury against appellant. In view of the amount of the last verdict, coupled with the improper remarks referred to, we are of the opinion that appellant should be granted a new trial.

The judgment is reversed and cause remanded for a new trial under proceedings consistent herewith.

STEELE v. STEELE.

(Filed January 13, 1905.)

Husband and wife—Action by husband for divorce—Defense by wife—Liability of husband for wife's costs and attorney fees—In an action by the husband against his wife, in which he obtained a divorce on the ground of her lewd and lascivious conduct, and in which she filed answer denying the allegations of the petition, and filed a cross petition asking a divorce from him for cruel and inhuman treatment, the wife is entitled to her costs, including a reasonable attorney fee to be paid by the husband, unless it is shown that she has ample estate out of which to pay her costs and attorneys, although the wife was in fault on the merits of the suit for divorce.

Bennett H. Young and M. W. Ripy for appellant.

C. B. Seymour and Jos. E. Conkling for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

The appellee, Andrew J. Steele, instituted this action against his wife, Louise M. Steele, for divorce a vinculo matrimonii, alleging as a ground

therefor such lewd and lascivious conduct on her part as proved her to be unchaste. She filed answer, denying the allegations of the petition, and in the second paragraph, which she made a cross petition against her husband, prayed for a divorce from him on the ground of cruel and inhuman treatment. The chancellor, upon final hearing, entered a decree granting the husband the relief sought, but making no provision for alimony for the wife or the payment of her costs, including a reasonable attorney's fee by the husband. From this judgment she has appealed.

As no appeal lies to this court from a judgment granting a divorce, the only question presented by the record is whether or not the wife (appellant) was entitled to have her costs, including a reasonable attorney's fee, paid by her husband, although she was in fault, that being fixed by the decree of the chancellor. It seems to us that this case comes squarely within the purview of the principle enunciated in *Turner v. Turner*, 23 Ky. Law Rep., 370. In that case the husband sued for and obtained a judgment of divorce from his wife on the ground of abandonment by her, without fault on his part, for one year previous to the institution of the suit. In her answer she denied that she had abandoned her husband, and alleged that he had driven her from his home, wrongfully and without cause, and prayed for a divorce from him on the ground of cruelty. Upon final hearing the court decreed the divorce to the husband, but gave the wife the sum of \$200 in alimony. Thereupon the wife entered a motion for an attorney's fee to be taxed as costs in her behalf. This motion was overruled, and she appealed. After reciting the foregoing facts, this court, through Judge Burnam, said: "Section 900 of the Kentucky Statutes provides that in actions for alimony and divorce the husband shall pay the cost of each party unless it shall be made to appear in the action the wife is in fault and has ample estate to pay the same, and in the case of *Ballard v. Caperton*, 59 Ky., 414, this court said, viz.: 'This provision of the Revised Statutes applies to all suits for divorce and alimony. None are excepted from its operation. And in all such cases the husband is bound to pay the costs of each party (including a reasonable compensation to the attorneys of the wife for their professional services rendered to her in the action), no matter what the result of the suit may be, or by what cause it may have been terminated, unless two things are made to appear in the action: First, that the wife is in fault; and, second, that she has ample estate to pay the costs. There must be a concurrence of the two conditions in order to exempt the husband from the liability imposed by the statute, and both conditions must be made to appear in the cause. Although it may be made to appear that the wife is in fault, yet if it be not also made to appear that she has ample estate to pay the costs, the husband is bound to pay. Or, if she has the estate, and is not in fault, the husband is liable for the costs.' "

And this seems to have been the rule which has been followed in determining the question of the liability of the husband for the wife's counsel fees. Whilst appellant in this case is not free from fault, it certainly can not be said that she has ample estate; it, therefore, follows that the husband is liable for the cost, including a reasonable attorney's fee. And for this reason alone the judgment must be reversed and the cause remanded,

with instructions to the circuit judge to make appellant a reasonable allowance for counsel fees."

The principle enunciated in the opinion in *Thomas v. Thomas*, 7 Bush, 665, has no application to the case at bar. There the wife sought to obtain a judgment for a reasonable attorney's fee for services in this court on an appeal after the decree of divorce had been granted in the lower court. This was refused on the ground that the litigation in this court was not between husband and wife, but the parties having been separated by the judgment of the lower court, they stood here in the attitude of ordinary litigants. In the case at bar the services rendered by the counsel of the wife were rendered to her while she was the wife of appellee, and under the statute, as expounded in the case of *Turner v. Turner*, supra, he is liable for all her costs, including a reasonable attorney's fee, although she was in fault as to the merits of the controversy.

Wherefore, the judgment is reversed for proceedings consistent herewith.

KOCH v. COMMONWEALTH.

(Filed January 18, 1905.)

Intoxicating liquors—Retailing—License—Towns of the sixth class—Section 3704, Kentucky Statutes, which is part of the charter of towns of the sixth class, provides that the granting of a license to sell spirituous, vinous or malt liquors shall be under the exclusive control of the board of trustees of such town, and where one has obtained a license from the board of trustees he is not required to have a license from the county court, but should pay or tender to the county court clerk the license tax due the State, and the refusal of the clerk to accept the money tendered made the clerk liable to the State therefor; but such refusal did not subject the defendant to prosecution for selling such liquors without a license.

J. M. Dial for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant was indicted by the grand jury of Kenton county in two cases for the offense of retailing liquors without license. The law and facts were submitted to the court, who found the defendant guilty and fixed his punishment at a fine of \$75 in each case.

It was conceded on the trial that the defendant had sold spirituous, vinous and malt liquors by retail at the time charged in the indictment, but he offered to prove that at the time he sold the liquor he had a license from the town of Central Covington, where his saloon was situated; that his State license expired on May 9, 1903; that on that day he had a license from the town of Central Covington which expired on June 1, 1903, at which time his town license was renewed by the municipal authorities for one year; that while his own town license was in full force he applied to the county judge of Kenton county for a county license, and that a protest being made by the citizens of the neighborhood, the license was refused by the county court.

After this he applied to the county clerk for license, tendering to the county clerk the amount of the license, together with the cost of issuing it, but the county clerk refused to issue the license because of the order of the county court above referred to. He thereupon instituted a mandamus proceeding against the clerk in the Kenton Circuit Court, praying that the county clerk be compelled to issue him license. This case being heard the judge announced from the bench that he would make no order in it; and thereupon the plaintiff dismissed that suit without prejudice. He continued to run his saloon, and thereafter made the sales for which he was indicted. The special judge who tried the cases held that the clerk erred in not taking the money and issuing the license to the defendant; but that the mistake of the clerk did not operate as a license or excuse his violation of law in selling without license, relying upon the following cases: Commonwealth v. Blackington, 24 Pick., 356; Reese v. Atlanta, 63 Ga., 344; State v. Bach, 36 Minn., 234; Phoenix Carpet Co. v. State, 18 Ala., 143; State v. Myers, 63 Mo., 324; Roberts v. Florida, 26 Fla., 360; State v. Dower, 21 Wis., 281. In these cases it was held that so long as no license is issued, although it may be the fault or mistake of the official, the defendant is liable for the sales without license. But none of these cases seem to us in point in the case before us. Here the defendant had a license from the municipal authorities of the town. Section 3704, Kentucky Statutes, which is a part of the act governing towns of the sixth class, to which Central Covington belongs, provides that the granting of license to sell spirituous, vinous or malt liquors "shall be under the exclusive control of the board of trustees." In *Schwearman v. Commonwealth*, 99 Ky., 296, it was held that when exclusive authority to grant these licenses is vested in the municipal government, the issue of such a license is not at all dependent upon an order of the county court, but that it is the duty of the clerk to collect the State tax from the person licensed, and that the jurisdiction of the county court to grant license is confined to county districts outside of an incorporated city or town in which exclusive authority is vested in the municipality over the subject of license. (Kentucky Statutes, section 4203. In that case it was held that the county clerk was liable on his bond for the license taxes collected by him within the city, although no order of the county court had been made granting the licenses. The case rests on the ground that when the applicant has received his license from the municipal authorities it is the duty of the clerk to receive from him the State tax and issue to him the State license. This is a mere ministerial act on the part of the clerk. In the cases relied on for appellee the defendant had no license; but in this case the defendant has a license from the officers who are given by law exclusive jurisdiction in the premises. When he got this license and tendered to the clerk the State tax he had done all that the law required him to do. It was then the duty of the clerk to accept the money. When he refused to accept it he became liable to the State therefor.

The case differs from those cited in that here the defendant had a license from the only authority which had jurisdiction to grant it. It is not like the case where the defendant has been granted no license. The order of the county court refusing appellant license was void as the county court had no

jurisdiction as to licenses within the town of Central Covington, and was, therefore, no authority to the clerk for refusing to receive the money which appellant tendered him.

Judgment reversed and cause remanded for further proceedings consistent herewith.

MORRISON, &c. v. FLETCHER.

(Filed January 18, 1905.)

1. Deed—Delivery—Acceptance—Presumption—Where a house and lot in this State was conveyed by a mother to her daughter, and the deed left by the grantor with her agent in this State for record in the county where the property was situated, and it was so recorded, the presumption arises that there was both a delivery and acceptance of the deed.

2. Conveyance by deed—Subsequent devise by grantor of same property to grantee—Election to take under will—Where property conveyed by deed by a mother to her daughter was afterwards devised by the mother to said daughter, the daughter could not take the property under both the deed and will, and the daughter having elected to take under the will, is thereby estopped to claim it under the deed.

3. Foreign will—Probate in this State—Effect—Where a will was made and duly probated in another State and subsequently presented for ancillary probate in this State in the county where land devised therein is situated, the judgment of the court admitting it to probate can not be collaterally attacked.

4. Tenant in possession—Remaindermen—Adverse holding—A tenant in possession of real estate, whether holding for life or claiming the fee, is bound for the taxes thereon, and the possession of such tenant is not adverse to the remaindermen who claim under the will after the death of the life tenant.

Montgomery & Montgomery and J. P. O'Meara for appellants.

W. A. Barry for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Settle.

The record in this case presents a controversy between the appellants, C. A. Morrison, Lucy A. Morrison (formerly Lucy A. Richardson) and the appellee, W. D. Fletcher over the title to a house and lot situated in the city of Elizabethtown, Ky., the former claiming it as devisees in remainder under the will of Mary M. Morrison, the latter as sole devisee under the will of his wife, Georgia A. Fletcher, nee Georgia A. Morris.

It appears that the real estate in question was formerly owned by Mary M. Morrison, a widow and resident of DeWitt, Ark., and that she, while on a visit to Kentucky, by deed of date October 22, 1879, conveyed it to her daughter, Georgia A. Morrison, therein reserving to herself a life estate in the property. After acknowledging the deed before a deputy of the clerk of the Hardin County Court Mrs. Morrison returned to her home in Arkansas, leaving the deed with J. W. Fletcher, an uncle of appellee, to be, as he testified, put to record, and it was lodged by him for record in the office of

the clerk of the Hardin County Court January 17, 1880, and soon thereafter duly recorded.

Some time in the year 1882, Mary M. Morrison died at her home in DeWitt, Ark., testate, and in September of that year her will was duly admitted to probate in the probate court of Arkansas county in the State of Arkansas. By the provisions of her will the testatrix devised to her daughter, Georgia A. Morrisnn, all the property, real and personal, of which she died possessed. The real estate, however, was only devised the daughter for life, with remainder in the event of her death without issue, to Robert Scanland, a brother of testatrix, and at his death to appellants, C. A. Morrison and Lucy A. Morrison, nee Richardson, nephew and niece of her deceased husband. The real estate thus devised consisted of a house and three parcels of land in DeWitt, Ark., and the house and lot in Elizabethtown, Ky., in controversy. The testatrix and her daughter, Georgia A. Morrison, were living with Robert Scanland in DeWitt, Ark., at the time of the death of the former, and after her death the daughter continued to live with him several years, and until his death.

On the 10th of March, 1899, she intermarried with the appellee, W. D. Fletcher, with whom she lived until her death, which occurred February 10, 1901. No children were born to Georgia A. Fletcher, but she left a will whereby she undertook to devise her husband all of her property, real and personal. The will was duly admitted to probate by the county court of Meade county, Kentucky, in which county she and her husband were domiciled at the time of her death. As before stated, the house and lot in controversy is claimed by appellee under the will of his wife, and this action was brought to quiet his title to same, as well as to recover of appellants damages for certain alleged acts of trespass committed by them upon the property, and by interfering with his tenants, it being averred in the petition that while he was in the peaceable possession of the house and lot the appellants, C. A. Morrison and Lucy A. Morrison, together with Frank Morrison, her husband, and James Montgomery, appellants' attorney, set up claim to same as the property of appellants, C. A. and Lucy Morrison, and were attempting to deprive him of the possession thereof, and had in fact collected of his tenants certain rents by making them believe that appellants were entitled to the same.

The petition, as amended, contains the further averment that appellee's wife, Georgia A. Fletcher, obtained a fee-simple title to the house and lot in controversy by virtue of the deed from her mother, and that upon the death of the mother she took possession of the property under the title conveyed her by the deed, and remained in the possession thereof under the deed until her death. The answer of appellants denies appellee's title, or that his wife ever accepted the deed from her mother, and avers that her interest in and title to the house and lot was only a life estate under the will of her mother, Mary M. Morrison; and further, that as she died childless, and the first or intermediate remainderman, Robert Scanland, is also dead, appellants, C. A. and Lucy A. Morrison, under the provisions of Mary M. Morrison's will, became invested with an absolute title to the property as surviving remaindermen.

The chancellor, however, adopted the contrary view, and by the decree

rendered adjudged that Georgia A. Fletcher acquired title under the deed from her mother and not by the will, and, therefore, that the will of Georgia A. Fletcher invested appellee with the title thus acquired by her, consequently he was granted all the relief asked in the prayer of the petition. A careful reading of the record inclines us to the opinion that the deed from Mary M. Morrison to Georgia A. Fletcher, nee Morrison, was never manually delivered to the latter. It is not shown by the evidence that the daughter was with the mother, or in this State when the deed was executed, upon the contrary the circumstances attending the making of the deed create the inference that she was then at her home in Arkansas, for if with her mother, some one of the several witnesses who testified to the fact of seeing the mother during her visit to Kentucky would have told of seeing the daughter. Indeed we might go further, and say the record furnishes no evidence that tends to prove that the daughter was ever in Kentucky after the year 1878 until she came into the State as the wife of the appellee. According to the testimony of J. W. Fletcher the deed from Mrs. Morrison to her daughter was left with him to be recorded.

In *Bunnell, &c. v. Bunnell, &c.*, 23 Ky. Law Rep., 805, it is said: "Delivery (of the deed) is the act finally that divests the grantor of title, and acceptance the concurring act that invests the grantee. One may be established by entirely different proof, and indeed to have occurred on a different occasion from the other. Upon reconsideration of these cases we are inclined to adhere to the doctrine that when the grantor has executed a deed, by signing it, completely acknowledging it, and causing it to be lodged for record and recorded in the proper office for registry, under the authority of *Ford v. Gregory's Heirs*, and *McConnell v. Brown*, *supra*, a prima facie case is made, or presumption is raised, that he has delivered the instrument on the day of its date. This presumption, of course, subject to be rebutted by competent proof of either a nondelivery in fact or of a delivery at another time than the date of the instrument. Such facts, however, raise no presumption of an acceptance by the grantee (*Owings v. Tucker*, 90 Ky., 279) save where a clearly beneficial interest is conferred."

Applying the above rule to the facts of the case at bar, we are inclined, in view of the relationship of the grantor and grantee, and the apparent beneficial character of the conveyance, to hold that the due execution and recording of the deed in question authorizes the presumption that there was both a delivery and acceptance thereof. Although a prima facie acceptance of the deed by Georgia A. Fletcher is shown by the facts and circumstances referred to, her right to the possession of the house and lot thereby conveyed did not accrue until the death of her mother in 1882, which terminated the life estate in the property reserved to the mother by the deed.

Upon the death of her mother Georgia A. Fletcher took the title as well as the possession of the property devised her by the will, and the house and lot conveyed her by the deed was included in the realty given her for life by the will. Under these circumstances an election upon her part was necessary. In *Bigelow on Estoppel*, pages 503 & 4 it is said: "A party can not occupy inconsistent positions, and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts. Any decisive act of the party done with knowledge of his rights

and of the facts, determines his election and works an estoppel. * * * It is an old rule of equity that one who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the will, and will not be permitted to set up any claim or right of his own, however legal or well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will. Thus if a man bequeath to another property which belongs to a third person, to whom he gives by the same will other parts of his estate, such third person must convey his property to his devisee or he can not take the property devised to him under the will. The only question in such case is, did the testator intend (upon the face of the will) that the property should go in such a manner, and not had he the power to do so? It is immaterial whether the testator thought he had the right, or knowing the extent of his rights, intended by an arbitrary exertion of power to exceed them, in either case the legatee as such can not dispute the ownership of the property bequeathed to the other, and he can only take the property on the terms upon which it is given." (Pom. Eq. Jurisp., 2d edition, volume 1, section 742.)

In *Gore v. Stephens*, 1 Dana, 203, it was said by this court: "It is one of the leading maxims in equity that a person shall not claim an interest under an instrument, whether a deed or will, without giving free effect to the instrument as far as he can. If the testator give what is not his property, but which he supposed to be his, and gives to the person whose property it is an interest by his will, that person will not be permitted to defeat the disposition where it is in his power, and yet take under the will, and the same rule applies though the testator knew that he had no right to dispose of the lands, and yet knowing it, takes upon himself to dispose of them." * * * (Story's Eq. Jurisp., section 1096.)

In the light of the foregoing authorities it is manifest that Georgia A. Fletcher could not take under both the deed and will. It is also clear that Mary M. Morrison, after conveying her the property in controversy by deed, intended to abrogate the deed, and doubtless thought she accomplished that end in devising the daughter by her will the same property with the residue of her estate, and this intention of the mother was, we think, effectuated by the daughter and devisee, by an election on her part to stand by the will, and to take the property therein devised her under its provisions.

Obviously in making such election she understood her rights under the deed and will, for, according to the evidence, she had and kept a copy of the will from the time it was probated until her death, and in addition to the presumption arising from the recording of the deed, of its acceptance by the grantee and her consequent knowledge of its terms and provisions, it was further shown by the evidence that she was informed of its existence in 1883 or 1884, through Scanland, her uncle and agent, to whom the fact was communicated by J. W. Fletcher.

It also appears from the deposition of J. A. Gibson, a lawyer of DeWitt, Ark., and the legal adviser of her mother, that Georgia A. Fletcher received under her mother's will from \$3,000 to \$4,000 in money, and that she further received and had in possession until her death the house and lots in DeWitt devised her for life by the will. There was no evidence conducing to prove that Georgia A. Fletcher held the Elizabethtown property in a manner or under a claim of title different from that under which she held the Arkansas property. Upon the contrary it appears she did not attach any importance to the deed, and in fact never withdrew the original from the clerk's office in which it was recorded. Indeed the evidence disclosed by the record preponderates in favor of appellants' contention, that she held the house and

lot in controversy under the will regardless of the deed, and any other view of the matter would be inconsistent with her conduct throughout, and at variance with the circumstances attending her control of the property.

Nor does the fact that Georgia A. Fletcher left a will making appellee her sole devisee militate against this view, for it appears from the evidence that she owned at the time of her death a very considerable estate in addition to that received from her mother. We are unable to sustain appellee's contention, that the will of Mary M. Morrison was improperly admitted to probate by the Hardin County Court, or that the statute of limitation barred appellant's right to have it probated in this State.

Upon this question we do not regard *Allen v. Froman*, 96 Ky., 314, as an authority in point. In that case there was an attempt to make an original probate in this State of a copy of the will of one who was a resident of another State at the time of his death, and it appearing that the original had never been probated in the State of the testator's residence, and that his death occurred more than twenty years before the copy was offered for probate in this State, it was properly held by this court that the right of probate was barred by the ten-year statute of limitation. But the will of Mary M. Morrison had been, as it appeared, legally admitted to probate in a court of competent jurisdiction in the State of Arkansas, where the testatrix resided at the time of her death. The will was presented to the Hardin County Court solely for ancillary probate because some of the property affected by it lies in that county, and under the authority of *Johnson v. Bard*, 54 S. W., 721, decided by this court, the limitation applied in *Allen v. Froman*, supra, could not be applied to this will, and did not prevent the county court from admitting it to probate.

In any event it has been conclusively settled by this court that the judgment of a county court admitting a will to probate can not be attacked in a collateral action or proceeding, and this is true of foreign as well as domestic wills. (*Whalen v. Nisbet, &c.*, 95 Ky., 464; Kentucky Statutes, section 4852.)

We think the chancellor attached undue importance to Georgia A. Fletcher's possession for more than fifteen years of the house and lot in controversy, and to the fact that she paid the taxes thereon during that time. If after her mother's death she elected to hold the property under the deed, notwithstanding the will of her mother, actual possession of it by her was unnecessary. Upon the other hand, if she elected to take the property under the will, her possession, however long or continuous, was not adverse to the title of the remaindermen, and in any event she was personally liable for the taxes, and the property was also bound therefor during her possession of it, whether it was held by her as tenant for life under the will, or as the owner of the fee under the deed. The foregoing conclusions make it unnecessary for us to consider the contention made by counsel for appellants, that if Georgia A. Fletcher elected to take the property in controversy under the deed from her mother, and also received the remaining estate devised her by her mother's will, compensation is due appellants from appellee as her devisee for the property conveyed her by the deed.

Being of the opinion that the chancellor erred in the conclusions reached by him the judgment is reversed and cause remanded, with directions to the lower court to set it aside and enter in lieu thereof judgment dismissing the petition and giving appellants, C. A. and Lucy A. Morrison, the house and lot in controversy, and for such further proceedings as may be consistent with the opinion.

Whole court sitting.

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COURT OF APPEALS OF KENTUCKY.

HAGER, AUDITOR v. GAST, &c.

(Filed January 19, 1905.)

1. Street Improvement—Abutting property owned by the State—Liability for cost of improvement—Under section 2838, Kentucky Statutes, which requires the State to pay its proportion of the cost of the improvement of a public street in cities of the first class, on which property is situated which is owned by the State, or is held in trust for the public use of the State, where such street has been improved under the ordinance of the city, and an apportionment warrant or statement of the costs thereof shall be certified by the board of public works of the city to the State auditor, it is the duty of the auditor to pay the same.

2. Constitution—Special legislation—Exemption from taxation—Authorizing debt to be contracted on behalf of State—The act supra is not in conflict with section 166 of the Constitution on the ground that it is local or special legislation, because Louisville is the only city of the first class in this State, nor is it in conflict with section 170 of the Constitution, by which it is provided that public property used for public purposes shall be exempt from taxation, as it is well settled that the sections of the Constitution relating to taxation do not apply to assessments made on adjoining property for the improvement of a highway. Nor is it in conflict with sections 49-50 of the Constitution, which forbids the general assembly authorizing any debt to be contracted except for certain specified purposes, as these sections have been the organic law since 1851, and under it this court has sustained such legislation, holding that these provisions embrace the ordinary expenses of the government.

N. B. Hays and Loraine Mix for appellant.

Wm. Furlong and H. L. Stone for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hobson.

The State of Kentucky owns a lot of land in Louisville on which is situated the Kentucky Institute for the Blind. The institute was originally located

outside of the city boundary, but as the city has grown, its limits have been extended until the city takes in the property, and streets have been opened adjoining it. The city council ordained that these streets should be improved at the cost of the adjoining owners. Appellee Gosnell was the contractor, who did the work under the ordinance of the city and the contract made with him by it. Section 2833a, Kentucky Statutes, is as follows: "That when any public way, or other public improvement of any city of the first class in this Commonwealth, is ordered or directed, by ordinance of the general council of said city, to be constructed, which, according to the provisions of the act for the government of that class of cities, may be lawfully constructed at the cost of the owners of the lots of ground adjacent to such improvement, or within the taxable limits thereof, defined as provided in such act, and any such real estate within such taxable limits is owned by the State of Kentucky, or is held in trust for the public use of the State, the proportionate part of the cost of making such public way or other public improvement shall be apportioned against the real estate of the State in like manner as against other lots of ground within such taxable limits, and apportionment warrant or statement thereof shall be certified by the board of public works of such city to the auditor of public accounts, who shall thereupon draw on the State treasurer for the amount of such apportionment warrant or certified statement in favor of the person named therein as entitled to the amount thereof, and the State treasurer shall pay said warrant drawn by the auditor out of any money in the treasury not otherwise appropriated."

The auditor having refused to draw his warrant on the treasurer for the amount of the apportionment warrant issued by the city for Gosnell as provided by the statute, this suit was instituted for a mandamus compelling him to draw his warrant on the State treasurer therefor. The auditor filed an answer, to which the court sustained a demurrer, and he failing to plead further awarded the mandamus as prayed. The only question raised by the answer are matters of law. It is insisted that the statute is unconstitutional because it is local or special legislation, as it applies only to the city of Louisville, and is in conflict with sections 59-60 of the Constitution. The act is a part of the law governing cities of the first class. It is true Louisville is the only city of the first class in the Commonwealth, but this is immaterial. Section 156 of the Constitution provides that the cities and towns of the Commonwealth shall be divided into six classes, and that the organization and powers of each class shall be defined and provided for by general laws. The power of the legislature to provide for the government of cities of the first class are the same as they would be if there were a hundred cities of the first class instead of one, for if any other city by an increase of its population comes to be placed in the first class, it will be governed by the act; otherwise the legislature would be powerless to carry out section 156 of the Constitution. (Richardson v. Mehler, 28 Ky. Law Rep., 917.)

It is also insisted that the act is in conflict with section 170 of the Constitution, by which it is provided that public property used for public purposes shall be exempt from taxation. But it is well settled that the sections of the Constitution relating to taxation do not include or apply to assessments

made on adjoining property to pay for the improvement of highways. (*Zable v. Orphans' Home*, 92 Ky., 89; *Holzbauer v. Newport*, 94 Ky., 407; *Levi v. Louisville*, 97 Ky., 407; *Gosnell v. Louisville*, 104 Ky., 201.)

Lastly, it is urged that the act is in conflict with sections 49-50 of the Constitution, which forbid the general assembly authorizing any debt to be contracted on behalf of the Commonwealth except for certain specified purposes. But these sections of the Constitution have been the organic law of the State since 1851 (sections 35-36, article 2 of former Constitution), and under it this court sustained such legislation. (*Lindsey v. Auditor*, 3 Bush, 281; *Commonwealth v. Collins*, 12 Bush, 386; *Auditor v. Haycraft*, 14 Bush, 284.) These provisions of the Constitution do not embrace the ordinary expenses of the government. The State may repair its blind institute or build a road to it to make it more accessible, or conduct its ordinary affairs without making a special levy for this purpose. The State gets the benefit of the improved highway, and instead of building it itself has authorized the city to have it built, agreeing to pay its pro rata part of the expense like other property owners abutting on it. The State could have authorized this portion of the highway to be built, and paid for it out of the general fund. The fact that the city was authorized to have it built does not change the legal aspect of the transaction.

Judgment affirmed.

COMMONWEALTH v. NAPIER.

(Filed January 19, 1905—Not to be reported.)

Criminal law—Indictment—Upon the trial of appellee, charged with the burning of property of Hiram Cawood, it was error to peremptorily instruct the jury to find for the defendant, the proof showing that the property was in the name of his wife. It was shown by the evidence that the property was known as that of Hiram Cawood; the witnesses all spoke of it as such; he had the possession and control of it, and, moreover, he had an inchoate interest in it and possession of it, and a conviction or acquittal under the indictment would bar another prosecution for burning the barn of Sally Cawood, the wife.

N. B. Hays and Ira Fields for appellant.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Paynter.

Rebecca Napier was indicted in the Harlan Circuit Court for the crime of barn burning jointly with one Thomas King. The charge in the indictment is that she and King "did unlawfully, willfully and feloniously burn a barn not their own, but the property of and belonging to Hiram J. Cawood." On the trial of Rebecca Napier the Commonwealth introduced evidence showing that Thomas King set the barn on fire at the instance of Rebecca Napier; that she had King to burn the barn and paid him \$10 to set it afire. There was other evidence tending to confirm this testimony.

The defendant then introduced Hiram Cawood, who testified as follows:

"Q. Mr. Cawood, who owns that barn and the land where it stood?"

"A. The land where it stood is titled to my wife, but I use it all the

time; the barn and mowing machine and things that got burned was mine."

"Q. Isn't it a fact, Mr. Cawood, that at the time the barn was burned the land was titled to your wife and the deed was made to her, and that you didn't hold title to the land, the barn or the property at all?"

"A. She holds title to the land; but the barn and things that got burned was mine."

"Q. Where do you live with reference to the barn?"

"A. About seventy-five yards from the barn."

"Q. You lived with your wife at that time did you?"

"A. Yes, sir."

"Q. She occupied the same building?"

"A. Yes, sir."

"Q. Who built that barn?"

"A. I done the last work on it myself."

No other evidence was introduced, and the court thereupon instructed the jury to find the defendant not guilty on the ground that there was a variance between the charge in the indictment and the proof, in this: That the barn burned was not the property of or belonging to Hiram J. Cawood, but was the property of his wife, Sally Cawood. Section 128 of the Criminal Code: "If an offense involve the commission of or an attempt to commit an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, or as to the owner of the property taken or injured, or attempted to be injured, is not material."

In *Johnson v. Commonwealth*, 87 Ky., 189, the indictment charged that the defendant broke and entered into barbershop of Philip White, but the evidence showed that the shop broken into was leased and occupied not by White alone, but by him jointly with one Gatlin, his partner, and that the property belonged to another. It was held, under the section of the Code above quoted, that the indictment sufficiently described the house broken into, although White was not the sole or actual owner of it, but in possession only as tenant jointly with his partner. In *Hennessey v. Commonwealth*, 88 Ky., 301, the charge was that the defendant obtained \$15 in money from Betty Cook by false pretenses. It was shown that Betty Cook was a married woman, and, therefore, it was claimed that the \$15 was the property of her husband. The conviction was sustained, but the judgment of the court is rested on the idea that it was immaterial whether the money obtained was the property of the husband or that of the wife if the defendant obtained it by false pretenses from his wife.

The question is presented whether in indictments under section 1169, Kentucky Statutes, the house burned may be laid as the property of the husband where he and his wife are both living on the property. Under such circumstances the wife is technically in possession, but as a matter of fact the husband is in the actual possession and control of the property. There is not the slightest difficulty to identify the act. The grand jury knew, as did the defendant, what property was intended to be described in the indictment. Section 128, Criminal Code, was intended to modify the rigorous requirements of the common law as to the description of the person or prop-

erty injured. When the act can be identified there is no danger of a defendant being put in jeopardy twice for the same offense. On the trial of an indictment for burning the barn of Mrs. Cawood it would be easy to show that she had been tried under an indictment for the same act. As was shown by the evidence in the case the barn was known by the witnesses as Hiram Cawood barn. They all spoke of it as such. He had possession and control of it. The description of the barn in the indictment could not have misled the defendant, and as Cawood has an inchoate interest in the barn and possession of it, a conviction or acquittal under the indictment would bar another prosecution for burning the barn of Sally Cawood.

We, therefore, conclude that the court erred in instructing the jury peremptorily to find for the defendant, and this is ordered to be certified.

THE HARDY PACKING CO. v. SPRIGG.

(Filed January 20, 1905—Not to be reported.)

Fertilizer—Guarantor of notes—Action against—Issue—Evidence of value—Competency—In an action against one as guarantor of notes executed for Fertilizer, who filed answer, alleging that the notes sued on were given for the price of a fertilizer on a warranty that it was a good wheat producer, but that it was worthless and of no value, on which answer issue was joined by a traverse, it was competent and relevant for the defendant to prove by the farmers who purchased and used the fertilizer that it would not, and did not, produce wheat.

Williams & Handley for appellant.

J. W. Gore and Mather & Creal for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Nunn.

The appellant sued appellee as guarantor of eight or ten small notes, the whole amounting to \$270.

The appellee answered and alleged, in substance, that he received no consideration for guaranteeing the payment of the notes; that they were executed by farmers for the purchase price of fertilizer on a warranty that the same was a good wheat producer; that the warranty failed; that the fertilizer would not produce wheat, and was worthless and of no value. Appellant replied, traversing these allegations. Upon this issue a trial was had, which resulted in favor of appellee. The appellee introduced eight or ten farmers who purchased this fertilizer, and who stated that it was worthless, and would not, and did not, produce wheat. Appellant objected to this evidence, and contends that the only competent testimony that could have been introduced by appellee was a report of analysis of a sample of the fertilizer, by the director of the Agricultural Experiment Station of the Agricultural and Mechanical College of Kentucky, as provided in subsection 8 of section 1822 of the Kentucky Statutes. Even if the statute should be construed to have the effect as contended for, which we do not decide, the appellant did not prepare its pleadings to get the benefit of the statute. It was not alleged that it complied with the provisions of this statute in any

particular. It did not even allege that the fertilizer furnished appellee for sale was labeled with the analysis as made by the director of the Agricultural Experiment Station, and, if so labeled, that the fertilizer furnished appellee was of the kind or grade as the samples furnished by it to the director for analysis. We are of the opinion that the evidence objected to was competent and relevant to the issue.

Judgment affirmed.

CAMDEN INTERSTATE RY. CO. v. SMILEY, &c.

(Filed January 20, 1905—Not to be reported.)

1. Injunction—Dissolution—Amended pleading—Damages—In an action to enjoin a railroad company from constructing a viaduct in a street in front of plaintiff's property, where an injunction granted by the clerk was dissolved by the circuit court, it was not error in this court to permit the plaintiff to amend her petition, charging that the viaduct was a permanent obstruction and praying for damages to her property caused thereby.

2. Railroads—Constructing viaduct in street—Damages to abutting property—Where a viaduct was constructed by a railroad ten or twelve feet high in the center of a street, twenty-one feet from plaintiff's dwelling, which was worth \$1,250, a verdict allowing \$425 damages is not so excessive as to authorize this court to disturb it where the proof shows that the ingress and egress to and from the property was seriously impaired.

T. R. Brown for appellant.

R. S. Dinkle and P. K. Malin for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee owns a lot fronting one hundred and twenty feet on Mound street in Catlettsburg, Ky., having on it two dwelling houses which she rented to tenants. Appellant was building along Mound street a viaduct some ten or twelve feet high which occupied the central part of the street, leaving only the space of twenty one feet between her property line and the base upon which the viaduct rested, and after deducting the sidewalk of ten feet, only about eleven feet for teams to drive on. The purpose of the viaduct was to raise appellant's track so as to get up to the bridge over the Big Sandy river. It rested on trestle work. Bents were placed eighteen feet apart, the bents resting on concrete pedestals two feet square. While appellant was building the structure appellee brought this suit to enjoin it from continuing the erection in the street on the ground that it was a taking of her property by appellant without first paying a just compensation therefor, as the ingress and egress to and from her property would be materially affected. An answer was filed by the defendant, and on the hearing before the circuit judge upon affidavits the court dissolved the injunction which had been granted by the clerk. The plaintiff thereupon amended her petition, charging that the viaduct was a permanent obstruction in the street, unreasonably destroying ingress to and egress from her property, and damaging it in the sum of \$1,250, for which she prayed judgment. The case was then on her motion transferred to the ordinary docket, where it was heard before a jury

who returned a verdict for her in the sum of \$425, on which the court entered judgment.

It is insisted that the court erred in allowing the amended petition to be filed seeking damages for the obstruction of the street. The courts have a wide discretion in allowing amendments, and as it had been held that the construction of the viaduct would not be enjoined we do not see that there was any substantial error in allowing the plaintiff to amend her petition and claim damages for the injury to her property. The plaintiff was manifestly entitled to damages if the statements of her petition were true, and although she was not entitled to enjoin the construction of the viaduct, the court, in furtherance of justice, should not have left her remediless and refused to allow her to amend her petition and ask the relief to which the facts she stated entitled her. (McHugh v. Louisville Bridge Co., 23 Ky. Law Rep., 1546.)

While the proof was conflicting there was sufficient evidence of obstruction of the ingress to and egress from the property to justify the submission of the case to the jury. (Ashland and Catlettsburg Street Railway Co. v. Faulkner, 21 Ky. Law Rep., 156; L. & N. R. R. Co. v. Cumnook, 25 Ky. Law Rep., 1890; Henderson v. McClain, 19 Ky. Law Rep., 1452; Ludlow v. Detweiler, 20 Ky. Law Rep., 895.)

The court instructed the jury as follows:

"1st. The court instructs the jury that if they believe from the evidence that the defendant in constructing its viaduct on Mound street appropriated and obstructed the street adjacent to plaintiff's lot so as to deprive plaintiff of the reasonable use of the said street as a means of ingress and egress to and from said property, they will find for the plaintiff and fix the damages as in instruction No. 4.

"2d. The court instructs the jury that they are not authorized to find any damages for plaintiff if they believe from the evidence that sufficient space in Mound street is left between plaintiff's property and defendant's viaduct on said street to permit the reasonable use of same for ingress and egress to and from said property by vehicles in ordinary and general use.

"3d. The court instructs the jury that if they find for plaintiff under instruction No. 1, that they are only 'permitted to find for the plaintiff such depreciation of value, if any, of plaintiff's property as they believe and find is due to the obstruction, if any, to the reasonable use of Mound street adjacent to plaintiff's property for travel by any vehicle, in ordinary and general use, to and from plaintiff's property, and the jury are not permitted to include in any finding they may make any depreciation in the value of plaintiff's property that they may find to be due to the operation of defendant's line of street railway on the viaduct in Mound street adjacent to plaintiff's property, or to the unsightliness of defendant's viaduct, or to any fear by horses from operation of cars on said viaduct or to mere proximity of or inconvenience from defendant's viaduct that does not obstruct the reasonable use of Mound street adjacent to plaintiff's property for travel by any vehicle, in ordinary and general use, to and from plaintiff's property.

"4th. If the jury find for plaintiff under instruction No. 1 they will first ascertain from the evidence the fair market value of the property in question just before it became generally known that the viaduct of the defend-

ant was to be built on Mound street adjacent to said property; they will then ascertain from the evidence what portion of that value, if any, has been taken from same by reason of the construction of said viaduct on Mound street adjacent to said property, and the amount so found is the sum plaintiff is entitled to recover, nor exceeding \$1,250."

The principal complaint is that instruction No. 4 takes off the brakes, allowing the jury to find for appellee whatever of the value of the property had been taken from it by the construction of the viaduct. All the instructions of the court are to be read together, and when the four instructions above quoted are so read they could not have misled the jury. By instruction 3 the jury were told plainly that they could not find for the plaintiff on account of certain things, but only for the damages from the obstruction of ingress and egress to and from the property. This is plainly set out in instruction No. 1; it is repeated in instruction No. 2, and is reiterated in instruction No. 3.

The plaintiff's evidence tended to show that her property was worth about \$1,250 before the construction of the viaduct, and that it had been damaged by its construction in the sum of \$625, as teams could not pass on the space of eleven feet and loaded wagons could not turn and go under the viaduct. The proof was somewhat conflicting as to whether a wagon could turn and pass under the viaduct, but as to the space left there was no conflict in the evidence, and it was reasonably clear from the proof that the ingress and egress to and from the property was seriously impaired. The jury fixed the damages at \$425, and we can not say that the verdict is so excessive as to warrant us in disturbing it.

Judgment affirmed.

THE KENTUCKY STOVE CO. v. BRYAN'S ADM'R.

(Filed January 24, 1904—Not to be reported.)

1. Damages—Liability for—In this action to recover damages for the death of appellee's intestate it is not a defense that deceased was at work under an independent contractor, as the furnishing of the wheel, the bursting of which killed him, its shafting and power were all under the supervision of appellant.

2. Competency of witnesses—It was not error for the court to refuse to permit stockholders of appellant to testify for it in an action against it for damages with reference to conversations had with the intestate. (24 Ky. Law Rep., 1800.)

Bennett H. Young and M. W. Ripy for appellant.

Gardner & Moxley for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Nunn.

This appeal is from a judgment for \$3,000, obtained for the death of William Bryan, who was killed by the bursting of an emery wheel in the plant of appellant.

This wheel was situated in a room at one end of the plant, about one hundred feet from the engine which operated it.

The appellee in substance alleged that the wheel was defective; that it was improperly and unsafely put on the shaft which revolved it, and that the servants of appellant negligently and carelessly operated the wheel at an excessive and dangerous rate of speed, and that the agents and servants of appellant in charge knew, or by the exercise of ordinary care could have known, and this appellee's intestate did not know that the wheel was defective; that it was improperly placed upon the shaft, and that it was operated at a dangerous and excessive rate of speed. Appellant denied all negligence, and alleged contributory negligence on the part of the deceased; also that the decedent was not in the employ of appellant; that he was employed by and under the sole control of one John Hines, an independent contractor, and, therefore, it was not responsible for the death of Bryan. The affirmative matter in the answer was traversed by a reply. It appears from the evidence that the wheel was not defective. The only evidence to indicate that it was defective was the fact that it burst, but the evidence conduces to show that it was at the time deceased was killed improperly and insecurely placed upon the shaft which revolved it, and that it was being operated at an excessive and dangerous rate of speed.

It is shown without contradiction that appellant owned and controlled the power that operated this wheel, and it was its duty to exercise reasonable care in making it secure and safe for the protection of persons whose duty it was to work and labor in the room, where the emery wheels were situated. Under the facts proven in this case this duty devolved upon appellant. It matters not whether the persons working about these wheels were employees and upon the payrolls of appellant, or whether they were working under a boss or independent contractor, as the furnishing of the wheel, the shafting and the power to run it were all under the supervision and control of appellant. (Ohio Valley Ry. Co. v. McKinley, 17 Ky. Law Rep., 1020; Wilson v. Alpine Coal Co., 26 Ky. Law Rep., 838; King v. Creekmore, 25 Ky. Law Rep., 1293; Ford & Ford v. Crigler, 25 Ky. Law Rep., 57.)

The instructions as given by the court were unobjectionable, and properly submitted every phase of the issues to the jury. Appellant also complained that the court erred in refusing to allow two stockholders of appellant to testify with reference to conversations and transactions had with appellee's intestate. This was not error. (Story v. First National Bank of Louisville, 24 Ky. Law Rep., 1800.)

Perceiving no error in the record prejudicial to appellant the judgment is affirmed.

HELTON v. COMMONWEALTH.

(Filed January 24, 1905—Not to be reported.)

1. Criminal law—Evidence—Admonition of the court—Upon the trial of appellant the court permitted the prosecution to prove that some weeks after the killing he returned to the house where it occurred and indulged in conduct indicating that he was being lashed by a guilty conscience; that he said he wanted to pray for those boys; that he had to kill them in his self-defense. After admitting the evidence, the court excluded it by an

admonition to the jury that they could only consider the fact that he did visit the premises again after the killing, and that he was more or less intoxicated. Held—That the whole circumstance was immaterial, and should not have been admitted; yet it was not prejudicial to accused.

2. Evidence—Evidence to the effect that notches were cut upon appellant's pistol was immaterial except as he had admitted that they were put there to indicate the number of men he had killed. Had there been doubt as to its identity, then evidence of such marks would have been admissible. There was no evidence that appellant had ever fired his pistol at any other person, and the admission of evidence as to marks upon it does not seem to have been prejudicial.

J. M. Roberson for appellant.

N. B. Hays for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge O'Rear.

This appeal is prosecuted from a conviction of manslaughter. Appellant was constable of District No. 4 in Knox county. He had in his hands for collection a capias pro fine against David Fletcher for \$5 and costs. In attempting to execute the writ he arrested Fletcher. But before starting with him to the county jail he suffered Fletcher to go to his home, ostensibly to carry some articles of merchandise for the use of his family. A brother of David Fletcher and one Brock, a boarder at the house of the person arrested, went along. Fearing some difficulty, appellant summoned his nephew, Jay Helton, to assist in executing the writ. There was some talk as the parties went along to the house indicating that Fletcher would not go to jail. Whether it was to the effect that he would resist the officer by force, or whether he would settle the fine and costs by payment after he got to his house there is a conflict in the evidence. At the house David Fletcher took a pistol holster, but without the pistol, and buckled it on his person.

The officer expostulated with him and told him that, being a prisoner, he would not be allowed to carry arms with him. Fletcher went to his trunk, which was in the room, and started to raise the lid. Whether this act was to get a pistol from the trunk, as claimed by appellant, or to get the money or for some other purpose, as claimed by the prosecution, there is a sharp conflict of evidence. The officer and his deputy say that the prisoner raised the trunk lid, grasped a pistol that was in the trunk and presented it at the deputy, when appellant and the deputy began shooting at him, killing him instantly, the shots fired by appellant taking effect in the back, and in the back of the head. When the shooting began Tom Fletcher and Brock, who had accompanied the party to the house (they both boarded there) entered from a rear room, Tom having two pistols in his hands. The officers turned their fire upon Tom Fletcher and Brock, killing Tom and wounding Brock. The contention of the officers is that David Fletcher, Tom Fletcher and Brock had entered into a conspiracy to kill the officers in the resisting of the arrest, and that they had to shoot to save themselves, while the prosecution claims that the officers acted unnecessarily in shooting David Fletcher, using more force than was necessary, even if it appeared to them and was a fact that David was attempting to get a pistol from the trunk.

All these issues of fact were submitted to the jury by irreproachable instructions.

The only errors complained of that this court is authorized to notice was in the admission of evidence against the accused. Of these rulings only three are assailed. The first is, the court permitted the prosecution to prove that appellant, some weeks after the killing, returned to the house where it had occurred, but which had since been vacated by the family of Fletcher, and indulged in uncertain conduct, but which was thought to indicate mental perturbation by the accused, possibly that he was brooding over the act, indicating that he was being lashed by a guilty conscience; that he then said he wanted to pray for those boys; that he had been compelled to kill them in self-defense. The prosecution also proved that appellant was drunk on that occasion, and was armed with a pistol. After admitting the evidence the court excluded it by an admonition to the jury, except they were allowed to consider the fact that the accused did visit the premises again, and that he was more or less intoxicated. We are of opinion that the whole circumstance was immaterial, and should not, on that account, have been admitted. Yet we are unable to perceive how it was prejudicial. Appellant was permitted to prove why he went there; that he went at the suggestion of his counsel to examine the situation of certain doors so as to be able to explain it to the attorney, appellant never having seen the place but once before; that he was a peace officer justified his carrying arms; that he was more or less intoxicated was not such a circumstance as would probably have prejudiced his case. If it be suggested that the court's admonition could not remove from the jury the hurtful effect of the matter excluded after it was once admitted, it seems enough to say in response that it is not at all certain that the matter was really prejudicial. To pray for one's enemies is not regarded as evidence that the one offering the prayer is doing it from a sense of his own personal guilt. The taking of human life, even when justifiable under the law, may affect one's peace of mind. But that fact does not militate against the legal innocence of the slayer. These are mental phenomena well known. The jury in every probability were fully aware of them, and were as apt at least to give them a proper application as not. It would be trivial to reverse a judgment for such slight irregularity in the trial.

Another matter complained of is that it was proven that appellant sold his pistol, the one with which he did the shooting charged in the indictment, to Chas. Byrley some time after the killing. Byrley was permitted to prove that there were three notches cut on the pistol, which the Commonwealth sought to show, and argued to the jury, were put there by appellant to indicate the number of men he had shot with it. Unless appellant admitted, or it was otherwise shown, that he so marked the pistol, and for the purpose of making a score of the result of his shots fired on the occasion for which he was being tried, the matter is wholly immaterial and irrelevant. If there was doubt as to the identity of the pistol, and the distinguishing marks were used by the witness for the purpose of identification, the evidence would have been admissible, for it was a material fact to be shown that appellant fired a pistol of large calibre, of the size of the one offered in evidence, inasmuch as two of the mortal wounds entering from the back

were fired from such a pistol. There was no evidence that appellant ever fired his pistol at any other person or on any other occasion. The admission of the evidence does not seem to us to have been prejudicial.

The remaining objection is that the court allowed evidence to go to the jury of the killing of Tom Fletcher and of the shooting of Brock. It would have been difficult, if not impossible, to have prevented it, even if it were not proper, for it was all one transaction, so interwoven and done so quickly that, according to appellant's own version, "it was over before you could open your mouth." To tell of it, without telling all of it, would be hard to control. Everything done at the time, and every part of the affair, was receivable in evidence as explaining the nature and motive of the act for which appellant was being tried. But were it otherwise, the court whenever objection was made, rejected all evidence of the shooting of Tom Fletcher and of Brock. The most of the evidence admitted on that point came from the appellant himself and his witnesses. There does not appear to be a reversible error in the record.

Judgment affirmed.

JEFFERSON, & CO. V. HOPSON BROS.

(Filed January 24, 1905—Not to be reported.)

1. Liens—Married women—Since the enactment of section 9123, Kentucky Statutes, married women have the same power to create liens upon their own property for its improvement as unmarried women or men.

2. Same—Even though the property upon which material was furnished for the building of a house was the property of a wife, and she did not enter into a written contract with reference to its improvement, still where she accepted the material the law implies a promise to pay.

John C. Dabney and R. A. Burnett for appellants.

Sims & Thomas for appellees.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Nunn.

Appellants are husband and wife. About the first day of December, 1900, the husband purchased from one Glover four acres of land at \$100 per acre, and caused the conveyance to be made to himself. On the 27th day of the same month he surrendered to Glover the deed, it having not been recorded, and caused Glover to make a deed to his wife, claiming at the time, as testified by him, that the money used in paying for the land belonged to her, and it was the intention in the beginning to have the conveyance made to her, but by oversight he suffered the deed to himself.

Between the dates of these deeds the husband entered into a contract with one Hamby, whereby Hamby agreed to furnish the material and erect a dwelling house upon this property at the price of \$1,100. Under a contract with Hamby the appellees furnished material in the erection of this house to the value of \$149. Appellees took the necessary steps to perfect a lien on the property, and instituted this action to enforce it. Appellants answered that they did not contract for this lumber and were not responsible there-

for; that appellant's husband had paid more for the erection of this house than he had contracted to pay, and the property belonged to the wife and she had not signed any written contract, nor made any contract of any character for the improvement of her property. It appears that there was proof introduced by both parties upon the question as to whether or not the change of title to his property from the husband to the wife was fraudulent. Under recent decisions of this court this question is not material in respect to the liability of this property for the payment of the claim in suit.

In the case of *Tarr & Templin, &c. v. Muir, &c.*, 107 Ky., 283, and *Johnson, &c. v. Bush & Curran, &c.*, 23 Ky. Law Rep., 1899, it was decided that section 2128 of the Kentucky Statutes had the effect to repeal that part of section 2479 which required a written contract signed by a married woman before her property could be placed in lien for improvements made thereon; that since the enactment of section 2128, concerning the rights and liabilities of married women, she had the same power to create liens upon her property for the improvement thereof as possessed by unmarried women or men. Even if this property is hers appellees are entitled to a lien for the material furnished in making the improvement thereon. She accepted the material, and the law implies a promise to pay for it.

Judgment affirmed.

CITY OF LOUISVILLE v. LOUISVILLE CITY RAILWAY.

(Filed January 25, 1905—Not to be reported.)

H. L. Stone for appellant.

Boyle & Yeaman and Humphrey, Burnett & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Judge Barker delivered the following response to petition for rehearing:

The tax bills involved in this action bear interest from the time, and in the manner, that other taxes bear interest under the provisions of the charter of cities of the first class. The various payments made by the railway to be applied as of the dates made, thus extinguishing principal and interest under the ordinary rule as to partial payments.

All other motions except as herein indicated overruled.

RAMSEY, &c. v. CITY OF SHELBYVILLE, &c.

(Filed January 25, 1905—Not to be reported.)

Gilbert & Gilbert and J. C. Beckham & Son for appellants.

Willis & Todd for appellees.

Appeal from Shelby Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

There is nothing in the opinion to suggest the illegality of any appropriation made by the council of Shelbyville out of the annual revenue for the benefit of the public library. On the contrary, so far as this record shows, and we are at present advised, such action, if any, was entirely valid.

MANNING v. ILLINOIS CENTRAL R. R. CO.

(Filed January 26, 1905—Not to be reported.)

Railroads—Damages—Where there was no evidence that the presence of one who was injured by being struck by a moving train was discovered by those in charge of the train in time to avert the danger to him by the exercise of ordinary care, under the well-settled rule that he was a trespasser, the company was under no obligation to maintain a lookout for him, and is not responsible to him unless his danger was perceived and there was after this a failure to use ordinary care for his safety.

W. J. Webb and S. H. Crossland for appellant

Robbins & Thomas, J. M. Dickinson and Pirtle & Trabue for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant on May 1, 1902, lived north of the station Bouz on appellee's road, and was walking along the railroad going south to his work, which was beyond the station. As he went along a train passed him also going south, which pulled in on the side track at the station, and when he reached the side track he walked down the main track. He heard a second train coming southward down the railroad, and supposing that it would come in on the main track crossed over to the side track, and without looking back proceeded to walk on down the side track in the direction of the first train, which had stopped on the side track some distance south of him. While he was thus walking along the side track the second train, when it reached the switch, also took the side track, pulling in behind the first to leave the main track clear for a passenger train, and in so doing ran upon him and knocked him off the track while he had his back to it and was under the impression that this train was on the main track. He sued to recover for his injuries, and at the conclusion of all the evidence the court instructed the jury peremptorily to find for the defendant.

Appellant complains of the action of the court and relies on the case of *Wilmuth's Adm'r v. I. C. R. R. Co.*, 25 Ky. Law Rep., 671. That case is rested on the idea that the engineer saw the man on the track two hundred feet away from him, and after perceiving his danger failed to exercise ordinary care for his safety, or at least that there was evidence from which the jury might properly so find. There was no evidence in this case that the engineer saw the appellant before he was struck, or that his presence on the track was perceived by any one on the train in time to avert the danger to him by ordinary care. The plaintiff's evidence failed to show that his presence on the side track was seen by those in charge of the train, and under the well-settled rule that he was a trespasser the company was under no obligation to maintain a lookout for him and is not responsible to him unless his danger was perceived, and there was after this a failure to use ordinary care for his safety. The court should have sustained the defendant's motion for a peremptory instruction made at the conclusion of the plaintiff's evidence. The testimony for the defendant in no way strengthened the plaintiff's case. The proof by the engineer was that by reason of the curve he could not see the plaintiff as the engine obstructed his view. The

fireman testified that he was putting in coal, and when he looked out and saw the plaintiff he at once called to the engineer, who did all he could then to stop the train.

Under all the evidence we are satisfied from the proof that the flagman of the first train had turned the switch and that the second train ran in on the side track very close behind plaintiff, and struck him very soon after he walked from the main track to the side track. But whether this is true or not, and if it be conceded that he was struck after he had been on the side track some distance and far enough for the engineer to have seen him after rounding the curve, still the fact remains under the evidence that he did not see him, and the peremptory instruction was properly given. The bell on the train was ringing, but it is plain that the plaintiff supposed that the train was on the main track, and, therefore, did not look back.

Judgment affirmed.

CITY OF LOUISVILLE v. ANDERSON, &c.

(Filed January 26, 1905—Not to be reported.)

Abatement of action—Taxes—Action to collect—Where a conveyance was made to one in trust for appellee, only a dry naked trust being taken, his death did not have the effect of abating the action in which taxes were sought to be collected against the property, and it was error to sustain a motion to strike such action from the docket.

H. L. Stone for appellant.

Wilkins G. Anderson and H. M. Lane for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

This action was instituted by the appellant, July 21, 1892, on tax bills for the years 1886, 1887, 1888, 1889, 1890 and 1891, and process was issued against the defendants therein, viz., Caroline B. Anderson and George W. Anderson, her then trustee. It does not appear that this process was ever executed. This action remained upon the docket without any steps being taken until the 11th day of March, 1897, when appellee, Wilkins G. Anderson, her husband and her then trustee, filed an affidavit, showing that George W. Anderson, the former trustee of his wife, had died on the 28th day of August, 1894. This appears to have been the first suggestion of record of the death of George W. Anderson. One week after this, to wit, the 18th day of March, 1897, the appellant caused an alias process to be issued against appellee, Caroline B. Anderson, the service of which was accepted by her attorneys on April 12, 1897.

The appellant also filed an amended petition, stating the date of the death of George W. Anderson, and that Wilkins G. Anderson had been duly appointed as the trustee of appellee; that he had qualified as such, and was then acting as trustee for his wife with respect to the real estate described

in the petition, and made him a defendant to the action. On the 11th day of December, 1897, the appellees filed grounds and entered a motion to strike the action from the docket for the reason that the first trustee died in August, 1894, and more than twelve months had elapsed after his death without any revivor of the action. This motion was not acted upon by the court until 1904, when the court sustained the motion and dismissed the action, of which appellant complains. It appears from the record that the real estate described in the petition descended to appellee, Caroline B. Anderson, from her father, and that prior to her marriage with appellee, Wilkins G. Anderson, a conveyance of this real estate was made to George W. Anderson in trust for her, and Wilkins G. Anderson relinquished to George W. Anderson any and all interest in her estate that would or might come to him by virtue of the contemplated marriage between them. George W. Anderson was to have the power to sell and convey the estate and reinvest the proceeds thereof upon like trusts, but such sale and reinvestment was only to be made with the consent of Caroline B. Anderson, who was to be paid the rents, issues and profits of the estate, and her receipts were to be a full acquittance to the trustee, and she was to have the right and power to dispose of this estate by will as perfectly as if she was unmarried.

Under this deed George W. Anderson did not take any beneficial interest in the property whatever. He took only a mere dry or naked trust, and his death did not abate, or have the effect to abate, the action, which appears from the record to have been pending all the time against appellee, Caroline B. Anderson, the sole owner and beneficiary of the property, and the person who owed and should have paid the taxes if a just claim. To have sold this property, or any part of it, for the taxes, and to pass the legal title to the purchaser it was necessary that the trustee, the holder of the title, be made a party to the action; but his not being a party did not prevent the court from proceeding against Caroline B. Anderson, the real and sole owner of the property, and if the taxes were found to be just and a proper claim, to have caused the same to be paid out of the rents and profits realized from the property, and if necessary the court might have placed the property in the hands of its receiver to effectuate that object, or the court might have ordered a sale of her equitable interest. Having arrived at these conclusions, we deem it unnecessary and a waste of time to discuss the question of the necessity of revivor.

We express no opinion upon the merits of the controversy, as that question is not before us. But we are of the opinion that the court erred in sustaining the motion of appellees to strike the action from the docket. On the return of the case to the lower court the appellees should be permitted to plead and make defense if they desire.

For the reasons indicated the judgment is reversed and cause remanded for proceedings consistent herewith.

MORRIS v. COMMONWEALTH.

(Filed January 17, 1905—Not to be reported.)

1. Criminal law—Instructions—Where there was nothing in the testimony of appellant to show that he at any time abandoned the difficulty in good faith before he mortally wounded the deceased he was not prejudiced by a qualification added to an instruction authorizing an acquittal upon the grounds of self-defense or apparent necessity to the effect that unless the jury believed from the evidence beyond a reasonable doubt that the defendant first wilfully and feloniously assaulted the deceased with a knife or rock, and in so doing made the harm or danger, if any there was towards him, necessary or excusable on the part of deceased in his own necessary self-defense from the defendant, in which event the defendant ought not to be excused upon the grounds of self-defense, etc.

2. Evidence—The testimony of the physician who examined the wounds of deceased, to the effect that the wound in the head tended to hasten the death of deceased, was immaterial as the appellant admitted that he killed deceased and the physician had already stated that a knife wound in the left breast was a fatal wound.

E. E. Hogg, G. I. Rader and J. R. Llewellyn for appellant.

N. B. Hays and E. H. Morris for appellee.

Appeal from Jackson Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant Morris was indicted by the grand jury of Jackson county for the murder of John Moore. He was convicted of manslaughter and his punishment fixed at twenty-one years in the penitentiary. The proof shows that Moore ran a blacksmith shop and a mill, and also repaired guns and pistols. On the day of his death he was in his yard working on a buggy tire when the defendant came along the road near by, between 12 and 1 o'clock. No witness saw the difficulty. The proof on behalf of the Commonwealth is wholly circumstantial. Shortly thereafter the defendant appeared at a neighbor's with blood on his knife and blood on his pants and stated that he had killed Moore, but that he had to do it. There were several persons there who went at once to Moore's. They found him outside of his yard and near a little path leading from his gate down to the road, lying on his face, breathing, but unconscious. He died without speaking a few moments after they got there. The road at this point ran along the creek, which at that time had a little water in it, and on the side of the road near the creek was a stump which the water had left there. Near this stump lay the hat of the deceased, a two-foot rule, closed, also some horse-shoe nails, and by the stump lay a barlow knife about one sixth open which was his. The ground about six feet from the stump showed signs of a struggle. From this point the tracks of the deceased went across the creek and then returned to the point where his body lay. There was a little blood sprinkled near the stump, a large quantity a few feet further on, and there were signs of blood on the rocks or on the ground from that point across the creek and back to where the deceased was lying. On the far side of the creek there was an impression in the dirt as though made by a man's knee. The deceased when found had one stab near the left nipple which went into

the neighborhood of the heart or into it, as shown by the probe, and another stab near the right nipple which went into the cavity. Near by the body of the deceased was a rock weighing two and one-half or three pounds which had on it hair and flesh marks, and there was a bruise about the ear of the deceased where the rock had struck him. The knife which the defendant had was what is known as a large or daddy barlow. There was found in the pocket of the deceased a small pistol, which was empty, a twenty-two caliber which shot once.

It also appeared from the evidence that a few days before the defendant had passed the house of the deceased with a pig, and some one after this had reported that the deceased had said that the defendant had stolen the pig. Some men who were in the field working with him were joking him about this a day or so before, and he said he did not steal the pig, but that if he had stolen it he would as soon steal a pig as to steal corn, and then he said he did not like for any G— d— s— of a b— to tell that on him. On the day of the homicide, and not long before the defendant reached Moore's house, he overtook a man in the road to whom he said that John Moore, "the g— d— black rascal," had been accusing him of stealing a pig, and he would just as soon be a hog rogue as a corn rogue; that he wanted to see Moore and see what he was accusing him of stealing a pig for, something that he was innocent of. To another witness he spoke of Moore's having cursed his boy. While the evidence of what he said about Moore's cursing his boy was not important, it served in some measure to show the state of feeling of the defendant, and was for this reason confirmatory of the testimony as to what he said about the pig matter.

The court allowed the doctor who examined the body of the deceased to state that he was inclined to think the wound in the head would to some extent hasten the death of the deceased. This was objected to, but it was immaterial, as admittedly the defendant killed the deceased, and the doctor had already stated that the stab in the left breast was a fatal wound. The defendant also complains that he was not permitted to ask Ike Sloane this question: "When you first got there did you notice any shavings around the stump?"

The Commonwealth objected to the question as leading, and the court sustained the objection, but whether this was proper or not we need not determine, as there is no avowal what the witness would have stated. The testimony for the Commonwealth showed that at the stump referred to there were two piles of shavings as if two men had sat there whittling. The evidence for the defendant was to the effect that these shavings were made by others after Moore was killed. The defendant had interrogated his other witnesses on the subject and he could have interrogated Sloane by the same line of questions.

These are all the questions made in the case except the propriety of the fifth instruction, which is as follows: "If you shall believe from the evidence that at the time the defendant cut, struck, stabbed and wounded the deceased with a knife so as to cause or hasten his death, or at the time he struck and wounded the deceased with a rock so as to cause or hasten his death (if you shall believe from the evidence beyond a reasonable doubt that he did the one or the other or both), he believed and had reasonable grounds

to believe that he was then and there in danger of death or the infliction of some great bodily harm at the hands of the deceased, and that it was necessary, or was believed by the defendant in the exercise of a reasonable judgment to be necessary, to so cut, strike, stab and wound the deceased with a knife, or to strike and wound the deceased with a rock in order to avert that danger, real or to the defendant apparent, then you should acquit the defendant upon the grounds of self-defense and apparent necessity. Unless you shall believe from the evidence beyond a reasonable doubt that the defendant first wilfully and feloniously assaulted the deceased with a knife or with a rock, and in so doing made the harm or danger, if any there was, towards him, necessary or excusable on the part of the deceased in his own necessary self-defense from the defendant, in which event you ought not to excuse the defendant upon the grounds of self-defense and apparent necessity."

The defendant objects that the instruction should not have been qualified by the words contained in the last paragraph, and insists that there was no evidence in the case upon which to base it. The defendant testified in his own behalf that as he crossed the creek Moore spoke to him about the hogs running after him when he came by with the pig; that he then said "you are mistaken where I got that pig;" that Moore said, "I saw you pick it up," and he said, "I can prove by Mr. Spars I got the pig there;" that Moore then said, "don't you accuse me of lying, I saw you pick it up; I am not afraid of any G— d— man;" that he said then, "I don't guess you are;" that Moore then came out of the gate and got his knife out and he got his; that Moore struck at him and he knocked his lick down and struck at him; that Moore made another lick at him and he cut him again; that Moore then shut up his knife and grabbed at a rock and jumped across the stream and grabbed another rock and turned back across the stream and threw the rock at him; that he undertook to dodge it and it struck him in the side, knocking him to his knees; that the deceased then ran upon him, saying, "I aim to kill you," and struck him twice with his fist: that he then grabbed the rock the deceased had thrown at him and when he hit the deceased he pitched on his face; that it was just a short time; that it was all immediately done.

The finding of the jury shows that they did not credit the defendant's version of the transaction. The proof showed that there was dirt on the knees of the deceased on his pants; that there were no cuts on the defendant's person. The knife of the deceased was a small barlow knife and was found right by the stump as though he had aimed to shut it up when he dropped it as he was rising from the stump. His hat and rule and nails were near by. While the deceased had the little empty pistol in his pocket he did not make, so far as appears, any effort to use it, nor did the defendant know that he had it. The declaration of the defendant as he was going down the road, and just before he reached the house of the deceased, was that he wanted to see Moore and find out what he was accusing him of stealing that pig for, and this was accompanied by very abusive language. The jury were not required to believe the defendant's evidence. They might believe it, or they might not. They were required to find a verdict on all the evidence before them, and in doing this they might consider the

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circumstances proven in the case. If the last clause of the instruction had been omitted it would not have helped the defendant in any respect, for the jury would not have been warranted in finding him not guilty under the usual self-defense instruction on the ground that he acted in his necessary self-defense if he first willfully and feloniously assaulted the deceased with a knife or with a rock, and in so doing made it necessary for the defendant to use in his self-defense such force as he employed. Under the usual self-defense instruction the defendant had only the right to cut the defendant with a knife or to strike him with a stone in his necessary self-defense, and if no more than the ordinary instruction had been given, the jury would have had to determine from all of the evidence whether the defendant acted or not in his necessary self-defense or first assaulted the deceased willfully and feloniously with a knife or rock.

Though the evidence was circumstantial, there was enough to go to the jury, and there was nothing in the circumstances or in the testimony of the defendant himself to show that he at any time abandoned the difficulty in good faith before the deceased received his mortal wound, and, therefore, he was not prejudiced by this qualification not being added to the instruction. On the whole case we see no substantial error to the prejudice of the defendant in the record. There was no doubt that the defendant killed the deceased. It was equally clear that there was a struggle between the two men ending in the death of deceased. The only question was, who brought on the difficulty? If the deceased came out of his yard and attacked the defendant in the public road he should have been acquitted; and he would have been acquitted under the instructions given by the court, if the jury had so believed from the evidence. But if the defendant attacked the deceased with a knife or stone and so brought on the difficulty, he can not be excused on the ground of self-defense. The jury saw and heard the witnesses. They had all the facts and circumstances before them, and they reached the conclusion that the defendant did not act in his necessary self-defense.

Judgment affirmed.

CUYLER v. BUSH.

(Filed January 25, 1905—Not to be reported.)

1. Lands—Title—It appearing that the land in controversy was within a boundary known as the "forge line" or "three mile circle" which was embraced in a large body of land conveyed in 1849 by several claimants to Samuel C. Jackson and others, and that appellant owns it, it was error for the chancellor to dismiss his petition in which he sought to recover same.

2. Same—Appellee claims through John Clem, who testified that Mason, who gave him fifty acres of land outside of the "forge circle," explained to him that he owned no land in the circle, and the fifty acres must be selected outside, and that when he sold to Vaughn he explained to him that he only sold him so much of the land as lay outside of the circle, and that Vaughn fully understood this when he purchased the land. This occupation was not adverse to appellant's title and can not be included in the time required by appellee to make up his title by prescription.

O. H. Pollard, R. L. Greene and M. A. Phillips for appellant.

C. F. Spencer for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Barker.

This controversy involves the title to fifty acres of unenclosed timber land in Powell county, Kentucky. The proceeding was commenced by the appellant's filing a bill in equity in the Powell Circuit Court against appellee for the purpose of obtaining an injunction restraining the latter from cutting timber. Appellant, in his petition, alleged ownership and possession of the land in question, and also facts which, if true, entitled him to the restraining order he sought. The answer placed in issue the title and possession of appellant, and alleged title by prescription in the defendant (appellee). Upon final hearing, the chancellor reached the conclusion that appellee owned the property in litigation, and dismissed appellant's bill; of which judgment he is now complaining.

In 1849, several claimants to a large body of land around the present site of Clay City, Powell county, Kentucky, entered into a compromise by which all of the interests of the various claimants within a perfect circle, with the smokestack of the forge of the Red River Iron Works as a center, and a radius of three miles from the center to circumference, was conveyed to Samuel C. Jackson and others. This boundary was well known as the "forge line" or "three-mile circle," and the deed to Jackson was duly recorded as by law required. The title to this land was afterwards, by regular devolution by properly-recorded deeds, conveyed to appellant, and he and his grantors have been in possession of it, claiming by themselves, their agents and tenants, continuously, to the full extent of the boundary above described, for more than fifty years.

In 1859 or 1860, J. C. Mason, a claimant who had conveyed his interest as above set forth, authorized John Clem to select for himself on either side of Hardwicke creek fifty acres of land outside of the "forge line" or "circle," and to take possession of it, and promised him a deed to it. In pursuance of this verbal gift, Clem, without knowing exactly where the "forge line" ran, and relying upon information of others, selected fifty acres of land, believing it all to lie outside of the "forge line." Upon this, in 1868, he built a small house, cleared and enclosed five or six acres. He lived there until about 1885 without ever having obtained a deed, when he sold it to John W. Vaughn, giving a bond for title, which called for fifty acres outside of the "forge circle." Vaughn afterwards failed, and made an assignment for the benefit of his creditors, and the property was sold by his assignee and bought in by Mrs. Vaughn, the wife of the assignor. Vaughn and his wife resided near and held the title conveyed to them by Clem until 1890, when they conveyed it to Morgan McKinney, who, in a short time thereafter, sold his title to the appellee, A. P. Bush.

The evidence in this case leaves no doubt in our minds that all of the land described in the petition lies within the "three-mile circle" or "forge line," and that appellant owns it, unless the appellee has acquired title to it, by prescription. Appellant's vendors entered into possession of the "three-mile circle" with the intention of claiming the whole boundary, and have held the same since 1849 continuously, by themselves, their agents and ten-

ants, paying the taxes, warning off trespassers, and exercising other acts of ownership. The rule in such cases is, that one who enters upon unoccupied and under a deed or patent, with the intention of taking possession of the whole, acquires possession to the full extent of the boundary contained in the muniment of title under which he enters. (*Culbertson v. McCullum*, 1 Ky. Law Rep., 267; *Newell on Ejectment*, 483-436; *Grughler v. Wheeler*, 12 B. Mon., 184, and *Layson v. Galloway*, 4 Bibb., 101.)

We, therefore, conclude that the appellant is the owner of the property in question, unless, as said heretofore, appellee has acquired a title by prescription. The facts as to this are few and simple. John Clem, through whom appellee claims, testifies that J. C. Mason, who verbally gave him fifty acres of land outside of the "forge circle," explained to him that he owned no land inside of the circle, and that the fifty acres must be selected outside, which he undertook to do. He says that he at no time claimed adversely, or otherwise, any interest in, or title to, land within the circle; that he believed that he was outside of it, but did not know, of his own knowledge, exactly where the line was, and that he never had a marked or well-defined boundary to the fifty acres he claimed; that when he sold it to Vaughn, and gave his bond for title, he explained to his vendee that he only sold him such of the land as lay outside of the "forge line," and that Vaughn fully understood this when he purchased; that the bond for title, which he gave to his vendee, described the land as lying without the "forge line."

The occupation of John Clem was not adverse to appellant's title, and his possession from 1863 to 1885 can not be included in the time required to make up the title by prescription claimed by appellee. In the case of *Smith v. Morrill*, 5 Litt., 212, it is said: "The boundaries of the land of the tenant who made this improvement did not extend into, but adjoined the appellee, and the tenant deposed in this cause that when he made said improvement he extended it into the lines of the appellee by mistake of the place where the true line was, and did not intend it. According to the decision of this court in the case of *M'Kinney v. Kenny*, 1 Mar., 461, this act of the tenant could not possess him further than his actual enclosure, and the recovery from this tenant could not possess the evictor further than the tenant held, and the court below so instructed the jury."

And in *M'Kinney v. Kenny*, 1 Mar., 461: "The accidental and undersigned projection by M'Dowell of one corner of his farm over the line of Kenny to the extent of one pole, can not be considered as an entry on a part for the whole. It has been more than once decided by this court, that possession to extend itself beyond the close must be upon a claim of greater extent; and it is believed that to give a constructive extension to the possession of M'Dowell beyond the limits of the claim under which it was taken, and contrary to the intention of the occupant, would not have the sanctity of authority or reason. It would be to make M'Dowell a trespasser against his will."

There is no evidence in this case that the Vaughns held the land with any other intention than was consistent with the information given them at the time of the conveyance by Clem, and their deed to M'Kinney shows that they did not claim any land within the circle, because the last call runs with the "circle" line to the point of beginning; so that appellee's claim to title by prescription breaks down under the uncontradicted evidence.

But in addition to this, even if Clem and Vaughn had claimed the land adversely from 1863 to 1899, appellee's title must fail. Appellant's vendors, as before stated, were in possession under the older deed, claiming to the full extent of their boundary, a circle with a radius of three miles. If Clem had claimed the land from the time he built his house and occupied it, his title by prescription would have been limited to the extent of his actual enclosure within the boundary of the older title, the rule being that, where the holder of a junior makes entry upon land in the actual or constructive possession of the owner of an older title, he acquires possession only to the extent of his actual enclosure. (Chiles v. Jones, 7 Dana, 528; Shreve v. Summers, 1 Dana, 239; Moss, & Co. v. Currie, Id., 267; Jones v. McCauley's Heirs, 2 Duv., 414; Kentucky Land and Immigration Co. v. Crabtree, 24 Ky. Law Rep., 744.)

The land in controversy is wild, rough mountain land covered with timber. No part of it was ever enclosed, except from five to seven acres fenced by Clem, and the most that appellee, under any state of case, could have acquired by prescription, under the rule above announced, would have been this enclosure. The real trouble in this case is not that the appellee, or his vendors, believed they had a right to any land within the boundary of the "three-mile circle," because that was well known, in theory, at least, as containing land belonging to appellant and his vendors. But they did not know exactly where the "circle" line was located with reference to the land in question. They made no claim to the land within the "circle," but did not believe it extended out so far as to include the land in dispute. The "circle" line was well known as extending out three miles in every direction from the smokestack as a center, but it was not known that three miles from the smokestack reached this particular land. All of the deeds which constitute appellee's chain of title show this to be true, by their last calls running with the "circle" line to the point of beginning. With the greatest respect for the opinion of the chancellor on the facts, we are forced to the conclusion that he erred in adjudging that the appellee was the owner of the property involved herein, and in dismissing appellant's petition. The trespasses complained of were within the "circle," and not within the enclosure made by Clem, and, therefore, on appellant's land, and the injunction should have been awarded.

For these reasons the judgment is reversed, with directions to enter a judgment in accordance with the prayer of the petition.

CITIZENS INSURANCE CO. OF MISSOURI v. HENDERSON ELEVATOR CO.

(Filed January 25, 1905—Not to be reported.)

Insurance—Cancellation of policy—The testimony in this action conduces to show that the policy was cancelled, that appellee's agent agreed to its cancellation, and the money returnable under a clause of the policy relating to its cancellation was by consent of appellee's agent to be applied to premiums on another policy to be issued by another company upon the same property. There was sufficient evidence to authorize the submission of the case to the jury.

Lockett & Lockett for appellant.

Clay & Clay for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Paynter.

This action is based upon a policy of fire insurance for \$1,200, which the appellant issued on October 8, 1903, to appellee on hay and grain in its warehouse at Janesville, Ill. The property was destroyed by fire on October 30, 1903. The court peremptorily instructed the jury to find for the appellee.

The policy contained the following provision, to wit: "This policy shall be cancelled at any time at the request of the insured, or by the company by five days' notice of such cancellation. If this policy shall be cancelled as heretofore provided, or become void or cease, the premiums having been actually paid, the unearned portion shall be returned on the surrender of the policy or last renewal, this company retaining the customary short rate except that when this policy is cancelled by this company by giving notice it shall only retain the pro rata premium."

The appellant averred that the policy had been cancelled on October 19, 1903, and that the authorized agent of the appellee agreed to the cancellation and promised to surrender the policy. The evidence introduced by the appellant tended to show that Cox of the firm of Cox & Beal, the agents who issued the policy of insurance and who represented other insurance companies, notified appellee's agent that the policy was cancelled, and that he consented thereto and agreed to send for the policy which was at Henderson, Ky., and surrender it; that he asked Cox & Beal to issue other policies on the property for the amount of appellant's policy; that they issued several policies which were cancelled by their companies; that the Detroit Fire and Marine Insurance Co. issued a policy for \$1,200 on the property, but subsequently reduced it to \$600; that this policy was in force at the time the fire occurred; that the day after the fire appellee's agents surrendered the policy which the appellant had issued. The evidence further conduces to show that Cox informed appellee's agent that he would be required to pay a four instead of three per cent. rate, which he had paid the appellant; thereupon, he agreed to pay the insurance agents an additional sum of \$12 to cover the additional rate. The testimony conduces to show that the appellant's policy was cancelled; that appellee's agent agreed to its cancellation; and that the money that was returnable under the clause of the policy quoted, was by the consent of appellees' agent to be applied by Cox & Beal to premiums on another policy or policies to be issued on the same property. The effect of the agreement was, that the insurance agents were not to return the money to the appellee, but were to hold and apply it for its benefit in the payment of premiums. Therefore, the evidence tends to support the averments of the answer that the policy had been cancelled at the time of the fire. The facts of this case are quite different from those of the case of the Continental Fire Insurance Co. v. Daniel, 25 Ky. Law Rep., 1501. We are of the opinion that the averments of the answer were sufficient to show a cancellation of the policy.

We are of the opinion that the case should have gone to the jury upon the testimony offered by the appellant; hence, the judgment is reversed for proceedings consistent with this opinion.

MILLER v. COMMONWEALTH.

(Filed January 27, 1905—Not to be reported.)

1. Criminal law—Evidence—Sufficiency of—Where there is any testimony to show the accused guilty this court will not reverse a case for lack of evidence.

2. Bill of exceptions—Where the transcript fails to show what conduct of the Commonwealth's attorney is complained of, that question can not be reviewed.

John H. Wilson for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Paynter.

The appellant was indicted for false swearing averred to have been committed while giving his testimony before the grand jury of Knox county in relation to a matter then under investigation by it. It is claimed that the appellant swore falsely when he testified that certain parties were not engaged in gambling on a certain night at a certain place in Barbourville.

Two witnesses were introduced by the Commonwealth, whose testimony strongly tends to show that the parties named were engaged in a game on the occasion in question in the presence of the appellant. Counsel for the appellant devoted most of his brief to show that these witnesses did not agree with each other as to collateral facts and as to what they saw with reference to the game. The court has repeatedly held that it is the province of the jury to pass upon such questions. It has also held that if there is any testimony tending to show the guilt of the accused, it will not reverse a case for the lack of evidence. It is suggested that the Commonwealth's attorney was guilty of improper conduct in his argument to the jury. The transcript fails to show what conduct of the Commonwealth's attorney is complained of, hence that question is not here for review.

Perceiving no error in the record, the judgment is affirmed.

COMMONWEALTH, BY, &c. v. FARMERS BANK OF KENTUCKY.

(Filed January 27, 1905—Not to be reported.)

Escheat—Construction of statutes—In this action to recover lands on the ground that it had escheated to the Commonwealth, sections 1606 to 1623, Kentucky Statutes, do not give the right to maintain the action. Commonwealth, By, &c. v. Wisconsin Chair Co., page 170.

W. J. Webb and F. L. Turner for appellants.

Clay & Clay for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Paynter.

The Farmers Bank of Kentucky is a corporation. It acquired the title to certain real estate in Ballard county, under a decretal sale. It held it for a longer period than five years. Charles Linthicum, as escheator of that

county, instituted this action to recover the land upon the ground that it had escheated to the Commonwealth by virtue of section 192 of the Constitution and of section 567, Kentucky Statutes. The same question was involved in the case of Commonwealth, By, &c. v. Wisconsin Chair Co., decided January 19, 1905, in which this court held that the escheator was not authorized to maintain the action. The statute law (sections 1606, 1623, inclusive), does not apply to the case under consideration. And the right to maintain the action is not given by these provisions of the statute. The court did not in the case to which reference is made determine what effect section 192 of the Constitution and section 567, Kentucky Statutes, has upon the rights of a corporation as to property held for a longer period than five years. Neither does the court do so in this case.

The judgment is affirmed.

COMBS' ADM'X, &c. v. KRISH.

SAME v. KRISH, &c.

(Filed January 27, 1905—Not to be reported.)

Pleading—Variance—In these actions there is a variance between the proof and pleadings. The petition alleged a sale of land to one, and the proof showed a sale to another. The judgment was, therefore, unauthorized. Where a judgment sought to be opened had been obtained by one, he was a necessary party to the petition for a new trial. If there is a defect of parties that question must be raised by demurrer, and it not being raised is waived.

J. J. Fitzpatrick and Hazelrigg, Chenault & Hazelrigg for appellants.

J. J. C. Bach, Bach & Patrick and W. H. Miller for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee, Krish, on February 7, 1901, filed his petition in equity against W. H. Turner and wife and the widow and heirs at law of J. H. Combs, alleging that Turner owed him an account of \$156, and that to secure the debt Turner had mortgaged to him a lot in the town of Hazard, which he had purchased from J. H. Combs, and for which Combs had executed to him a title bond, and that Turner had paid Combs for the land, but that no deed had been made. An answer was filed by the widow and children of Combs, in which they denied that Turner had purchased the land from J. H. Combs, or held a title bond for it, or had paid him the purchase money. Some of the heirs of Combs were infants, and a guardian ad litem was appointed for them. Proof was taken by the plaintiff which showed that Combs had sold the lot to one G. D. Stout for \$80 and executed to Stout a bond for title; that Stout was a physician and had some doctor's bills against Combs, the amount of which the witness did not know; that Stout sold the lot, or a part of it, to Turner; that Combs died about two years after the sale to Stout, and shortly before he died said that he had bought a wagon from Turner; that he had to buy it to get a debt Turner owed him for some property. The wagon was worth \$50 or \$60. The case was then submitted and pending submission Polly Ann Combs, as administratrix of

J. H. Combs, tendered her petition, in which she alleged that there was a balance of \$80 due her intestate on the land, for which she prayed judgment. The court refused to allow her petition to be filed, and entered a judgment that Stout and Turner had fully paid to Combs the price of the land and adjudging that the widow and heirs of J. H. Combs convey the land to Turner. He also adjudged Krish a lien on it and ordered it sold. This was on September 4, 1901. On the 7th day of January, 1903, Polly Ann Combs, as administratrix of J. H. Combs, filed her petition in the Perry Circuit Court for a new trial, in which she alleged in substance that the title bond given by her husband to Stout was not in her possession, and she did not know in whose possession it was as it was concealed when the former case was tried and it had recently come into her possession, and that this bond showed that the purchase price for the land was \$200, and of this only \$81 had been paid. She filed the title bond with her petition, and asked to have the judgment set aside, and for a new trial of the action. The court dismissed her petition. She and the children have prosecuted an appeal to this court from the original judgment, and she has prosecuted an appeal from the judgment dismissing her petition for a new trial.

The evidence before the court in the original action was insufficient to show that either Stout or Turner had paid Combs for the land. The amount of the doctor's bills was not shown, and it was not shown that the wagon was taken for the payment of the property in contest, nor were any facts shown from which this should be presumed. There was also a variance between the proof and the allegations of the petition. The plaintiff alleged the sale of the land by Combs to Turner. The proof showed a sale to Stout. There was no proof in the record that the title bond was lost, and there was nothing justifying the introduction of parol evidence as to its contents. The judgment in that case was, therefore, unauthorized.

While the petition for a new trial does not allege that no part of the purchase money had been paid except \$81, the allegation being that only this much has been paid as shown by the bond, it must be borne in mind that the petition is filed simply for a new trial, it having been aptly denied in the original case that the purchase money had been paid. In the original action Krish alleged that the purchase money was all paid, and to obtain the relief he got in that action it was incumbent on him to maintain his allegation. The facts stated in the petition of the administratrix for a new trial showed that the purchase money was not all paid, or, at least, was sufficient to raise a presumption to this effect. The judgment which was sought to be opened had been obtained by Krish, and, therefore, he alone was a necessary party to the petition for a new trial. Turner was not a party plaintiff in the original suit, and filed no cross petition or pleading of any kind. If there is any defect of parties defendant this objection must be raised by special demurrer, and not being so raised, is waived. If it turns out that other parties are necessary to a final determination of the action they may be brought in. Stout and Holcomb, to whom he also sold a part of the land, should be brought before the court if any relief is sought against them. On the return of the case to the circuit court, such pleadings as may be necessary to bring in the proper parties and complete the issues may be filed.

The judgment on both appeals is reversed and cause remanded for further proceedings consistent herewith.

MOSELY v. COMMONWEALTH.

(Filed January 31, 1905—Not to be reported.)

Former opinion—Affirmed upon the authority of *Kelsie Mosely v. Commonwealth*.

B. B. Golden for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Barker.

The indictment, evidence adduced upon the trial, and the instructions given by the court to the jury in this case, were the same as in the case of *Kelsie Moseley v. Commonwealth*, this day decided. The jury found the appellant guilty of voluntary manslaughter and fixed his punishment for a term of ten years in the penitentiary.

The judgment herein is affirmed for the reason given in the opinion in that case.

BRAMBLET v. COMMONWEALTH LAND AND LUMBER CO.

(Filed February 1, 1905—Not to be reported.)

Helm, Bruce & Helm and W. S. Pryor for appellant.

O. A. Wehle and Albert S. Brandels for appellee.

Carroll & Carroll for bondholders.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Judge O'Rear delivered the following extension of opinion:

It will be recalled that the judgment acquired by appellant Bramblet's purchase from the banks were based upon five notes. One of the notes for \$13,248 and one for \$4,720 belonged to Thomas F. Hargis, and were by him assigned to the bank, as collateral. Two other notes for amounts equal to the ones just stated, were owned by Fetter and pledged by him to the banks. The remaining note, the one for \$5,300, was the debt of the corporation, the Commonwealth Land and Lumber Co., for money borrowed by it from the bank. The notes owned by Hargis were a part of the purchase money of the land conveyed to the Commonwealth Land and Lumber Co., by Hargis and Fetter. They were secured by liens upon the land. It was competent for Hargis to collect these notes from his corporation, the Commonwealth Land and Lumber Co., and if they were not paid at maturity, he might have sued his corporation and enforced his liens against the land. When he pledged the notes to the bank as collateral to secure his debt to the bank, he did not part with the absolute title to them. He retained the title subject to the right of the bank to enforce the collection of the notes, and apply the proceeds to the payment of its debt.

It was also competent for Hargis to have paid his debt to the bank, and thereby have redeemed his notes pledged upon the debt. In that event he would have been fully restored to all of the rights he had in the notes before assigning them to the bank. If the corporation, the Commonwealth Land and Lumber Co., of which Hargis was president, failed to pay the notes owing by it to him, he might, without violating his duty to the corporation, have redeemed the notes from the bank and sold them to Bramblet at any price agreed between them. Bramblet would then have had the right to enforce their collection for the full amount without regard to what he paid for them. If Hargis was unable to redeem his notes by the payment of his debt to the bank in full, but could obtain a settlement from the bank for less than the full amount of his debt, thereby redeeming his land notes so as to leave him a margin in them, it was competent for him to do so. If to raise the money to make the compromise with the bank he had to give some of this margin to the person furnishing the money, there was nothing in that transaction that involved a breach of his duty to his corporation, for he did not undertake to the corporation not to collect from it the debt it owed him for the purchase money of the land he had sold it. In that transaction it was implied at least that Hargis might do for his own interest what any person not at all connected with the corporation might have done, had he held such a debt against it. We, therefore, conclude that the transaction between Hargis and Bramblet, by which Bramblet bought up the judgment against the Commonwealth Land and Lumber Co., based upon Hargis' notes, was not an illegal act. By it he obtained the perfect title to that judgment, with its interest and costs. He also obtained, so far as the Commonwealth Land and Lumber Co. in this litigation is concerned, the title to the other collateral pledged to the bank for Hargis, namely, his shares of stock in the Commonwealth Land and Lumber Co. But for the remaining judgments, or parts of judgments, based upon the Fetter notes and the \$5,300 note, the matter rests upon the principle announced in the original opinion herein. As to them it was Hargis' duty to give the benefit of his information, his services, and ability to arrange for their settlement at less than their face, to his corporation, whom he had engaged to serve, and not to his friend or partner for a consideration personal to him, Hargis.

The conclusion announced above necessitates a somewhat different adjustment of the rights of the parties from that indicated in the original opinion. Instead of Bramblet being entitled to have returned to him the whole of the purchase money paid by him to the banks for the judgment, \$10,000, he should have been repaid so much of the \$10,000 and interest as the Fetter notes and the \$5,300 note bear to the sum of all five of the notes.

The shares of stock in the Commonwealth Land and Lumber Co. pledged by Fetter and others than Hargis to secure the Fetter notes and the \$5,300 note, will, if the Commonwealth Land and Lumber Co. redeems the land, as is allowed in the original opinion, belong to the corporation, and not to appellant Bramblet.

The petitions for rehearing are in other respects overruled.

CITY OF LEBANON, &c. v. KNOTT, &c.

(Filed January 31, 1905—Not to be reported.)

H. S. McElroy for appellants.

John McChord for appellees.

Appeal from Marlon Circuit Court.

The judgment in this case is affirmed by an equal division of the court, Judge Cantrill not sitting.

CONTINENTAL INSURANCE CO. v. THOMASON.

(Filed January 13, 1905—Not to be reported.)

1. Insurance—Provision of policy—Change of ownership in property—Thomason, the appellee, had his house and barn insured for five years. The policy provided, among other things, that if any change in the ownership of the property take place the policy shall be void, and that no one except an officer of the company in its western department should have authority to waive or alter its terms. During the life of the policy the assured made a contract with his son by which he conveyed him the tract of land upon which the house and barn were situated, but by a written agreement between them which, by mistake, was omitted from the deed, the deed was not to take effect in possession until the death of the assured and he in the meantime was to have a life estate in the property. After this was done, and before the policy matured, and when the last note for the premium was presented by the agent of the company he was informed by both the father and the son as to the condition of the title of the land and he said that he knew it and that it would be all right and would make no difference in the insurance. The premium note was paid upon this assurance and some four or five months thereafter the property burned and the company refused to pay the loss on the ground that there had been a change in the property. Held—The knowledge of the agent of the transfer of the property is the knowledge of the company, and having collected the premium note with the assurance that the insurance was all right it can not now be heard to say that the policy was not in force.

2. Same—If the insurance company, aside from the provisions of section 700, Kentucky Statutes, waived a change that had been made in the title to insured property, the burden is upon it to show that the life estate was of less value than the amount of the insurance, and in this record disclosed neither pleading nor proof that the life estate of the assured was not sufficient to cover it.

J. A. & John A. Moore for appellant.

James & James and A. C. Moore for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Chief Justice Hobson.

J. H. Thomason, the appellee, insured his house, barn and some personal property with the appellant company on August 7, 1899, for five years, and on the 8th day of December, 1903, the property was destroyed by fire. He sued to recover for the loss, and having succeeded in the circuit court the insurance company appeals.

The policy, among other things, provided that "if any change take place

in title or possession (except by succession by reason of the death of the assured) of the property herein named * * * this entire policy shall be null and void. It is stipulated that no agent or employe of this company, or any other person or persons than an officer of the company in its western department at Chicago, Ill., shall have power or authority to waive or alter any of the terms or conditions of this policy or to make any endorsement hereon, and all agreements by such officer must be signed by him."

During the currency of the policy the assured made a deed to his son, A. G. Thomason, for 125 acres of land, which included the residence and barn, but by a written agreement between them which was omitted by mistake from the deed this deed was not to take effect in possession until the death of the father and he in the meantime was to have a life estate in the property. After this was done the last premium note of the insurance company fell due and when it was presented by the agent of the company for payment he was informed by both the father and the son as to the condition of the title to the land and he said that he knew it and that it was all right and would make no difference in the insurance. The premium note was paid upon this assurance and some four or five months after this the house burned down. The company refused to pay the loss on the ground that there had been a change of title to the property, relying upon the clause of the policy above quoted and insisting that the agent was without authority to waive the condition. The agent denies that he made the assurance above referred to, but this was proved by three witnesses, and he admits himself that then asked him if the insurance would be all right. A man named J. S. Henry represented the company at the time the policy was taken out. He took the application and received the first payment, forwarding it to the home office in Chicago, from which the policy was issued. Some time after this he ceased to be the agent, and Ab Henry became agent in his place. The premium note was sent by the company to him to collect, and he collected it, telling the assured the deed from him to his son made no difference in the insurance as above stated.

The provisions of the policy that its conditions should not be waived except by a writing endorsed on the policy and signed by certain of its officers is not applicable for the reason that notwithstanding this provision the company might be estopped to rely on a forfeiture of the policy. If the policy had become null and void by the change in the title to the property the company had no right to collect the premium note, from the assured. If, with this knowledge, it collected the premium note, assuring the insured that his insurance was all right, it can not now be heard to say that the policy is not in force. The weight of the evidence shows that the agent knew these facts, and so the question is narrowed down to this, is the knowledge of the agent the knowledge of the company?

Neither J. S. Henry nor Ab Henry, who succeeded him and collected the premium note, had authority to issue policies of insurance. The authority of each was limited to the taking of application and the collection of premiums, the applications being forwarded to the Chicago office, where, if the application was approved, the policy was issued. In *Phoenix Insurance Co. v. Spiers, &c.*, 87 Ky., 285, the company had a local agent named Curtis, who took applications for insurance, made the surveys, received pre-

miums, and countersigned and delivered policies to the insured, but did not issue them. The policy provided that it should be void if any other insurance was taken upon the property. Additional insurance was taken with the knowledge of Curtis, and the question was whether his knowledge was the knowledge of the company. The court, resting its opinion upon the ground that the acts of an agent within his ostensible authority are the acts of the principal, held the acts of Curtis within the apparent scope of his authority, and binding upon the company. Among other things, after discussing a number of authorities, the court said: "He usually represents a company remotely located. Its patrons in the vicinity naturally look to him for direction generally as to insurance obtained through him. He is generally regarded as having full power in reference to it. Being usually the only man upon the ground having anything to do with it, the persons insured in his company, with few, if any, exceptions, would, in the absence of notice that his powers were limited, regard his statement as to any matter relative to such insurance as authoritative, and any notice to him as to it is sufficient. They rarely know anything of the company or of its officers, who issue the policies, and look to the agent, through whom they have obtained the insurance, as the complete representative of the company in everything connected with that insurance. If they did not consider that they were authorized to do so, it would undoubtedly create distrust and cripple the business. As to third parties, the agent should, in the absence of notice to the contrary, be regarded as possessing all the powers his occupation fairly imports to the public. Under this rule an agent who solicits the insurance, takes the application, receives the premium and delivers the policy, may, in our opinion, by his conduct or acts, bind his company by way of waiver of a forfeiture on account of additional insurance, in the absence of knowledge upon the part of the assured that his powers in this respect have been restricted. This being so, it follows that the knowledge of the agent under such circumstances is to be imputed to the company."

This rule was followed in *Hartford Life Insurance Co. v. Hayden's Adm'r*, 90 Ky., 89; *Wright's Adm'r v. Northwestern Mutual Life Insurance Co.*, 91 Ky., 208. It has been held by this court that where an agent, with authority to solicit insurance, take applications and collect premiums, learns, when taking the application, of defects of title or other matters affecting the risk and rendering the contract of insurance void, his knowledge is the knowledge of the company. (*Rogers v. Farmers Mutual Aid Association*, 106 Ky., 871; *London and Lancashire Insurance Co. v. Gerteisen*, 106 Ky., 815; *Citizens Insurance Co. v. Crist*, 22 Ky. Law Rep., 47; *Ætna Life Insurance Co. v. Hartley*, 24 Ky. Law Rep., 57.)

The case before us can not fairly be distinguished from the *Spiers* case or the subsequent cases following it. There is nothing to indicate that the assured had notice of any limitations upon the apparent authority of the agent, Ab Henry. If the agent, instead of telling the assured that his insurance was all right, had told him that the change of title forfeited the policy, he had unquestionable authority to take an application for insurance on the property and collect the premiums therefor. He was the only representative the company had in the locality. He determined that this was unnecessary, and that all that was needed was that the insured should

pay his premium note. It was within the apparent scope of the authority of the agent under the circumstances to determine a question of this character, and when, with knowledge of all the facts, he collected the premium, assuring the insured that his insurance was all right, it was his duty to report the facts to his company, and it is to be presumed that he did this. (Rhode Island Underwriters Association v. Monarch, 98 Ky., 805.) It was unnecessary for the plaintiff to aver that the life estate of J. H. Thomason in the property destroyed was of value equal to the insurance, for if the company is estopped to rely upon the clause forfeiting the policy on account of the change of title after collecting the pay for the insurance with knowledge of the condition of the title, it must be presumed it so agreed to carry the insurance upon the ground that the life estate of the insured was of value sufficient to justify it. In other words, if it waived the change that had been made in the title, aside from section 700, Kentucky Statutes, the burden is at least on it to show that the life estate was of less value than the amount of the insurance, and there is neither pleading nor proof in the record that the life estate of J. H. Thomason was not sufficient to cover it.

By the terms of the policy the loss, if any, was payable to the mortgagee, P. S. Maxwell, as his interest may appear. The mortgage to Maxwell was renewed after the policy was issued, but the amount was not increased beyond the original amount of the debt, and it does not appear that any right of the defendant was affected by this, or even that it was informed of the amount of the Maxwell debt at the time the policy was issued. Prima facie the policy was payable to Maxwell to the extent of his mortgage debt as it appeared from the record in the county clerk's office. The verdict of the jury under the instructions of the court is in effect a finding that the agent, Henry, had notice of the change in the mortgage.

Judgment affirmed.

Whole court sitting.

Judges Paynter and Barker dissenting.

BULLOCK, TRUSTEE, &c. v. BULLOCK, &c.

(Filed February 1, 1905—Not to be reported.)

Wills—Estates—Where a will provided that the remainder of an estate should be equally divided among the descendants of Bullock at the time of his death, the judgment in this action decreeing a division and settlement among his descendants (he is still living), was erroneous, because it is impossible at this time to know which of his children will survive him. (See former opinion, 26 Ky. Law Rep., 1413.)

P. J. Beard for appellant.

Willis & Todd for Mary E. Gudgell.

E. H. Davis for guardian ad litem.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case. The opinion on former appeal may be found in 25 Ky. Law Rep., 1418, which is referred to for the facts of this unfortunate litigation.

On the return of the case to the lower court a judgment was rendered. That part of it which is necessary to a proper understanding of the question involved on this appeal is as follows: "This cause being again by consent submitted on the pleadings, proof and exhibits, and the court being sufficiently advised, it is the judgment of the court that the infant defendants, Lunsford Bullock, Helen Maul Bullock, Thomas Bullock and E. P. Bullock, Jr., are entitled to have paid into court from the proceeds of the sale of the land described in the petition the sum of \$1,500, with interest from January 20, 1903, to wit, \$1,622.50, it appearing to the court that there is now in court as the amount recovered from the former trustee, J. Lowry Bullock, the sum of \$991.33, part of proceeds of sale of land herein, but there is to be deducted from this the sum of \$10, which is allowed out of same to W. M. Cardwell for his services as custodian thereof, leaving \$981.33. Now it is adjudged that the defendant, Mary E. Gudgell, will pay into court a sum sufficient to pay the said sum of \$1,622.50. with interest from this date, and costs and allowances hereinafter adjudged, but not less than the sum of \$709.02, the amount of her bond unpaid at this date, with its accrued interest."

This judgment would be correct but for the clause in Mrs. Mary Bullock's will, as follows: "Remainder to be equally divided among descendants of E. P. Bullock living at the time of his death per stirpes."

E. P. Bullock is still alive, and it is impossible to know at this time whether or not his four adult or his four minor children will survive him. Such of them as may not survive him will not take any interest in the property, except their part of the use and profits while they live. There can not be any other reasonable construction given to this provision of the will, and it must control. The court can not disregard it, although it may entail a hardship in this case.

The appellee, Mary E. Gudgell, for the reasons stated in the former opinion, is entitled to all of the interests of E. P. Bullock and his four adult children in this property or fund, but she can not take and hold same in such a way as to affect the rights and interests of the named infant children. Her interest in the property of the four adult children depends upon the fact as to whether or not they survive their father. If so, she takes their interest in fee simple; if not, her interest in their portion ceases at their death.

These four infant children's interest can be protected in two ways: First, require Mary E. Gudgell to pay the balance of her sale bonds, with interest, into court. Add this to the amount recovered and received from the trustee, J. Lowry Bullock, and then require her to pay into court an additional sum to make the original purchase price of the land purchased by her. The court should then have this fund reinvested in other property upon the same terms and conditions as provided in Mrs. Mary Bullock's will, but the court should give to Mary E. Gudgell five-ninths of the rents and profits derived from this property so long as E. P. Bullock and his four adult children live. Her interest however should be decreased in the proportion that any one

Or more of the adult children should die before their father's death, and in the event they survive their father, she should take half of this property in fee simple. In the event all do not survive, she should take the interest of those who do not survive, or sufficient to reimburse her for her investment therein. The infant children should receive four-ninths of the rents and profits from this property until the death of their father and take in fee simple one-half of the property, or such part as may be coming to them upon the death of their father, as provided in the will of Mary Bullock.

Second. If the purchaser prefers it, the following plan may be adopted in lieu of the one above suggested. The court may require the balance due by the purchaser paid to the receiver, and also the funds collected from J. Lowry Bullock, the former trustee, and cause this fund to be reinvested as directed in the will of Mary Bullock, excluding E. P. Bullock and the four adult children from all interest therein, and the court may then direct the land sold to be conveyed to the purchaser, Mary E. Gudgell, retaining a lien thereon for anything that may, on final hearing or a final settlement of the trust at E. P. Bullock's death, be adjudged to the other contingent remaindermen, over and above the amount so invested for their benefit.

The adoption of either of these methods will protect the interests of the descendants of E. P. Bullock, who may be alive at his death and take under the will of Mary Bullock, and the purchaser, Mary Gudgell, should be allowed the option as to which method is adopted. If she adopts the first method suggested, then she will be entitled to a conveyance of the ninety acres of land purchased by her in this action free from all liens or claims of any character whatsoever.

For these reasons the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

BRADY v. FRALEY'S ADM'X, &c.

(Filed February 8, 1905—Not to be reported.)

Attachments—Fraudulent conveyances—On the day an attachment was sued out against his property a debtor conveyed his property to Wells, who was on his bail bond. Wells did not have to pay anything on the bond, and about ten months later conveyed the property to the wife of the debtor at the latter's request. The record seems to establish a fraudulent intent to defeat the recovery of the appellant's claim.

James F. Clarke for appellant.

Hazelrigg, Chenault & Hazelrigg and W. A. Young for appellees.

Appeal from Rowan Circuit Court.

Opinion of the court by Chief Justice Hobson.

In January, 1890, James A. Butts, &c., brought an ordinary action in the Rowan Circuit Court against F. M. Fraley, in which they sued Fraley for sixteen walnut logs, and took an order of delivery for the logs. To retain possession of the logs Fraley executed bond, with James J. Brady as surety, as provided by the statute. Butts finally recovered in the action, and having sued Brady on the bond, recovered judgment against him, which he

paid. Brady thereupon filed this suit against Fraley, charging that he had paid out on the judgment in all \$811.02, and in addition to this had paid in attorney's fees on an appeal taken to the superior court \$60, the appeal having been prosecuted with the approval of Fraley and for his benefit. A defense was filed to the action on the ground that Brady had received the sixteen walnut logs, for the possession of which the bond was given, and that they were of value more than the amount he had paid. An attachment was taken out by Brady on the ground that Fraley was about to dispose of his property with the fraudulent intent to cheat, delay and hinder his creditors. On final hearing the court gave judgment in favor of Brady for \$137.87, with interest and cost, and discharged the attachment. From this judgment Brady appeals, and a motion has been entered to dismiss the appeal on the ground that the amount in controversy is less than \$200.

The amount of Brady's claim was \$811.02, plus \$60, or \$871.02. If we deduct from this \$137.87, there is a balance of something over \$200, which is in controversy on the appeal. The motion to dismiss the appeal is, therefore, overruled. It is insisted that the attachment was properly discharged as the proof failed to show a fraudulent disposition of his property by Fraley. The facts are that Fraley, on the day the attachment was taken out, conveyed to W. R. Wells two tracts of land worth about \$1,500, which appear to have been about all the property he had. While this conveyance purported to be for value, it was really made because Fraley was in jail and Wells entered as his bail to secure his release from jail, the conveyance being intended as a security for Wells to protect him from loss on the bail bond. Wells did not have to pay anything on the bail bond, and about ten months later he conveyed the land, at Fraley's request, to Fraley's wife. It is said that the conveyance to Wells was not made fraudulently, but for an honest purpose, to secure Fraley's release from jail. Yet the effect of the arrangement was to put the absolute title in Wells, and while this would not conclusively show a fraudulent purpose, still when it was followed by the deed from Wells back to Fraley's wife, we think the fraudulent intent is sufficiently established, and the attachment should have been sustained and the land subjected to Fraley's debt. The proof is conflicting as to the value of the walnut logs which Brady got, but under the evidence, and giving some weight to the chancellor's judgment, we have reached the conclusion not to disturb his finding as to the amount due Brady.

Judgment reversed for a judgment subjecting the land to the debt of Brady as herein indicated.

RATLIFF, &c. v. MAY, &c.

(Filed February 8, 1905—Not to be reported.)

1. Lands—Survey of—Patents—In this action to recover for the value of timber cut, the question of title being in issue, the evidence of certain witnesses read as depositions as to the location and boundary of the land was insufficient to overthrow the location of the land as determined by the actual calls of the patent.

2. Parol evidence—The rule is well settled that parol evidence is inad-

impossible to show the actual location of a patent, and that course and distance must give way to marks found on the ground, or the actual location of the patent.

Roscoe Vanover, W. S. Pryor, J. F. Butler and W. S. Harkins for appellants.

J. M. Roberson for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellants were cutting some timber which appellees claimed was on their land; thereupon the following written contract was made between them:

"Whereas, J. E. Ratliff & Co. has out a lot of sawlog timber on Grassy creek on a tract of land known as the 'May survey,' and in order to settle the matter without a law suit or cost, the said J. E. Ratliff & Co. has agreed to pay the 'May heirs' \$3.25 per tree for all the trees cut by them inside of the 646 owned by them.

"They further agree to pay \$3.25 per tree for all merchantable poplar, ash and cucumber which measures twenty-two inches over the bark stump high from the ground which they have not cut standing in bounds of said survey owned by the 'May heirs.' Said timber is to be counted and branded as soon as hands can be procured to do the same, and the money is due and payable on this contract as soon as timber is counted.

"It is further agreed that party of the second part has the right to use such timber and stone as is necessary for roads, shanties, ox lots, etc., except timber to saw railing to build tram roads."

Thereafter appellees brought this suit upon the contract, alleging that the timber cut on their land at the contract price was of value \$3,074.50. The defendants filed answer, in which they claimed that the timber which they had cut was on their own land, and this is the only question necessary to be determined on the appeal. The proof showed that on December 7, 1846, a patent was issued to William Ramey for 8,620 acres of land. On January 8, 1858, two surveys were made, one of Isaac Epling for 650 acres, and one of John and David May for 1,000 acres. Subsequently, on June 17, 1872, there was another of 500 acres made by John Belcher and George Potter. The plaintiffs claim under the May patent issued in 1858. The defendants claim under the Belcher patent issued in 1872, and maintain that the May patent does not include the land. The controversy turns upon the proper location of the beginning point of the May patent. The plaintiffs claim two white oaks for the corner on the waters of Grassy creek, while the defendants claim two white oaks for the corner which are a mile and a half away from the point named and on the waters of Beaver creek.

When the case was called for trial the defendants moved for a continuance, filing affidavit as to what they could prove by witnesses whose depositions they wished to take. The plaintiffs consented that the affidavit might be read as the deposition of the witnesses, and thereupon the court overruled the motion to continue the action. It is said that the court paid no attention to the affidavit as containing the testimony of the witnesses referred

to, and, therefore, the defendants were prejudiced by the ruling of the court. The case must be tried here on the record before us. The same effect must be given to the statements of the witnesses in the affidavit for continuance as would be given to them if contained in the depositions regularly given by the witnesses, and if by giving this effect to the testimony judgment should be entered for the defendants the court will so order.

The defendants proved by John May, who made the survey on which the May patent was issued, and by several other persons who were present at the time, that he marked the two white oaks on the waters of Beaver creek as the beginning point of the survey and began the survey from that point, but all of the witnesses state that May did not run any line of the survey: that while he was running the lines of the Epling survey, which was run the same day, he went to these two white oaks and marked them as the corner of the May survey, and had them to stretch the chain once from them. They then returned to the Epling survey, which they completed, and the May survey was laid down entirely by protraction. David Belcher bought the May survey some years afterwards, and in running the lines then they ran from the two white oaks on Beaver Knob. This fact in the affidavit for continuance was proposed to be proved by George Belcher; by Moses Coleman they proposed to prove that he was one of the chain carriers on the May survey and would state the same facts in substance as John May and the other chain carrier whose depositions were taken. Buck Dameron was afterwards the surveyor of the county, and it was proposed to prove by him that the May survey began on the south side of Beaver Knob, and was situated entirely on the waters of Beaver creek. The depositions of these witnesses were before us in the case of *Barr v. Potter*, 29 Ky. Law Rep.. 416, and were substantially as set out in the affidavit, and it was held in that case that such evidence was insufficient to overthrow the location of the land as shown by the actual calls of the patent. The case before us is in effect the same as the case then presented.

Among the calls of the Ramey patent are the following: "Thence same course (S. 76 30 W.) 188 poles to two black locusts, hickory and black oak on top of the dividing ridge in a gap between said Grassy and main head of Card creek."

The calls of the Epling patent begin as follows: "Beginning at a hickory and two black locusts, corner tree to William Raymey's survey in the gap between Card creek and Greasy (Grassy); thence running the calls of said survey S. 76, 30 W. 118 poles to two white oaks and a black gum on the fork ridge of Greasy (Grassy) creek."

The calls of the May patent are as follows: "Beginning at two white oaks, corner trees of Isaac Epling; thence running with calls of Ramey survey S. 76 W. 1,056 poles to a stake, N. 250 poles to a stake, N. 80 E. 835 poles to a stake, S. 58 E. 57 poles to a chestnut oak and black oak on a ridge, S. 58 E. 180 poles to the beginning."

In the entire survey of the Epling patent the only two white oaks called for are the two white oaks in the line of the Ramey patent. The proof clearly shows that there is no creek known as Greasy creek, and that the word "Greasy" is simply a clerical error for the word "Grassy." If we locate the corner on Beaver Knob as claimed by the defendants it will not

touch either the Ramey patent or the Epling patent, while, as shown by the calls above quoted, the three patents must lie together, the May patent beginning at a corner of the Epling patent in the Ramey line and running from thence with the Ramey line. While it may be true that the surveyor marked the two oaks on Beaver Knob and told the people present that that was to be the corner of the May patent, still, as a matter of fact, he made no survey from that corner, and when he came to return the survey to the county court and to get the patent he in fact located the corner at the two white oaks, Epling's corner in Ramey's line. There would be no security in land titles if the calls of a patent after so many years could be entirely set at naught by parol evidence. The rule is settled that parol evidence is admissible to show the actual location of a patent, and that course and distance must give way to marks found on the ground or the actual location of the patent. But this rule has no application where no survey is made at all and the surveyor simply selects what shall be the beginning corner for the survey, and then in his report and in the patent which was issued on it, which he accepted, unmistakably designates another point as the beginning corner of the survey. To allow the parol evidence contended for would be to make the title to land depend not on the patent issued by the Commonwealth, but on the mere declarations of the surveyor at the time the survey is made.

Judgment affirmed.

MYERS' ADM'R, &c. v. ZOLL.

(Filed January 18, 1905.)

1. Vicious dog—Damage to child—Action for pain and suffering—Survives to administrator—Compromise with parents—Where a vicious dog known to be so by the owner was allowed to run at large, went upon the premises of another and bit and mangled a child, which suffered great pain therefrom for thirty five days, when she died from the injuries, the cause of action for her pain and suffering survived to her administrator and not to her parents, and a plea by the defendant of a settlement and compromise with the parents of the child for the damages is no defense to an action by the administrator.

2. Same—While the parents of the child had a cause of action against the owner of the dog at the time of the alleged compromise for nursing and medical bills bestowed and incurred in endeavoring to cure the child, they had no claim for compensation for her pain and suffering caused by the injury to her by the dog.

Bradley & Batson and Benjamin F. Washer for appellants.

Kohn, Baird & Spindle for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Nunn.

The appellant in substance alleged in his petition that on and prior to the 26th day of September, 1903, the appellee was the owner and kept a vicious dog, which he knew to be dangerous, vicious and inclined to bite

mankind, and which he allowed to go unrestrained and at large; that on the 26th day of September, 1902, this dog went upon the premises and into the residence of the intestate's father in the city of Louisville, without the knowledge of the father, and attacked, bit and mangled appellant's intestate, by reason of which she endured intense pain, suffering and agony, both bodily and mental, for thirty-five days, when she died, and asked damages of the appellee.

The appellee answered and did not deny any of the allegations of the petition, but alleged in substance that Theresa Rosa Meyer, appellant's intestate, was an infant, and died about the 1st of November, 1902, unmarried and without issue, leaving no estate of any kind, except the alleged claim asserted in the petition, and leaving no debts; that she left surviving her a father, John H. Meyer, who asserted against the appellee the same cause of action set up in the petition, and that appellee denied and disclaimed any responsibility or liability thereupon; that by the statute in such cases made and provided the mother and father of appellant's intestate were the exclusive beneficiaries of the alleged cause of action asserted in the petition; that on the second day of October, 1902, this appellee and John H. and Theresa Oswald Meyer, the parents of appellant's intestate, compromised and settled all claims against, and liabilities of, appellee by reason of their child's death, and the alleged injury received by her, and signed and delivered a receipt, acknowledging full satisfaction thereof, as follows:

"Louisville, Ky., October 2, 1902.

"Know all men by these presents, that we, John H. and Theresa Meyer, being husband and wife, and the parents of Theresa Rosa Meyer, do hereby, for and in consideration of the sum of \$500, the receipt of which is hereby acknowledged, do, on behalf of ourselves and each of us and of our said child, hereby remise, release and forever discharge George Zoll, of the city of Louisville, county of Jefferson and State of Kentucky, his heirs, executors and administrators, of and from all actions and causes of actions, suits, claims and demands whatsoever, in law or in equity, and especially from all claims and demands arising from an alleged injury of Theresa Rosa Meyer, the said child of the said John H. Meyer and Theresa Meyer, which occurred at 501 E. Kentucky Street, Louisville, Ky., on or about the 26th day of September, 1902, which the said John H. Meyer and Theresa Meyer have had, now have, or which their heirs, executors, administrators or assigns, or any of them, now have, hereafter can, shall or may have for or by reason of the said alleged injuries, or for any cause, matter or thing whatsoever.

"In witness whereof we have hereunto set our hands this 2d day of October, 1902.

(Signed) "JOHN H. MEYER,
"THERESA OSWALD MEYER."

Appellee further alleged that at the time appellant Dean was appointed and qualified as the administrator of Theresa Rosa Meyer she had left no estate of any kind or character, and that the appointment of appellant as such administrator was null and void, and that he had no right to prosecute this claim, inasmuch as the parents of his intestate and the sole beneficiaries were fully paid and satisfied as to any and all claims which might exist

against appellee for their use and benefit. The court overruled a demurrer to this answer.

Appellant filed a reply, in effect denying that his intestate's parents had compromised and settled the matters sued for in this action, and alleged that the receipt or writing copied herein was obtained by the fraud of appellee. The acts of fraud were specifically stated, but are not necessary to a determination of this appeal, and are, therefore, omitted. The appellant also stated that at the time the receipt was executed the child appeared to be improving, had every appearance that it would recover from its injuries, and that they were assured by the appellee that the dog which injured the child was free from hydrophobia or any disease, when in fact he was afflicted with such a disease, and inoculated the child, and that it died from hydrophobia within thirty days from that time, and asked that the alleged compromise and receipt be declared void. The court sustained a demurrer to this reply. Other pleadings were offered by appellant, which the court refused to allow to be filed. Under our view of the principles governing this case we deem it unnecessary to refer to them further. We are of the opinion that the court should have sustained a demurrer to the answer of appellee as it did not state any defense to the cause of action stated in the petition. Appellant by his petition sought to recover of the appellee damages for the pain, suffering and anguish endured by his intestate from the time she was bitten and lacerated by this dog until the date of her death, a period of about thirty five days, which cause of action survived to her personal representative under section 10 of Kentucky Statutes. The parents of this child never at any time had any right of action for the pain and suffering of their child. This right existed in the child alone, and survived upon its death as stated. The parents had no right to compromise or settle with appellee for this cause of action, because at the time of this pretended settlement or compromise they had no beneficial or other interest in the cause of action stated, and any attempt on their part to settle for the child or for themselves for the pain and suffering endured by it prior to its death was void. The parents' interest in the cause of action stated in the petition was not in existence at the time of this pretended settlement. In 4 Bush, 358, in the case of *McBee v. Myers, &c.*, the court said: "But it is insisted in support of the judgment that the contract relied upon by appellant is of no effect and void, because the subject-matter of the contract at the time was not in esse; that it had neither an actual nor a potential existence, and was a mere hope or contingency, founded upon no right, and coupled with no interest, and, therefore, could not be the subject of a contract. This we recognize not only as the doctrine of the common law, but as being authoritatively settled by the adjudication of this and other courts."

If the allegations of the petition were true the parents did have a cause of action at the time of the alleged compromise, in that they had the right to recover for the nursing, attention and medical bills bestowed and incurred in endeavoring to restore the child to health, and that it must be presumed that this was the meaning and extent of the settlement made, for at that time it was not expected, nor contemplated, by the parents that the child would die by reason of its injuries, and the interest sued for herein was not in the minds of the parties at the time of the execution of the re-

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celpt referred to. Appellee cites in support of the settlement pleaded the following authorities: Doyle v. N. Y., &c., 72 N. Y. S., 936; Mattoon, &c., Co. v. Dolan, 105 Ill. App., 1; Christie v. Chicago, &c., 74 N. W., 697; Dowell v. Burlington, &c., 17 N. W., 901; Sykora v. The Case Mfg. Co., 60 N. W., 1008; Prater v. The Tenn., &c., Co., 58 S. W., 1068; Vail v. Anderson, 64 N. W., 47. We have carefully examined each and all of these authorities, and find that in all of them the settlements were made with the beneficiaries after the death of the party injured, some few of them before administration, and some after. But in all of the cases the parties settled and compromised with had then a vested, beneficial interest at the time of the settlement, that is, their interests in the estate were in esse, and, therefore, the cases have no application to the question involved in the action at bar.

For these reasons the judgment of the lower court is reversed and cause remanded for further proceedings consistent herewith.

Whole court sitting.

COMMONWEALTH, BY, &c. v. WISCONSIN CHAIR CO.

(Filed January 19, 1905.)

Escheat—Real estate—Corporations—Under Constitution, section 192, and Kentucky Statutes, section 567, providing "that no corporation * * * shall hold any real estate in this State except such as may be proper and necessary for carrying on its legitimate business for a longer period than five years under penalty of escheat," an escheator can not maintain an action under section 1606, Kentucky Statutes, to have the title to a tract of land owned by a foreign corporation in Ballard county to vest in the Commonwealth, as it is only to land mentioned in said section 1606 that the escheator has authority to maintain an action to escheat.

W. J. Webb and F. L. Turner for appellants.

Robbins & Thomas for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Paynter.

The appellee is a foreign corporation and owns forty-seven acres of land in Ballard county. Charles Linthicum, escheator for Ballard county, instituted this action in the name of the Commonwealth against appellee to forfeit its title to the Commonwealth. It is averred that the appellee owned it for a longer period than five years, and did not need it for carrying on the legitimate business authorized by its charter. The action is based on section 192 of the Constitution and section 567, Kentucky Statutes.

Section 192 of the Constitution reads as follows: "No corporation shall engage in business other than that expressly authorized by its charter, or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate, except such as may be proper and necessary for carrying on its legitimate business, for a longer period than five years under penalty of escheat."

Section 567, Kentucky Statutes, reads as follows: "No corporation shall engage in business other than that expressly authorized by its articles of

incorporation or amendments thereto; * * * nor shall any corporation hold or own any real estate, except such as may be necessary and proper for carrying on its legitimate business, for a longer period than five years, under penalty of escheat."

The question arises as to the right of the escheator to institute and maintain this action. Neither the section of the Constitution nor that of the statute quoted provides a remedy for having land forfeited to the Commonwealth. The only instance in which an escheator can institute proceedings is under sections 1606 and 1623, inclusive, of Kentucky Statutes.

Section 1606 reads as follows: "That part of estates lying or found in this Commonwealth not disposed of by will of persons who have died, or may hereafter die, without heirs or distributees entitled to the same, or which have been, or may hereafter be, devised to any person who, or any heir or distributee or devisee of his, or of the testator, has not claimed the same, or shall not claim the same, within eight years after such death, shall vest in the Commonwealth, subject to the debts and liabilities of the decedent."

This section provides the conditions under which the title to land may vest in the Commonwealth. It is only as to land thus vesting in the Commonwealth that the escheator has authority to maintain an action. The sections of the statute referred to defines the duties of escheators. It would be violative of the statute to hold that the escheator could maintain this action. It would be creating a duty for the escheator to perform not prescribed by law. When the statute prescribes the duties of an office, it excludes the idea that he is empowered to perform other and distinct duties. It is a case for the application of the rule of construction that the inclusion of one thing is the exclusion of all others. The court properly sustained the special demurrer. If we should suggest a remedy it would be purely advisory, besides the court must forbear to express an opinion as to the purpose and effect of the provision of the Constitution and section 567, Kentucky Statutes.

The judgment is affirmed.

DENHAM v. COMMONWEALTH.

(Filed January 20, 1905.)

1. Verdict—Indefinite—May be perfected by jury or court—If the verdict of the jury be so inadequate in form or substance, or its language so indefinite or ambiguous as to make its meaning uncertain, the jury should be required to perfect it, and this may be done by them in the presence of the court and under its direction, or after returning to the jury room, or it may be done by the court in the presence of the jury and with their approval.

2. Valid verdict—A verdict of a jury in a criminal case for maliciously striking with a deadly weapon with intent to kill, which reads as follows: "We, the jury, find the defendant guilty, fix his punishment three years in pen," though awkwardly expressed, is not so defective as to affect its validity.

3. Indictment for malicious striking—Evidence of robbery—Competency—Res gestæ—Where one was assaulted in the night time and knocked unconscious at his front gate with a weapon, on the trial of his assailant for malicious striking with intent to kill it was not error in the court to admit

evidence that after the injured man regained consciousness he discovered that \$42 in money had been taken from his pocket after he was stricken, as such taking was a part of the *res gestæ*.

4. Bloodhounds—Trailing suspected criminals—Competency—While the pedigree of bloodhounds used in trailing supposed criminals was not asked about nor stated with particularity, yet where it is shown that they were pure bloodhounds and had been carefully trained in tracking men, evidence of their trailing the defendant on the night of the alleged offense was properly allowed to go to the jury for what it was worth as a circumstance tending to connect the defendant with the crime.

C. C. Williams for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Settle.

On the night of October 20, 1902, one C. H. Vanarsdale, who resides in Lincoln county, on the Hustonville and Middlesburg pike, was called to his front gate, situated within thirty yards of his house, upon reaching which he found two men, one a tall man and the other of lesser height. When Vanarsdale got to the gate the tall man asked if he was Mr. Vanarsdale, and said, "G—d—n you, I am going to kill you," at the same time raising his arm, and holding in his hand something that Vanarsdale took to be a knife or pistol. Immediately following this demonstration the shorter man struck Vanarsdale in the face, and knocked him down. The blow was evidently inflicted with brass knucks, or other deadly weapon, as it lacerated Vanarsdale's face and rendered him unconscious for some time, but he managed to either walk or crawl to the house, and after a time informed his family of what had been done to him. When he met his assailants at the gate he had \$42 upon his person, but when he regained consciousness he discovered that the money was all gone.

James Cottrell and the appellant, Hiram Denham, were arrested for the crime committed upon Vanarsdale, and both were soon thereafter jointly indicted by the grand jury of Lincoln county for willfully and maliciously striking and wounding Vanarsdale with a deadly weapon, with intent to kill him, but of which he did not die. Cottrell was first tried, convicted and sent to the penitentiary, but for what length of time the record in this case does not indicate. After many continuances of the prosecution as to the appellant, Denham, he was finally brought to trial, which resulted in his conviction and the fixing of his punishment by the jury at confinement in the penitentiary for three years. He has appealed from the judgment of conviction, and now asks its reversal. Numerous alleged errors upon the part of the lower court were set forth in the grounds filed in support of the motion made by appellant for a new trial but only three of them are now relied on in the brief of appellant's counsel.

It is contended for appellant, first, that the verdict returned by the jury was so indefinite and defective as to render it insufficient to support the judgment; second, that after the verdict mentioned was returned and the jury discharged, the trial judge being advised of the alleged defective character of the verdict, improperly recalled the jury and caused them to retire

and return another and second verdict, equally as defective in form and substance as the first, which he received, and upon which the judgment appealed from was entered; third, that the court admitted upon the trial incompetent evidence greatly to appellant's prejudice.

The language of the first verdict was as follows: "We, the jury, fin the defendant guilty, fix his punishment three years in pen. S. E. Estes, Foreman." That of the second: "We, the jury, find the defendant guilty and fix his punishment at three years in the State prison. S. E. Estes, Foreman."

While each verdict is awkwardly expressed, we do not think either so defective as to affect its validity. Obviously any one of average intelligence and ordinary understanding would know at a glance that the word "fin" in the first verdict was intended for find, and that the word "pen" is a mere abbreviation of the word penitentiary, an institution provided by the State, in which offenders against its criminal laws are confined for punishment and correction. Nor would a mistake be made by one of common understanding as to the meaning of the words "State prison." They are frequently used as synonymous with the word penitentiary, never as meaning a jail, which, as is well known, is a prison appertaining to a county or municipality, in which are confined for punishment persons convicted of misdemeanors committed in the county or municipality. We think a judgment entered upon either verdict would have been good, as neither was fatally defective. Correction, however, of their first verdict by the jury was authorized. Judicial pride in maintaining a presentable, as well as accurate, record of the proceedings in his court induced the trial judge, doubtless, to exclude from that record such a deformed verdict as was the one first returned by the jury, hence its correction was proper, though not necessary to its validity.

If a verdict be so inadequate in form or substance, or its language so indefinite or ambiguous, as to make its meaning uncertain, the jury should be required to perfect it. This may be done by them in the presence of the court and under its direction, or after returning to the jury room, or it may be done by the court in the presence of the jury and with their approval. (Bishop's New Crim. Procedure, volume 1, section 1004.)

Where mistakes, such as appear in the first verdict in this case, occur the necessary correction may be made by the jury or court in one of the several ways already indicated. (Am. & Eng. Enc'y. of Law, volume 28, page 865.)

In the case at bar the court calling the attention of the jury to the defects in the first verdict, directed them to return to the jury room and correct it, which they did. Counsel's contention that the jury were discharged after the return of the first verdict and recalled by the court after such discharge, and then sent to their room to return a second or correct verdict, is not sustained by the record. Upon the contrary, we find that the jury were not discharged until after the return of the second verdict, as this statement in the bill of exceptions immediately following the first verdict will show: "And the judge being shown the verdict, he thereupon sent the jury back to the jury room," and they then returned the second verdict. But if the jury had been discharged, as charged by counsel for appellant, even then, as they had not left the presence of the court before being recalled and directed to

retire to their room for the purpose of returning the second verdict, no injury could have resulted to appellant's rights.

In *Taggart v. Commonwealth*, 104 Ky., 801, it appeared that the jury returned the following verdict: "We, the jury, find the defendant, Don Taggart, guilty, and fix his punishment at confinement for seven years in the punishment." The clerk, in reading the verdict, substituted "penitentiary" for the word "punishment." After the reading of the verdict the jury was discharged, but took their seats in the court room, save one, who entered a water closet connected with the court room. The attention of the court was called to the mistake in the verdict. The members of the jury were recalled, and the court erased from the verdict the word "punishment," and in lieu thereof wrote "penitentiary." The verdict was then read to the jury, and the jury polled. Upon that state of facts this court said: "We perceive no error in this. The context clearly shows that by the word punishment was meant 'penitentiary,' and the immediate correction could not, in any conceivable way, have prejudiced the rights of appellant."

It is insisted for appellant that as he was charged with and being tried for malicious striking and wounding Vanarsdale with a deadly weapon, with intent to kill him, the court erred in admitting evidence that Vanarsdale was robbed of \$42 when assaulted and knocked down in his yard. The competency of such evidence has been repeatedly recognized by this court. In *Roberson's Crim. Law*, 2d volume, page 1058, it is said: "It is a general rule that in a prosecution it is not competent to show that defendant on another occasion committed another and distinct crime, even though it be similar to the one charged. There are exceptions to this rule. Thus evidence of another and distinct crime, if it is committed as part of the same transaction, is admissible, and forms a part of the *res gestæ*." (*Snapp v. Commonwealth*, 82 Ky., 173.)

Clearly the robbery committed upon Vanarsdale was a part of the *res gestæ*. The evidence in question was admissible upon another ground, *viz.*, to show a motive for the assault upon Vanarsdale.

"The intent, knowledge or motive under which the defendant did the act charged against him not generally admitting of other than circumstantial evidence, may often be aided in the proof by showing another crime, actual or attempted, then it is permissible." (*Bishop's new Crim. Procedure*, volume 1, section 1126; *O'Bryan v. Commonwealth*, 24 Ky. Law Rep., 2511; *Bess v. Commonwealth*, 25 Ky. Law Rep., 1091.)

It is further insisted for appellant that the court should have excluded the evidence introduced to show the use of bloodhounds in the attempt to discover the assailants of Vanarsdale. It appears from the evidence that a telephone message was sent to John Mulligan, of Wilmore, Ky., on the night of the assault upon Vanarsdale, requesting the use of his bloodhounds to track the guilty parties. The request was complied with, and a pair of bloodhounds sent by Mulligan to Vanarsdale in charge of Keelin and Smith. They got to Vanarsdale's on the same night the assault was committed. The heads of the dogs were held up when they were taken from the wagon until the place of the assault was reached. They were then put to their work, and at once struck the trail which they followed to the home of James Cottrell in the neighborhood. Upon reaching and entering

the house they immediately went to Cottrell and appellant, who were there, smelled them, and did no further trailing. It also appears that care was taken by the family and friends of Vanarsdale to prevent persons about the premises after the assault upon Vanarsdale from going to or about the place where it was committed, in order that the bloodhounds might not be confused or obstructed in following the tracks of the assailants.

It also appears from the testimony of Mulligan, the owner of the dogs, that one of them was two years, the other sixteen months old; that both are bloodhounds of good breeding, the sire of the older one being a pure bloodhound, and the grandsire an English bloodhound, trained in tracking men. It was further testified by their owner that both dogs had been carefully trained in tracking men, and that the older dog had tracked and aided in the capture of sixty-three criminals, in several of which the younger dog had assisted. While the pedigrees of the dogs were not asked about, nor stated with particularity, we incline to the opinion that the testimony as a whole shows that they substantially possessed the breeding qualities and training required by the rule announced by this court in *Pedigo v. Commonwealth*, 103 Ky., 41, therefore, the testimony as to the trailing done by them in the capture of appellant and Cottrell was properly allowed to go to the jury for what it was worth as one of the circumstances tending to connect the appellant with the crime for which he was convicted.

The testimony in question was, as we think sustained, and the guilt of appellant as thereby indicated confirmed by Vanarsdale's identification of him by his size and voice, the finding by the arresting officer of money concealed in his drawers' leg, the confession of his accomplice, and other circumstances of equal weight shown by the record. Though no objection is urged to the instructions in the brief of counsel, we have nevertheless carefully read them, and find that they presented fully and fairly to the jury all the law of the case.

The record presenting no cause for reversal the judgment is affirmed.

CITY OF LOUISVILLE v. JACOBS, &c.

(Filed January 31, 1905—Not to be reported.)

Taxation—Pleading—Liens—This action to recover taxes due appellant having been instituted before the lapse of the five-year statute, it prevented the statute of limitations from running. A purchaser before its termination was a pendente lite purchaser, and the plea of the statute in such a state of case is not available, the fact that the five years had expired before such purchase will not operate as against the claim for taxes upon which the action was instituted against the real owner before the lapse of that period.

H. L. Stone for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

The appellee, Lizzie Jacob, owned property on Main street in the city of Louisville. She failed to pay the tax bill for the year of 1895, amounting to

\$288.25, on the assessment of that property, and this action was brought on February 28, 1900, to recover the amount of the tax bill. Another suit of the city against her was pending in the Jefferson Circuit Court to recover taxes due for previous years. A judgment was entered therein directing the sale of the property for the taxes found to be due for those years. On December 11, 1899, the property was sold and R. C. Wintersmith became the purchaser, but the appellee, Lizzie Jacob, had the right to redeem the property from that sale. At the time of the sale the Fidelity Trust and Safety Vault Co. had a mortgage upon the property for about \$8,000. Appellee, L. M. Rice, had a junior mortgage for about \$2,500. Thus the matter stood when in June, 1900, the appellee, Lizzie Jacob, sold the appellee, L. M. Rice, the property. Rice paid the Wintersmith purchase money into court, satisfied his own mortgage debt, assumed the mortgage debt due the trust company and paid the appellee, Lizzie Jacob, \$189. Besides this, he assumed the payment of all taxes against the property, but reserved the right to question or litigate any claims for taxes asserted against the property. It is recited in the deed that R. C. Wintersmith joins in the deed for the purpose of conveying all right, title and interest he has in the property acquired by his purchase for the taxes. After the appellee, Rice, took the deed the city filed an amended petition, bringing him before the court. This action was instituted against Lizzie Jacob before the lapse of five years after the claim for taxes matured, but more than five years elapsed after its maturity before the amended petition was filed making Rice a defendant. The appellee, Rice, pleads and relies upon the statute of limitations as a bar to the right of the city to recover.

Lizzie Jacobs owned the property, and the legal title was in her at the time this action was instituted. It remained in her until she sold it to Rice. The sale to Wintersmith had not divested her of title. Wintersmith never paid the purchase money, and it is perfectly evident from this record that he was acting as the friend of the appellee, Jacob, in the purchase of the property, for he permitted Rice to pay the excess of purchase money to her. So Lizzie Jacob was the real owner of the property, subject to the mortgages and tax sale. She being the real party in interest, it was proper for the city to sue her. The suit against Lizzie Jacob prevented the statute of limitations from running. Rice was a pendente lite purchaser, and, therefore, the plea of the statute of limitations is not available.

The judgment is reversed for proceedings consistent with this opinion.

CHESAPEAKE & OHIO RAILWAY CO. v. COMMONWEALTH.

(Filed January 24, 1905.)

1. Railroads—Separate coaches—Failing to furnish—Indictment—Sufficiency—An indictment which charges the defendant with having “willfully and unlawfully failed to furnish for the transportation of white and colored passengers on its line of railroad a separate coach, each compartment divided by a good and substantial wooden partition, with a door therein, and each bearing in some conspicuous place, in plain letters, appropriate words indicating the race for which it was set apart,” is a good indictment, under Kentucky Statutes, section 795, known as the Separate Coach Act.

2. Instructions—Unavoidable casualty—On the trial of the defendant for a violation of the separate coach act (Kentucky Statutes, section 795), the court should have instructed the jury that if they believed from the evidence that the operation of defendant's train February 19, 1903, without a separate coach or compartment car marked and provided with notices, as set out in instruction No. 1, was caused by an unavoidable accident or casualty, which defendant, by ordinary prudence, could not reasonably have anticipated or guarded against, they should find the defendant not guilty.

Willis & Todd for appellant.

N. B. Hays and L. Mix for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Chesapeake & Ohio Railway Co., was tried, convicted and fined \$500 in the Shelby Circuit Court, under an indictment charging it with having willfully and unlawfully failed to furnish for the transportation of white and colored passengers on its line of railroad a separate coach, each compartment divided by a good and substantial wooden partition, with a door therein, and each bearing in some conspicuous place, in plain letters, appropriate words indicating the race for which it was set apart.

Appellant asks a reversal of the judgment because of alleged error upon the part of the lower court, first, in overruling its motion in arrest of judgment; second, in failing to properly instruct the jury and refusing proper instructions offered by appellant.

Section 795, Kentucky Statutes, provides: "Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches, by steam or otherwise, on any railroad line or track within this State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in whole or in part, or leased by them, * * * are hereby required to furnish separate cars or coaches for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words, in plain letters, indicating the race for which it is set apart."

Section 796 declares that no discrimination shall be made in the quality, convenience or accommodations of the coaches set apart for white and colored passengers, and section 797 provides: "That any railroad company or companies that shall fail, refuse or neglect to comply with the provisions of sections 795 796 shall be deemed guilty of a misdemeanor, and upon indictment and conviction thereof shall be fined not less than \$500, nor more than \$1,500 for each offense."

The evidence contained in the record conclusively shows that appellant did on the 19th day of February, 1903, operate a passenger train upon and over its railroad in Shelby county, which did not have attached, or belonging to it, a separate coach for the transportation of white and colored passengers, partitioned and otherwise equipped or required by the statute.

Indeed no denial of this fact is made by counsel for appellant, but it is contended that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court; and, further, that the appellant on the day in question was prevented by unavoidable accident and casualty from having with and as a part of its train a separate coach for the use of colored passengers, as required by the statute, and as was its custom.

We are of opinion that the first contention is without merit. The indictment in large measure follows the words of the statute in describing, and in fairly appropriate language sets forth with sufficient particularity the acts constituting the offense, and that it was committed in Shelby county on the 19th of February, 1903, and before the finding of the indictment. We think the language of the indictment was sufficiently explicit to apprise appellant of the offense with which it was charged, and to bar a subsequent prosecution against it for the same offense. The trial court, therefore, did not err in overruling the motion in arrest of judgment. Appellant's second contention presents a more serious question, and one upon which this court has never passed.

It appears from the record that appellant's passenger train, for the running of which without the separate coach it was indicted in this case, was known as No. 22, and that it was scheduled to leave Louisville daily at 8:30 a. m., and on February 19, 1903, it left Louisville at 8:30 a. m., as usual, but for the first time was carried through to Lexington without the separate coach for the use of colored passengers. It also appears that another of appellant's trains known as No. 25 left Ashland daily at 1:20 p. m. for Louisville, and arrived at the latter city at 8 p. m. of the same day, and that this train was always provided with a separate coach for the transportation of white and colored passengers, equipped as required by the statute, which after its arrival in Louisville was transferred to and connected with train No. 22, due to leave Louisville at 8:30 a. m., and used by the latter train daily. It further appears that train No. 25, instead of leaving Ashland, February 18, 1903, at 1:20 p. m., its schedule time, which would have enabled it to reach Louisville at 8 p. m. of that day, was so delayed by a landslide east of Ashland that it did not leave that city until 12:14 a. m. of February 19, which caused it to arrive in Louisville thirteen hours and thirty-one minutes behind its schedule time, or at 9:31 a. m. February 19, 1903, about one hour after train No. 22 left that city on its schedule time. In other words, the two trains met near Shelbyville.

On account of the delay caused to train No. 25 beyond Ashland train No. 22 was, on February 19, 1903, deprived of the use of the separate coach it was accustomed to receive from train No. 25 before leaving Louisville, and its run that day from Louisville east was consequently made without it, as stated. The evidence for the Commonwealth established the fact that on no other day than February 19 was train No. 22 run through Shelby county without a separate coach equipped and lettered as required by the statute, and the further fact that there were no colored passengers on the train that day. It was shown, too, by appellant's testimony that it had and used between Louisville and Ashland three separate coaches equipped and lettered as required by the statute for the transportation of white and colored passengers, which had theretofore supplied the wants and convenience of the traveling public.

and that neither delay nor accident had, previously to February 19, 1908, prevented train No. 25 from arriving at Louisville in ample time to attach the separate coach for colored passengers to train No. 25 before the arrival of the schedule time for its departure from that city.

Did the foregoing facts and circumstances excuse the failure of appellant to have attached to the passenger train in question a separate coach for the use of white and colored passengers on the occasion named in the indictment? In considering this question it must be borne in mind that appellant was required by statute to run its train, as well as to provide it with the separate coach. Besides, it was and is a common carrier, entrusted by the Federal government with the duty of carrying its mails without unreasonable delay. Its duty to the public requires regularity and promptness in the running of its trains, and it will hardly be contended that delay of the other train in reaching Louisville should have prevented this one from leaving that city according to its schedule time.

It is, however, insisted for the Commonwealth that appellant is amenable to the punishment prescribed by the statute because of its failure to keep at Louisville an extra separate coach equipped as required by the statute for the use of its white and colored passengers, as it might have done, to guard against such emergencies as the one that occurred on February 19, 1908. It is true that such a precaution might have been taken, but in view of the fact that no occasion had theretofore arisen for an extra separate coach of the character indicated, and of the further fact that there was an interval or margin of twelve and a half hours between the time scheduled for the arrival of the train bringing the separate coach and the time of the departure of the other, appellant's contention that its employes charged with the duty of operating its trains could not, under the circumstances, have anticipated and guarded against the conditions that compelled the running of the train in question on February 19 without the separate coach, is not without force. At any rate, it was for the jury to say whether, notwithstanding the accident which delayed train No. 25, appellant, by the exercise of reasonable diligence, could have secured for train No. 25 a separate coach for white and colored passengers equipped as required by the statute.

It is said by Bishop in his work on Statutory Crime, section 132: "Again, a statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act, because the common law requires such concurrence to constitute a crime. A case of overwhelming necessity, or of honest mistake of facts, will thus be excepted out of a general statutory prohibition." * * *

It is true the statute *supra* declares "that any railroad company or companies that shall fail, refuse or neglect to comply with the provisions of sections 795 and 796 shall be guilty of a misdemeanor," etc. The words "fail," "refuse," "neglect," are used interchangeably, and as meaning something more than an unavoidable or accidental violation of the statute.

We are aware that it has been held by this court, and by other courts of last resort, that acts not done with compulsion or under necessity, if forbidden by statute, although not *malum in se*, are punishable as provided in the statute, notwithstanding they might have been done without willful or malicious intent. (*Wayman v. Commonwealth*, 14 Bush, 466; *Jellico Coal Co. v. Commonwealth*, 96 Ky., 878.)

In *Commonwealth v. Bull*, 18 Bush, 666, it is said: "When the legislature has declared that a given act shall be deemed unlawful the person voluntarily doing said act will be charged with a criminal intent." * * *

But the above rule applies to unlawful acts voluntarily (and in that sense intentionally) done, and never to such as are done under compulsion or necessity. The appellant on the morning of the 19th of February, 1903, in sending out its train seems to have acted from both necessity and compulsion. By unavoidable accident or casualty the train from which train No. 22 was accustomed to get the separate coach for colored passengers in time for its departure from Louisville on the morning of each day was delayed beyond the hour for the departure from Louisville of that train, thereby leaving appellant to the choice of not sending out its train on the morning of the 19th of February, and not transporting its passengers or the mail, in violation of law, or sending out the train without the separate coach for colored passengers as the statute required.

In *Stephens' Digest of Criminal Law*, article 32, it is said: "An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid the consequences which could not otherwise be avoided, and which had they failed would inflict upon him, or upon others whom he was bound to protect, inevitable or unavoidable evil; that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided." (*Ency. of Law and Procedure*, volume 12, page 160.)

We think the appellant, upon the facts of this case, was entitled to the benefit of the rule above quoted, and that the trial judge erred in refusing to give to the jury the law as asked by appellants, though improperly expressed in the instructions offered; that is, the court should have instructed the jury that if they believed from the evidence that the operation of appellant's train February 19, 1903, without a separate coach, or compartment car marked and provided with notices as set out in instruction No. 1, was caused by an unavoidable accident or casualty, which appellant, by ordinary prudence, could not reasonably have anticipated or guarded against, they should find the appellant not guilty.

For the reasons indicated the judgment is reversed and cause remanded for a new trial and further proceedings consistent with this opinion.

Whole court sitting.

OWSLEY, SR. v. OWSLEY, &c.

SAME v. OWSLEY, JR.

(Filed January 24, 1905.)

Records—Clerk Court of Appeals—Fees for copy—Loaning record—Where a record is taken from the clerk's office of the Court of Appeals by an attorney, to be used by him instead of a copy, his client is liable for the cost of a copy, although the clerk may have agreed with the attorney not to charge for the copy unless his client is successful, as the fees of the clerk's office now belong to the State and the clerk has no authority to make such an agreement.

W. C. Marshall, W. S. Pryor and Carroll & Carroll for appellant.

N. B. Hays for appellees.

Appeal from Cumberland Circuit Court.

Opinion of the court by Chief Justice Hobson.

These cases are submitted on the motion of appellant to correct the taxation of costs in so far as a copy of the record in each case is taxed as part of appellee's cost.

In the first case the record was obtained from the clerk by appellee's resident attorney, who argued it orally in this court upon an agreement of the clerk that his client was not to be charged with a copy unless successful. It is the settled rule of the court that where the clerk allows the attorneys to take the record upon the agreement that a copy is to be charged, a copy may be taxed as cost, although not actually made. The fees of the office now belong to the State. If the record is taken from the clerk's office to be used by the attorney instead of a copy, his client becomes liable for the cost, and the clerk has no authority to agree that he shall not be taxed with the cost of a copy if unsuccessful. The clerk can not give away the money of the State, and his agreement not to charge in any contingency for what the law allows to be charged is not binding on the State. The motion to correct the taxation of cost in the first case is, therefore, overruled.

In the second case the original attorney declined to take out the record on the understanding that his client was not to be charged with a copy unless successful, and the case was then submitted. A year afterward, and when the case had been decided and was pending on the petition for rehearing, the resident attorney here took out the record, but in doing this he evidently acted upon the idea that his client was entitled to the use of the record without further liability for a copy. Nothing was then said between him and the clerk. From the entries on the clerk's books, and all the facts as shown by the affidavits, we conclude that this record was withdrawn under a misapprehension, and that no copy of the transcript should be taxed in this case.

The motion to correct the taxation of costs in the second case is, therefore, sustained, and it appearing that the clerk has received the money, he is ordered to refund it to this extent to the appellant.

HARMON v. THOMPSON.

(Filed January 24, 1905.)

1. Contract—Writing—Best evidence—Presumptions—Where parties to a contract have written and signed a memorial of their undertaking, it is conclusively presumed, in the absence of fraud or mutual mistake, that the whole of the undertaking and all negotiations leading up to it, are merged in the writing. The writing is the best evidence, and so long as it can be produced is the only evidence of what the parties have agreed to do and of their whole meaning with reference thereto.

2. Same—In construing a written contract by which T. and H. agreed with T. to take charge of T.'s farm of 125 acres, lying adjoining the city of

W., and lay it off into lots, by streets and alleys, and to pay T. \$600 per acre for two-thirds of the whole tract, and to allow T. to retain the other third of the land so divided, an allegation by H., in pleading a mistake in the contract, is not available unless it alleges a mutual mistake of both parties to the agreement.

8. Abandonment of contract—Action for breach—Tender of deed—Necessity—In an action for damages for a breach of contract to sell land, where the breach alleged is an abandonment of the contract by the vendee and a refusal to execute his part of it, it is not necessary for the vendor to tender to his vendee a deed to the land when the vendee has declared that he will neither pay for the land nor accept the deed.

4. Defective pleading—Cured by verdict and judgment—In an action on a written contract by a vendor against the vendee for damages for a breach of his contract to sell land, while it was a necessary allegation in the petition that plaintiff was willing, able and ready to convey the title to the land, it affirmatively appearing after verdict and judgment that plaintiff was able, ready and willing to convey, the failure to make such allegation in the pleading was cured.

5. Disposal of property by vendor—Where the vendee of an executory contract to buy land abandons and refuses to comply with its terms, the vendor upon electing to proceed for damages for the breach may, after making his election, and after the time when by the terms of the contract the conveyance was to have been made, dispose of the property by sale or mortgage without regard to the contract.

6. Measure of damages—In an action by a vendor against a vendee for damages for the breach of an executory contract to buy land, the quantum of damages is the difference between the contract price and the actual value of the land at the date of the breach, and to which interest may be added.

Wm. Lindsay, Morton, Webb & Wilson and Beverly R. Jouett for appellant.

Pendleton & Bush, J. H. Hazelrigg and J. M. Benton for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge O'Rear.

This suit involved the construction of the contract copied below, the measure of damage for its breach, and the nature and requisites of the action upon it. The contract is worded as follows:

"This agreement, witnesseth, that whereas, H. P. Thompson owns certain lands in and near Winchester, Ky., and, whereas, the undersigned, B. E. Talbutt and Archer Harmon, desire to have the control and right of selling said lands, consisting of the unsold lands lying south of Belmont street, which runs south of the house of said H. P. Thompson and on the boundary bought by him of James Ballard's heirs, amounting to between 100 and 125 acres, lying south of said Belmont street in the town of Winchester; now it is agreed between the parties hereto as follows: Said Talbutt and Harmon undertake to sell said lands in lots of such size as may suit purchasers and be most advantageous to the interest of the sellers, and to account to said Thompson for said land at the price of \$600 per acre for two-thirds of the said land, and to leave the said Thompson the owner of the other third, that is to say, that the said Thompson shall receive, pay for, two-thirds of said land at the rate of \$600 per acre, and be entitled to the other third of said

purchase money of said lands. The said Talbutt and Harmon shall open such streets and alleys through such lands as they may think proper; one-third thereof shall be chargeable to said Thompson and two-thirds thereof to said Talbutt and Harmon, but the whole expense thereof is primarily to be borne by said Talbutt and Harmon, and said Thompson is to pay his one-third of said expenses. All the streets to be opened shall be by mutual agreement of the parties as to location and cost thereof, and not without such consent. Before deeds are made to said Harmon and Talbutt for the said lands the said Thompson is to receive two-thirds of the purchase price at the rate stipulated above in money or satisfactory notes. No interest is to be charged by Thompson until after January 1, 1891, and he shall not account for interest for such sums as may be received by him in excess of his two-thirds. For the balance due on the 1st day of January, 1891, notes are to be given with lien on the remaining land, or such security as said Thompson may accept in lieu thereof.

(Signed) "H. P. THOMPSON,
"ARCHER HARMON,
"B. E. TALBUTT.

"Witness: B. F. BUCKNER."

The contract was made February 17, 1890. At that time, and for some time prior, there had been considerable animation at Winchester in the real estate market. A "boom," so common during that period, was being experienced. Appellee had cut a farm, or a good part of it, into town lots, and was selling them at fairly remunerative prices. Appellant and Talbutt were promoters, or speculators, dealing in town lots, in various localities where active speculation was possible owing to inflated prices and excited expectations. Appellee's contention in this case is that they were attracted by what appeared to be favorable opportunities afforded by his property at Winchester, and bought it for that purpose. Appellant contends, on the contrary, that he and Talbutt engaged merely to promote appellee's venture in exposing his lots to public sale. The paper is said to be ambiguous, and because of that claim it was sought by appellant to have his construction of its meaning aided by extraneous evidence.

It is not every contract of vague or slightly obscure meaning that calls for, or that will admit of, other evidence to aid in its interpretation. If the paper itself affords a reasonably clear understanding of what the parties have engaged themselves to, it is safer, and it is the law, that its language alone should be consulted in arriving at that meaning. It is upon that reason that such rules as that all the terms of the writing must be consulted and reconciled, if possible, are founded, for when the parties to a contract have deliberately written down and signed a memorial of their undertaking, it is presumed, and in the absence of fraud or mutual mistake it is conclusively presumed, that the whole of the undertaking, and all negotiations leading up to it, are merged in the writing. The writing is the best evidence, and so long as it can be produced is the only evidence receivable of what the parties have agreed to do, and of their whole meaning with reference thereto. It were better if all agreements were perfectly clear and free from controversy. But they are not. It does not at all follow from that fact, though, that all agreements not perfectly plain, and having but one

possible interpretation, are subject to be explained in every case by extraneous and parol evidence. If such were so, the value of written contracts would be reduced to a minimum, if not nil. It is because such is not the law that the numerous rules for construing written contracts are in existence, for, most obviously, a perfectly plain, undoubted meaning needs no rule to aid in its construction. So when the written terms seem to be in conflict with each other, where some part of the writing is apparently inconsistent with another part, it does not follow that the bars are to be let down and parol evidence, with its train of uncertainties, admitted. Before that is allowed the resources of the paper itself must be exhausted; that is what the law assumes the parties intended by reducing the agreement to writing; for if it were to be left to parol testimony as to any part of its meaning, it was idle to have been to the trouble of having it written down. When, after applying to the writing those rules of interpretation found safe and just in the experience of the law, the meaning, or the probable meaning in law, of the parties can be fairly gathered with a certainty satisfying the judicial mind, the courts will consult the writing alone, rejecting extraneous evidence as aid in construing it. But where, after applying the rules of interpretation applicable to the writing alone, the judicial mind is still in doubt as to the meaning of the parties, and there exists a latent ambiguity, the law admits parol or other outside evidence to explain what was meant by the writing. Technical terms and trade expressions afford probably the most numerous instances of the application of the rule just stated, though there are of course many others.

Can the intention of the parties to the agreement sued on be gathered from that writing? Subjecting the paper to analysis, it appears clearly enough that Thompson, the owner of the land described, wanted to sell it, and was by that paper undertaking to sell it. The price at which he was willing to sell two-thirds of it is fixed at \$600 per acre. Appellant and Talbutt appear in the paper as both buyers and sellers. They were not selling to Thompson. They had to buy from him before they could sell to anybody, unless they were authorized by Thompson to sell for him. To buy from him the terms upon which they were to get the land must be agreed on. So it was stated that Thompson was to receive \$600 per acre for what he was selling, viz., two-thirds of the tract. But that was not the whole agreement. It was contemplated, as shown by the paper, that appellant and Talbutt were to resell, and possibly immediately before the date when by their agreement they would be compelled to pay for what they were buying. To protect Thompson in so parting with his title it was, therefore, provided in the paper that in event such sales were made the purchase money, or acceptable purchase money notes, if notes were taken in lieu of cash, were to be turned over to Thompson to the extent of \$600 per acre for such parts as were so sold, he not accounting for interest on it. It seems from the paper to have been also contemplated that some part, or maybe the whole of the purchase money for the land sold Harmon and Talbutt by Thompson, would not be paid or secured by notes of Harmon and Talbutt's vendees before January 1, 1891. It was, therefore, provided in that event Thompson was to have interest from Harmon and Talbutt after that date, and to have purchase-money notes for such balance before he made them a

deed. Other features of the contract show that Thompson expected, and that the parties agreed, that Thompson's one-third of the land not sold to Harmon and Talbutt was to be sold by them in their general plan of subdividing the whole tract into town lots, and selling them off. The paper provided for the expense of such division, all the parties bearing it in proportion to their ownership of the whole tract. It was likewise provided that Thompson was to receive the pay for his one-third interest in the tract if sold in lots under this scheme by Harmon and Talbutt at whatever price it might be sold, while for the other two-thirds, the part sold to Harmon and Talbutt, Thompson was to get only his original purchase price, the excess going to the owners, Harmon and Talbutt. Thus construed, every term, every provision and every word of the contract, as written, is accounted for, and given a consistent meaning, while the whole document is given a rational construction.

To adopt appellant's theory, which is that he and Talbutt were merely promoters, and were to sell Thompson's land for Thompson, and on commission, the commission being the excess of price realized on the part sold over \$600 per acre, would necessitate the ignoring or expurgation of several very explicit and important provisions of the agreement. That is never done when it is possible to avoid it, nor unless it clearly appears that such provisions are annulled intentionally by other provisions of the paper, for it must always be borne in mind that the office of the court is to arrive at the meaning of the parties: not necessarily what may have been in the minds of either one or both of them, but their meaning as it may be gathered from their written agreement. It would not do to allow years after, or at any time after, a written agreement has been executed, upon a disagreement arising as to its meaning, to hear evidence outside the contract as to what the parties meant, simply because the paper admits of a doubt as to its meaning. Parol evidence would not be safer as a guide to the original intention of the parties (in the absence of an allegation of fraud or mutual mistake) than the law's process of confining the inquiry to the agreed document so long as it is susceptible of reasonable certainty in being understood. Otherwise every disputable clause in a written document would open it up to every evil of chance, of misrecollection and of perjury, that the parties have attempted to avoid by reducing the matter to writing.

Under these rules the court did not err in rejecting appellant's amended answer, pleading his interpretation of the contract, although it was said that it was a mistake if the contract did not so express the meaning of the parties, for the mistake, to be available, must have been a mutual mistake, and not that alone of one of the parties to the agreement. It was not pleaded that it was a mutual mistake. In that state of the record it devolved upon the court to construe the writing. That construction was in accord with the one we have given it.

Harmon and Talbutt caused a sale to be made of some of the lots before January 1, 1891. The prices realized were less than \$600 per acre. The sale was discouraging, and marked the enterprise a failure. Whereupon Talbutt and Harmon abandoned the contract, and refused to have anything further to do with it. Early in 1891 appellee brought this suit, alleging the abandonment and consequent breach of the contract, and praying judgment for

some \$51,000 in damages because thereof. Other features of the petition are seized on as showing that appellee was endeavoring to hold appellant and Talbutt bound for a specific execution of their undertaking. But upon the whole, it satisfactorily appears that the real action was to recover damages for the breach of the undertaking by appellant and Talbutt to receive and pay for the land within the time stated. The case from the beginning seems to have been constructed upon that theory. A demurrer to the petition was overruled. The ground of the demurrer is, conceding the suit to be one to recover damages from the vendees for their refusal to take and pay for the property as agreed, that the petition fails to aver that the plaintiff was able and willing to convey to the vendees on January 1, 1891, a good title to the property, and did not aver a tender of a deed; also that the petition did not aver that plaintiff was then willing, ready and able to convey a good title. A contract to sell land, unlike one to sell personal chattels, gives to the vendor choice of two remedies for its breach by the vendee: One, an action against the vendee for specific execution of the contract, in which case the vendor must aver and show that he has the title contracted to be sold, and must tender it. The other, is a suit to recover the damages sustained by the vendor by his vendee's breach of the contract, where the breach is occasioned by the vendee's abandonment. In the latter case the vendor elects, as he may do, to retain the property, where the agreement is executory, and proceed to recoup himself in damages from the vendee. The vendee having broken the contract, is not entitled to have it enforced, if the breach is an abandonment of it, and a refusal to execute his part of it. Nor is it necessary for the vendor to tender to his vendee a deed when the latter has already declared that he will neither pay for the property nor accept the deed. The reason for requiring a tender in an action to enforce the specific execution of a contract is wholly lacking in a suit where it is sought to recover damages because the vendee has abandoned and refused to perform the contract. As the law does not require the doing of a vain thing, it will not require a pleading to aver that the pleader has offered to do what the defendant admits he would not accept if done.

That appellee was able and willing and ready to convey the title as agreed on January 1, 1891, was a necessary allegation, because it was an essential fact, for, although his vendees were in default in failing to take the property, yet to entitle him to recover damages he must have owned the property, and have been in position to have complied with his contract according to its terms. This defect in the petition is one of form. After verdict and judgment, it affirmatively appearing by the record that appellee was able, ready and willing to comply with his part of the agreement within the time fixed by the contract, the defect in the pleading was cured. (*Duncan v. Brown*, 15 Ben Mon., 196; *Roundtree v. Hardin*, 1 Ben Mon., 169; *Hill v. Ragland*, 114 Ky., 209.)

After January 1, 1891, appellee encumbered this property by mortgage, and under which it was sold before this case came on for trial. It is contended by appellant that this act of appellee's was an abandonment by him of the contract; that by that act and its consequences he put it out of his power to comply with his agreement, and for that reason can not recover against his vendees. Where the vendee of an executory contract to buy

land abandons the agreement and refuses to comply with its terms, the vendor upon electing to proceed for damages for the breach, may, after having made his election, and after the time when by the terms of the agreement the conveyance was to have been made, dispose of the property, by sale or otherwise, and without regard to the contract. It is the vendor's property. The contract repudiated by the vendee can not give the latter any right to the land, nor to control it. The only question then open between the parties is the extent of the damages sustained by the vendor for the breach. These he is entitled to recover in addition to the land. (*Mo-Brayer v. Cohen*, 92 Ky., 479.) The vendee has no more right to control the vendor's use or disposal of his own land before the verdict and judgment fixing the damages than he would have after they were so fixed and paid. Upon such breach the quantum of damages is the difference between the contract price and the actual value of the land on the date of the breach, provided the actual value is less than the contract price. In addition, interest may be awarded.

Such was the course pursued by the trial court in this case. That the case dragged along for several years before trial can not affect the right of appellee to recover what is legally due him. Appellant might have insisted on an earlier trial if he had desired it. The delay is reasonably accounted for by appellee. No substantial right of appellant's seems to have been affected by it. The action for a while was on the equity docket. On appellant's motion it was transferred to the common law docket for a trial by jury. Before the order of transfer was made the court decided upon the face of the record that appellant and Talbutt had abandoned the contract as of January 1, 1891. The evidence then in the record, in the form of depositions and exhibits, fully sustain the judgment. Whether there had been such abandonment was an issue in the case. Had appellant moved for the transfer of that issue to the common-law docket when he answered it would have been so ordered. (Section 10, Civil Code.) But he did not then move for it. It was thereafter within the discretion of the trial judge whether he would order it transferred. On the subject of an abandonment by appellant and Talbutt the evidence is all one way. In truth, it is not contended seriously in the argument for appellant that he had not abandoned the contract. It was not an abuse of discretion by the trial judge to decide that question himself, and to send the question of damages to the jury to try. The judgment of the court decreeing that appellant had abandoned the contract January 1, 1891, was not entered till October 24, 1903, although the judgment was in fact announced by the court on October 17, 1903. Before the orders of the latter date were signed the court amended them so as to conform to the facts stated. We see nothing in this prejudicial to appellant, or that was beyond the power of the court to do.

Perceiving no error in the record the judgment is affirmed.

SCHROEDER, &c. v. BOHLSSEN, &c.

(Filed January 25, 1905.)

Leiber & Lincoln and Bodley, Baskin & Flexner for appellants.

J. D. Reed for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Chief Justice Hobson delivered the following response to petition for rehearing:

In the petition for rehearing counsel insist that the court did not correctly state in the opinion the ground on which an affirmance of the judgment was asked; that their position was not that this was a devise that failed, but that their position was that the conditions precedent named in the ninth clause of the will gave only the potential possibility of a legacy arising thereunder, and that these conditions not having been fulfilled, there was never any such status at law under this clause as constituted a legacy in fact. In other words, they say that the clause of the will as to Joseph Schroeder made a conditional gift depending for its ripening into a legacy upon conditions precedent that had to happen before it could have any existence as a legacy, and that, therefore, the twelfth or residuary clause of the will became effective just as if the ninth clause had never had a place in the instrument when Joseph Schroeder died before the testatrix without being restored to his right mind.

We so understand the position of counsel on the original hearing, but it seems to us that the language of the statute is too broad to admit of this construction. The words are: "Which shall fail or be void or otherwise incapable of taking effect." If the word "fail" only was used there would be more ground for the position of counsel, but we must presume that when the legislature added the words "or be void or otherwise incapable of taking effect," they contemplated not only the failure of a legacy given absolutely and without condition, but intended to lay down the rule that should obtain in all cases where the devise is void or otherwise incapable of taking effect. When Joseph Schroeder died, insane in the lifetime of the testatrix, the devise to him became void or otherwise incapable of taking effect according to the ordinary sense of these words. The statute is not to be strictly construed, but, on the contrary, is to be liberally construed with a view to promote its objects. (Kentucky Statutes, section 460.) The legislature obviously intended by the statute to change the common-law rule, and the broad language employed covers conditional devises of no less than those which are absolute where the devisee dies in the lifetime of the testator.

Petition overruled.

Whole court sitting.

HAGER, AUDITOR v. FRANKLIN.

(Filed January 25, 1905.)

Commonwealth's attorney — Compensation—Lien on fines collected — If the Commonwealth's attorney who prosecuted a case has received all the money that is coming to him, that is, \$4,000 per year, then his prior right to a per cent. on judgments collected after he has gone out of office ceases, and the Commonwealth's attorney who is in office when the money is paid into the treasury, if he has not received his \$4,000 for the year, is entitled to the per centum.

N. B. Hays for appellant.

T. L. Edelen for appellee.

Appeal from Franklin Circuit Court.

Chief Justice Hobson delivered the following response to petition for rehearing:

As the law stood previous to the adoption of the present Constitution Commonwealth attorneys were entitled to 30 per cent. of the judgments for fines and forfeitures, and it was held that after judgment was rendered the Commonwealth attorney had a vested interest in so much of the judgment as was allowed him by law. (Stone v. Riddell, 68 Ky., 349; Berry v. Sheehan, 67 Ky., 434.)

As the law then stood some abuses crept in, and so much of the judgment as belonged to the attorney was collected and then little attention was paid to the collection of that part of the judgment belonging to the State. To remedy this defect it was provided in section 98 of the Constitution as to Commonwealth attorneys that "should any percentage of fines and forfeitures be allowed by law, it shall not be paid except upon such proportion of the fines and forfeitures as have been collected and paid into the State treasury, and not until so collected and paid." Pursuant to this provision of the Constitution is section 124, Kentucky Statutes, which gives the Commonwealth attorney 50 per cent. of fines and forfeitures, but provides that he shall not receive any part thereof from the treasury except upon such proportion of the fines and forfeitures as have been collected and paid into the State treasury, and not until so collected and paid. Section 125, Kentucky Statutes, limits the compensation of the Commonwealth attorney from the State treasury to \$4,000.

The purpose of the Constitution and section 124, Kentucky Statutes, was not to change the rule theretofore in force giving to the Commonwealth attorney a vested interest in the judgment when he obtained one, but to require all the money to pass through the treasury so that the State's part of the judgment would be collected. There is nothing in the statute to evince an intention to make any other change in the law as it was then well understood, and Commonwealth attorneys under the present statute who prosecute a case to judgment have a vested interest in the judgment no less now than under the former law. By the former statute the county attorney where he prosecuted, aiding the Commonwealth attorney, was allowed a certain percentage of the judgment, and he had a vested interest in the judgment no less than the Commonwealth attorney. (Stone v. Riddell, 68 Ky.,

§49.) So section 183, Kentucky Statutes, provides that "in all prosecutions in the circuit court when the county attorney is present and assists in the prosecution he shall receive from the State treasury 25 per cent. of all judgments," etc. Under this provision manifestly only the county attorney in office at the time the judgment is rendered gets any interest, for if the judgment is not paid until he goes out of office his successor will be entitled to no part of it, because he was not present and did not assist in the prosecution. By section 1721, Kentucky Statutes, it is provided: "As additional compensation for services in Commonwealth cases, each circuit clerk shall receive from the State treasury 10 per cent. of the amount of all fines and forfeitures recovered in their respective courts and paid into the State treasury, but not until so paid in."

In this section manifestly the circuit clerk who does the work in the case in which the judgment rendered is entitled to the 10 per cent. and not the clerk who is in office when the judgment is paid, for the allowance is made to each circuit clerk as an additional compensation for services in Commonwealth cases, and is to be received out of fines and forfeitures recovered in their respective courts. The money is not to be paid them until it is paid into the treasury, but their rights are vested in the fines and forfeitures recovered in their courts. It can not be presumed that the legislature intended to give the county attorney and circuit clerk a vested right in the judgments rendered and to deny to the Commonwealth attorney, who is chiefly responsible for the prosecutions, a like interest. It is a just principle that he who sows shall reap, and we should not presume that the legislature intended to change the former rule in violation of this principle without a clear expression of its will to this effect.

It will be observed that the State gives 50 per cent. of the judgments to the Commonwealth attorney, 25 per cent. to the county attorney and 10 per cent. to the clerk, thus making 85 per cent., and leaving only 15 per cent. to the State. This shows that it is not the legislative policy to make money for the State out of these prosecutions, but that the purpose of the statutes is to collect the judgments that may be rendered so that the punishments inflicted will be enforced, and that this may be done out of the funds thus brought into the treasury.

The salary of the Commonwealth attorney is limited to \$4,000, and he can not receive out of the treasury in any one year more than this amount. But it is not the purpose of the statute to cut him down below \$4,000 in any one year, if in this year sufficient fines and forfeitures are paid into the treasury to bring him up to that amount. In other words, the Commonwealth attorney, who does the work, has the prior claim on the judgment which he recovers, and if he has not received his \$4,000 for the year he is entitled to the money when paid into the treasury, although this may be after his term has expired.

On the other hand, if the Commonwealth attorney who prosecuted the case has received all that is coming to him, his prior right is out of the way and the Commonwealth attorney who is in office when the money is paid into the treasury, if he has not received his \$4,000 for the year, is entitled to the per centum. In this way the statute holds out an inducement to the prosecuting attorney to secure judgments and also to those who are in office

to have unpaid judgments collected. It is not unreasonable that the attorney who collects a judgment, should be paid for his services and at the same time the attorney who recovered the judgment is also entitled to compensation. As we said in the Chinn case, the fees belong to the office. The 50 per cent. of fines and forfeitures belong to the office of Commonwealth attorney. The incumbent of the office can not receive for his services in any one year more than \$4,000; but where he recovers judgments that are not collected during the year, he may look to these when collected to make up his \$4,000 in so far as he has not received that sum for his services during the year in which the judgments were rendered; and if there is a balance after paying him the \$4,000 for that year arising from such judgments, it may be applied to pay his salary for the year in which the money is paid into the treasury, or the salary of the incumbent of the office at the time the money is paid into the treasury, if there has been a change in the office. The attorney who has a judgment collected and paid into the treasury should be paid for his services, and while he can not have priority over the attorney who recovered the judgment, there is no reason why what is left of the 50 per cent. belonging to the office should not be applied to his salary after the other attorney has received his \$4,000. The language of the statute is: "No Commonwealth's attorney shall be paid, or receive as compensation for his services as such officer, for any one year, from the State treasury, more than \$4,000." (Section 125, Kentucky Statutes.)

The only limitation is that the Commonwealth attorney shall not receive for his services for any one year more than \$4,000. It was not designed to cut him down below \$4,000 because the money that ought to have been paid in one year was paid in the next; nor was it designed to abrogate the rule so long in force that the attorney recovering the judgment was entitled to look to the percentage belonging to the office for his compensation for his services.

The opinion heretofore delivered is extended as above indicated, and the petition for rehearing is overruled.

JONES v. CRAWFORD.

(Filed January 26, 1905.)

Homesteads—Marriage of infant homesteader—Under Kentucky Statutes, section 1707, providing that "the homestead shall be for the use of the widow * * * and the unmarried infant children of the husband, * * * but the termination of the widow's occupancy shall not affect the children," * * * where an infant who occupies a homestead under said act marries, it thereby becomes a member of another or new family, and its right to the homestead ceases.

W. B. Moody for appellant.

Turner & Turner for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge O'Rear.

The question presented for decision by this appeal is whether a homestead right under the statute which had become vested in an infant daughter of the land owner is divested by her marriage during her minority.

By statute (section 1702, Kentucky Statutes) there is exempted to the debtor with a family, who is a resident of this Commonwealth, land occupied by him not exceeding \$1,000 in value, which can not be subjected without his consent to sale for his debts. This right of homestead exemption belongs to the debtor who is a head of the family, and attaches to such of his real estate as may have been selected and is occupied by him for that purpose. Upon the death of such homesteader, by section 1707, Kentucky Statutes, it is provided: "The homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest child arrives at full age. But the termination of the widow's occupancy shall not affect the children." * * *

But for section 1707, upon the death of the homesteader, his property would at once pass to his heirs at law or devisees, subject to the rights of creditors, without any right to the widow or minor children to occupy it, save as they might take as heirs at law or devisees, which would give minors no claim superior to or different from that of major heirs. It is competent for the legislature to remove from liability for debts such portion of the debtor's estate as may be needful to sustain his family. It tends to keep the family together, to keep them from want, and is in harmony with the public policy to encourage the maintenance of the institution of the home. This policy, though varied in many of its features, is now a universal one in this country. It would be incomplete and fall short of its wise and humane purpose did it not extend to the widow and infant children of the debtor after his death. Every reason that existed before upon which it could rest continues with increased force after the death of the debtor. This right or privilege of homestead exemption is a creature of the statute. Its beneficiaries can take only what the statute has given them, and upon the terms named in the act. The heirs at law have no title during their ancestor's life to his property. Upon his death they take simply what the law gives them, and subject to the terms imposed by law. There is no inherent natural right of inheritance. So when the legislature created the privilege of homestead exemption in favor of a householder, and continued it after his death for certain members of his family, it was competent for the law-making body to select those members whose interests and whose relation to society were such as to bring them within the public policy treated of by the enactment, and who should for these reasons be favored by the statute. It was likewise competent, and perhaps necessary, to provide in what contingencies the right so conferred might be lost or otherwise terminated. The widow, by abandonment of the homestead, and the children upon reaching majority, lose their rights in the homestead as a homestead. The unity of the family—of the one family—of the deceased owner is looked to. When the widow abandons the homestead, as by remarrying and removing permanently from it, she is no longer regarded by the law, for the purposes of the application of the benefits of this statute, as a member of that family. When an infant child reaches his majority, he, too, is no longer a member

of the decedent's remaining "family," within the contemplation of the statute. If an infant child marries, it thereby becomes a member of another family, that of his, or her own, a new family, the head of which would be entitled to his or her own homestead exemption as such head of a family.

By marriage the infant does not bring the spouse into the old family as a member of it in law.

Counsel for appellee argue that an infant is incapable of contracting or of waiving his or her legal rights by conduct; that as appellee's right to occupy the homestead in this case had once attached, her subsequent marriage during her infancy could not waive that right because she was then under the disability of infancy. But it must be remembered that the disability of infancy, as discussed in law, is a status created by the law, and may be subject to limitations or exceptions by the law makers. The statute under investigation is an exception by legislation to the general rule of law regarding the disability of infants. Under it the infant's act, whereby he is removed from the class who may claim the benefits of the statute, is what was contemplated by the legislature, and was made a condition concurrent to the enjoyment of the statutory privileges.

The judgment of the circuit court is reversed and cause remanded for proceedings not inconsistent herewith.

THE LOUISVILLE & EASTERN R. R. CO. v. POULTER'S ADM'R.

(Filed January 26, 1905.)

1. Change of venue—Unless application be made at the appearance term a party is not entitled to a change of venue, where he failed to give ten days' notice to the opposite party of his intended application therefor, or failed to file a verified petition accompanied by the affidavits of two credible housekeepers of the county.

2. Undue influence of counsel—A party is not entitled to a change of venue by reason of the alleged undue influence of the counsel of his adversary in the "community" where the trial is to be had.

3. Master and servant—Injury to servant—Falling of defective scaffold—Contributory negligence—Question for jury—Where an employe was killed by the falling of a defective scaffold erected by the master and used by the servant in the building of a depot, there being conflicting evidence as to the servant's knowledge at the time of its defective condition, it was a question for the jury to determine whether the servant was guilty of contributory negligence in using it, under proper instructions of the court.

4. Peremptory instruction—The giving of a peremptory instruction to find for the defendant is improper where there is any evidence to support a verdict for the plaintiff.

5. Errors not excepted to—This court can not consider any alleged improper remarks made by the trial judge to appellant's counsel in the hearing of the jury unless it is shown by the bill of exceptions to have been excepted to at the time.

E. R. Atkinson, O'Neal & O'Neal and D. H. French for appellant.

L. W. Gates, R. F. Peak and S. E. DeHaven for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Settle.

The appellee, Andrew M. Sea, as administrator of the estate of Henry Poulter, deceased, obtained in the Oldham Circuit Court a verdict and judgment against the appellant, the Louisville & Eastern R. R. Co., for \$4,000 in damages for the death of his intestate, caused, as alleged in the petition, by the falling of a defectively constructed scaffold used by appellant in erecting a depot at Beard's Station, the intestate being at the time of his death a day laborer and general helper in the work of erecting the depot by employment of appellant.

As to the manner of his death, it was averred in the petition that while he was assisting other employees of appellant in placing in position for being attached to the depot building a large bracket of 200 pounds weight, and necessarily standing upon the scaffold for that purpose, that structure broke and fell, thereby precipitating the intestate to the ground, and causing the heavy bracket to fall upon him and fracture his skull, of which he shortly thereafter died.

It was further averred in the petition that the scaffold was negligently and improperly constructed by appellant's servants of defective and unsuitable material and in such a negligent and unskillful manner that when completed it was unfit and dangerous for use by appellant's workmen, and that its defective and dangerous condition was known, or by the exercise of ordinary care could have been known, to appellant and its other servants at work upon the depot, but was unknown, and by the exercise of such care could not have been known, to the intestate. The answer, by specific denial, put in issue the affirmative matter of the petition, pleaded contributory negligence upon the part of the intestate, and that he knew, or by the exercise of ordinary care could have known, of the unsafe condition of the scaffold, if it was unsafe, before he got upon it.

The affirmative matter of the answer was controverted by reply, and upon the issues thus formed the parties were put upon trial and proof with the result stated in the outset of the opinion. Numerous errors were assigned by appellant in support of its motion for a new trial, but they were regarded by the lower court as insufficient; consequently a new trial was refused.

One of the grounds for a new trial was that the court erred in overruling appellant's motion for a change of venue and continuance. The case was tried before a special judge because the regular judge was of counsel for appellee under a contract of employment made before his election. The affidavit of appellant's agent in Oldham county was filed in support of the motion for a continuance and change of venue, in which it was stated that, owing to the undue influence of appellee's attorney, the regular judge of the court, appellant could not have a fair trial in the "community;" that the attorney mentioned was elected judge of the court in which the action was then pending at the preceding November election and had acted as judge of such court during the term then in progress until the day before the calling of this case for trial, and that on the first day of the term the attorney, as judge of the court, in charging the grand jury made to that body, in the hearing of the members of the petit jury, summoned for the

term, certain improper and inflammatory statements in regard to corporations and the directors of corporations, which are set out in the affidavit, and that the members of the petit jury would naturally be unduly influenced by such language from the judge of the court, and thereby prejudiced against appellant in the trial of its case.

The answer of appellant had been filed at the previous term of the court at which term the cause was continued. The motion for a change of venue and continuance was not, therefore, made at the appearance term, but at the second term of the court after the institution of the action, and not in fact until the case was called and both the parties had announced ready for trial.

Section 1094, Kentucky Statutes, provides: * * * "A party to any civil proceeding, triable by a jury in a circuit court, may have a change of venue when it appears that owing to the undue influence of his adversary in the county, or to the odium which attends himself, or his cause of action or defense, he can not have a fair trial."

Section 1095 provides "before an order for a change of venue shall be made ten days' notice shall be given to the party."

Section 1096 provides: "Application for an order for a change of venue must be made by petition, verified by the affidavits of the party, supported by the affidavits of at least two credible housekeepers of the county in which the action is pending. The adverse party may file affidavits controverting the ground relied upon for a change of venue, and the court may hear other evidence for or against the application, and shall exercise a sound discretion in deciding the question."

Manifestly appellant did not comply with the provisions of the several sections of the statute, supra, in the matter of its application for a change of venue, as it neither gave the notice, nor filed the verified petition accompanied by the affidavits of two credible housekeepers of the county required thereby. In filing the affidavit upon which the motion for a change of venue and continuance was based, appellant attempted to avail itself of the privilege accorded by section 1103 of the statute, supra, which provides: "At the appearance term of a civil suit if a party desires a change of venue he shall state the facts and reasons therefor in an affidavit, which shall be good cause for a continuance, if deemed sufficient by the court, provided the application for a change of venue be made during the term."

Obviously appellant could not proceed under this section, as it had no application, for the simple and conclusive reason that the motion was not made, or affidavit filed, at the appearance term, but at a subsequent term, and after both parties had announced themselves ready for trial, as before stated. It is, therefore, evident that the trial court did not err in overruling the motion. But if this were not so, it is further evident that the affidavit was insufficient to authorize the order asked of the court. The affidavit set forth certain alleged intemperate remarks made by one of appellee's attorneys, now, and at the time of the trial, judge of the Oldham Circuit Court, in charging the grand jury. If they were uttered as stated in the affidavit, though in the hearing of the petit jury, their very intemperateness doubtless prevented them from having a hurtful effect upon the minds of the hearers.

While it is in effect stated in the affidavit that the remarks in question were made in the hearing of the petit jury, some of whom would be taken upon the jury to try appellant's case, it does not appear from the record that any of them in fact served upon the jury. We think the grounds presented by the affidavit insufficient in another respect. They relate alone to the undue influence of appellee's attorney in the "community" as in the way of appellant's securing a fair trial, whereas the statutory ground for a change of venue is the undue influence of the opposite party in the county. We apprehend it will never be considered that the great or unusual influence or skill of counsel for one of the parties to an action will authorize the granting of a change of venue to the other party, that his case may be tried where the influence of his adversary's counsel would be less powerful. It is insisted for appellant that the court erred in refusing the peremptory instruction asked by its counsel after the introduction of appellee's evidence. A peremptory instruction would not have been proper unless there was a total failure of proof.

According to the evidence, the scaffold, by the falling of which appellee's intestate lost his life, was constructed under the supervision of appellant's foreman, Wm. Cox, for the use of the workmen engaged in erecting its depot. The scaffold consisted of three upright scantlings six feet west of the depot, with planks, called outriggers, six by three quarter inches nailed to each of the upright scantlings and to the building, the planks or outriggers acting as a support for the planks used as a floor of the scaffold. The floor of the scaffold was about seven or eight feet above the ground. The distance between the northwest corner upright of the scaffold to the middle upright was about eight feet, and from the middle upright to the southwest corner was about fourteen feet. While the evidence was conflicting as to the number of braces on the scaffold, there was no conflict as to the fact that the middle outrigger had a knot in it, which was about midway between the end of the outrigger nailed to the middle upright scantling and the end nailed to the doorfacing of the depot.

We think the weight of the evidence showed that the knot greatly weakened the outrigger, which fact, in connection with the further facts that the distance between the south corner upright and the middle upright was fourteen feet, and that the scaffold was defectively braced, caused it to give way and fall. The proof also conduced to prove that the scaffold as a whole was a frail, unsubstantial and unsafe structure, defective in material and construction, and unequal to the task of supporting the combined weight of the 200 pound bracket and from two to four workmen who were required to get upon it to attach the bracket to the depot. In brief, we think it sufficiently shown by the evidence that appellant, through its superintendent, Cox, and other skilled employes then at work upon the depot, was guilty of negligence in thus constructing and maintaining the scaffold, and that it and they knew it to be unsafe and dangerous for use by its employes. Upon the other hand, there was evidence tending to show that the intestate knew, or ought to have known, of the dangerous construction of the scaffold, as he gave some assistance in erecting it; that is, by the orders of Cox he carried to it from an adjacent point about the depot some of the material used in its construction, and probably gave some other assistance to those by whom

It was put up. It appeared, however, from the evidence that he was a plasterer by trade, and that while he had occasionally done a little rough carpentering, he was practically without knowledge of or skill in that trade. It was for the jury to determine from all the evidence whether he was enough of a carpenter to know, after having given some assistance in erecting the scaffold, that it was defective and dangerous.

The several workmen of appellant testified that the intestate was told to support and push the end of the 200 pound bracket that was being adjusted to its place on the depot building, in doing which his proper place was on the floor of the scaffold, just behind one of the workmen who had the brace on his shoulder, but that instead of remaining on the scaffold the intestate negligently stood upon a ladder leaning against the scaffold and one of its braces; that his weight upon the ladder caused the brace to give way, as it was fastened with but one nail, and that the giving away of the brace so weakened the supports of the scaffold as to cause it to fall. They also testified that, in their opinion, if the intestate had remained upon the floor of the scaffold it would not have fallen, and that he had been warned by the superintendent not to stand upon the ladder.

Upon the other hand, two witnesses introduced by appellee, Botts and Casey, testified to the effect that the intestate was not upon the ladder when the scaffold fell, but upon and near the middle of the floor of the scaffold, where it was his duty to be. Botts did not see the scaffold fall, but in passing a very short time before it fell he saw the position of the intestate as described, and Casey said he saw the scaffold fall, and as according to his testimony, the intestate was still on the floor of the scaffold and near the middle when it fell, it is not probable that he got upon the ladder after Botts passed. At any rate, Casey testified that he saw the intestate when the scaffold fell, and he was then on the scaffold, and not on the ladder. Upon this point there was, therefore, a conflict of testimony, appellant's proof conducing to show the scaffold fell because of the breaking of the brace by the ladder upon which the intestate was standing, and that he was negligent in thus standing, but the testimony of appellee conduced to show that the fall of the scaffold was not due to that cause, but to its defective construction and inherent weakness, and more especially by the breaking of the outrigger containing the knot. If the jury had believed appellant's testimony they would have found that the intestate's death was due to his own negligence, but as they found for appellee, they necessarily did so upon the ground that the evidence introduced in his behalf showed that his death was caused by the negligence of appellant's servants. As it can not be said that there was no evidence to support the verdict, the giving of the peremptory instruction asked by appellant would have been improper.

We think the instructions given by the court were unobjectionable, except that, in one respect, they were unduly favorable to appellant, in that they imposed upon the intestate the duty, equal and corresponding to that of the master, to know that the scaffold was safe before going upon it. Such is not the law of the case. Upon the contrary, the correct rule is that the duty of furnishing reasonably safe tools and materials and place to work is primarily upon the master, and that the servant is under no duty to discover such defects, and unless he knows of their existence, or they were patent

and obvious to a person of his experience and understanding, he will not be precluded from a recovery for injury resulting from the failure of the master to perform the primary duty referred to.

This rule has been repeatedly approved by recent decisions of this court. (Phisterer v. Peter & Co., 25 Ky. Law Rep., 1605, and cases therein cited.) It follows, therefore, that the authorities relied on by counsel for appellant are not in point. The record does not show the alleged improper statement claimed to have been made by the trial judge to appellant's counsel in the hearing of the jury, or that an exception was taken thereto, consequently we have been unable to consider it. We are also unable to see that any ruling of the court upon the admission or rejection of evidence was prejudicial to the appellant. Nor was there error in the refusal of the court to give the instructions asked by counsel for appellant.

Wherefore, the judgment is affirmed.

BUEY'S ADM'X v. CHESS & WYMOND CO.

(Filed January 26, 1905—Not to be reported.)

1. Damages—Negligence—In this action the evidence showing that the deceased told the foreman that his machine was out of level, and needed new appliances; that he made the repairs the night before the accident, and that when he went to oil it he took the precautions to keep the belt from running over on another pulley so it would not be started, show that he was conscious of the danger he was in, and this being true his death was the proximate result of his own negligence.

2. Same—Master and servant—It is the duty of the master to furnish the servant with reasonably safe machinery for his work. Not that such machinery may not be dangerous in its use, even when properly used, but it must be in reasonably fit condition for the use in which it is employed, and must be kept in reasonable repair. The servant is not bound to increase the hazard of his employment by working at machinery or with tools in unfit condition, but where he knows of the danger and continues without complaint, or without bringing it to the master's attention, he assumes for the time the increased hazard in addition to the ordinary risks of his employment.

Bingham & Davies for appellant.

O'Neal & O'Neal for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge O'Rear.

Appellee operates a cooperage plant. Edward Buey was an employe in the plant. He operated a machine used to flare the steel hoops to be placed on barrels. He had worked in that factory for about thirteen years, and at that machine, or one like it, for about seven years. The propelling power was imparted to the machine from a general shaft above by means of a belt operating from it to a pulley attached to the machine. There were two pulleys attached to the shaft of the machine, one stationary in its position on the shaft and the other loose. The power was detached from the machine

by shifting the belt from the stationary pulley, by which the machine was run, to a loose pulley adjoining it, a common mechanical device.

Unless the machine was set level the belt would not stay on the more elevated pulley when they were in motion, but would slide on to the lower one. This unlevel condition of the machine might be produced either by a sagging of some part of the foundation, or by the wearing of the babbitt metal bearings in the journals accommodating the shafting of the machine. It was the practice in appellee's factory to overhaul these machines at intervals and re-adjust their levels, and make other repairs if needed. It was the duty of Edward F. Buey to report the condition of his machine to the foreman of the shop when it became out of fix. He also repaired it at the direction of the foreman. On Thursday before the accident by which he was injured and lost his life he reported to the foreman that his machine needed new babbitt metal; that it was unlevel. The necessary material was furnished him to make the repairs indicated by his information, and he and his brother, also a workman in the plant, and who has since been made a foreman, set to repair it. They did repair it that night. No further complaint was made of it before the accident. On the following Saturday morning, while attempting to oil his machine, a part of decedent's duty, he shifted the belt from the stationary to the loose pulley in order to stop the machine so as to get at its parts. He placed a block of wood, about one inch thick and one foot long, between the cogs of the machine so as to prevent its starting up if the belt should slip back onto that pulley. In addition he, with his disengaged hand, sought to ward off the belt from slipping back. Whether his hand was caught by the rapidly moving belt, and his equilibrium lost by it, is not clear, but at any rate he was thrown, or stumbled and fell, violently striking his head and inflicting a fatal wound.

In this suit by his administratrix against his employer to recover the damages because of his death it is charged that he was injured and killed by trying to handle a dangerous machine, which was out of repair, and unfit for the use for which it was being employed, which conditions were known to the master, or could have been discovered by it with ordinary care, and that they were unknown to him, and could not have been discovered by him with ordinary care. At the close of the plaintiff's evidence the trial court peremptorily instructed the jury to find for the defendants. The grounds of the court's action are set forth in the charge he gave the jury in granting the motion. It was found by the court that there was some evidence that the machine was out of repair, was unlevel, and unusually dangerous because of that fact, and that the master knew, or by the exercise of ordinary care might have known, of the fact in time to have avoided the injury. The court also found that there was some evidence to go to the jury that decedent was injured as the proximate result of the defects in the machinery. But the court found that plaintiff's own evidence showed that her decedent was aware of the unsafe condition of the machine, and of its danger to him in continuing to use it while in that condition. Because of the fact last stated the court granted the motion for the peremptory instruction. Counsel for appellant do not criticize the circuit judge's statement of the law governing the case, but claim that the facts found by the court did not

exist, or at least were not shown to exist; and that whether they did or not, was a fact to be found by the jury.

Before going further into the trial court's finding of the fact we will state shortly the law which should have been applied. It is the duty of the master to furnish his employes reasonably safe machinery with which to work. Not that machinery furnished may not be dangerous in its use, even when properly used, but it must be in reasonably fit condition for the use in which it is employed. It must be kept in reasonable repair. The master's duty extends to seeing that the machinery is in that condition of repair, and consequently he must use reasonable endeavor to keep himself informed of the condition. This the master may do by requiring the servant in charge of the machine, where he is competent to do so, to ascertain its condition, and to report it to the master, or to the superior in charge, and who represents him. The servant is not bound to increase the hazard of his employment by working at machinery or with tools in unfit condition. By bringing the fact, where it is known to the servant, to the master's attention, the defects can be remedied by the one in authority, or the servant be absolved from the increased risks incident to their use, if the danger is not such as that none but a reckless person would continue their use in that condition. When, however, the servant actually knows of the imperfection, and of the danger it involves to him, and continues without complaint, or without bringing it to the master's attention, he assumes for the time the increased hazard in addition to the ordinary risks of his employment. The law requires the master to do what he reasonably can do toward protecting his work in employments dangerous to life or limb. But employers are not omniscient. They can not actually know the condition of every piece of machinery or tool at every instant of its use. The workman who has it in immediate charge has the best opportunity for learning of such defects as may occur at any moment, and are open to his view. It is his duty to report it so that it can be repaired. If he fails in that duty the master may or may not be liable if some other person is injured by it, but if the neglectful servant himself suffers an injury from it, the master having no knowledge of the situation, it is a safe rule that lets the negligent servant bear the consequences of his own action.

Or if, in the nature of his employment and use of the machine or tool, the servant must learn of its actual condition, but for his own negligence in failing to do his duty knowledge of the actual condition of the thing will be imputed to him as if he had learned, for one ought not to profit by his own breach of duty. Appellant's intestate being dead, and not having retained full consciousness after his injury, it is said it is impossible to say just what was in his mind; and that as it is shown that the machine was unfit, and that the injury was caused by that fact, the question of the injured man's knowledge was a question of fact, to be decided by the jury upon all the evidence; that unless such knowledge was found to have existed in the decedent's mind, his estate is entitled to recover in this case. Where the plaintiff's evidence shows facts constituting *prima facie* a right to recover, and shows in addition other facts which defeat the right, it is always within the province of the court to direct a nonsuit, for the plaintiff can have no right to recover at all if all he has proven be true. If the circum-

stances were such as that the fact might have been decided from them either way, then it was a matter for the jury to determine whether the disputed fact did or not exist. But where the circumstances, as shown by plaintiff's evidence, all point to one conclusion, and in fact established it to the exclusion of others, the fact will be treated as one established and true for the purpose of the motion. For the purpose of deciding the motion for peremptory instruction, in its nature a demurrer to the evidence, all that the plaintiff has proven is taken as true.

Edward F. Buey being dead and not having spoken of the accident, it is incumbent upon whoever tries the fact to determine from the circumstances what his knowledge was at the time of his injury. His familiarity with the machine, and the fact that he had successfully operated it for many years, tends to prove his familiar acquaintance with it, as well as his actions at the time afford evidence of what he knew on the subject of its condition and danger to him. A powerful machine, used in rolling steel hoops, propelled by a tremendous force, is so obviously dangerous to human life and limb that he could not have been ignorant of the fact at his age, twenty-five, and with his experience and observation in working at it. The fact that he told the foreman it was out of level, and needed new babbitt metal for the journals, shows that he was aware of the needs and of what to do to remedy them. In addition, in making the repairs on the Thursday night before the accident he and his brother discovered that the foundation, partly composed of a wooden block, was decayed in part, by which the machine was allowed to sag; that he knew the replacing of the babbitt metal did not fully overcome the lack of perfect equilibrium of the machine, is shown by the fact that when he went to oil it Saturday morning he took the precautions indicating his knowledge that the machine was not then level. These very precautions, taken to keep the belt from running over on the stationary pulley and starting up the machine, show that he was conscious of the danger to him if it did start up while he was oiling it. Besides all that, the nature of his employment, of his duty in connection with the operation of this machine, was such that if he did it, he was bound to know of the very defects that existed. These things being true, and the master having no other knowledge or notice of the trouble, as a matter of law decedent's injury and death must be held to be the proximate result of his own negligence.

The peremptory instruction was proper and the judgment must be affirmed.

CAIN, BY, &c. v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed January 27, 1905—Not to be reported.)

Railroads—Putting passenger off at wrong station—Damages—Evidence—In an action for damages for being put off of a train at the wrong station, and having to walk in the night through the sleet and cold to her station, it was competent for the defendant company to prove by one Wilson and his wife that they invited the plaintiff to stay with them all night at the station where she was put off, as she is not entitled to recover for injuries she could reasonably have avoided, or enhance the damages by her own imprudent conduct.

Sweeney, Ellis & Sweeney for appellants.

Benjamin D. Warfield, Wilhur F. Browder and Reuben A. Miller for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Paynter.

Maud Cain, who sues by her next friend, bought a ticket at Owensboro for Utica, a station on defendant's line. She boarded a train for her destination, and as the train approached Sutherland, an intermediate station, it was called out, and she avers that the conductor told her it was the station where she was to get off; thereupon he picked up her valise and carried it out for her, and just as the train was leaving she discovered the mistake. She avers that it was a cold and sleety day in February; that she was compelled to walk to Utica, some miles distant, reaching there after dark; that in going along she fell through a trestle and hurt herself; that she suffered physical pain and mental anguish in consequence of her forced journey to Utica. She was about fifteen years old at the time of the occurrence, and it was the first time she had been on a train. The defendant denied the material allegations.

The plaintiff's testimony conduces to support the averments of the petition. The defendant introduced two disinterested witnesses who testified that the plaintiff voluntarily left the train at Sutherland; that she carried her valise from the train herself; that they told her at the time the train was pulling out that it was not the station at which she desired to get off. The conductor testified that he had no recollection of putting her off at Sutherland. But the evidence of the two disinterested witnesses was far more satisfactory than the conductor's, because they had a distinct recollection of what occurred.

The court gave the jury three instructions. Nos. 1 and 3 are as follows:

"Instruction No. 1. The court instructs the jury that if they believe from the evidence that on the 17th day of February, 1904, the plaintiff purchased a passenger ticket from the agent of the defendant, at Owensboro, Ky., for transportation on one of defendant's passenger trains, from Owensboro to Utica, a station on defendant's railroad, and she then and there took passage on defendant's passenger train, and before said train had reached Utica, but had only reached Sutherland, a station nearer to Owensboro than Utica, and not the point of her destination, the agents or servants of defendant notified her that she had reached Utica, and she relied on their statements as true, and got off the train at Sutherland, and did not discover that Sutherland Station was not Utica Station, and could not discover it in the exercise of ordinary care and caution, considering her age and experience in traveling, and did not discover that she was at the wrong station until the train had left her, and said Utica was many miles from Sutherland, and the plaintiff was compelled to, and did, walk to Utica Station, her point of destination, and suffered physical and mental pain therefrom, and was inconvenienced and annoyed as a direct and proximate result of said walk, the jury should find for her whatever damages she sustained, not exceeding \$3,500, the amount claimed in the petition.

"Instruction No. 3. The court further instructs the jury that if they be-

lieve from the evidence that at the time plaintiff got off the train at Sutherland no officer or agent of the defendant company ordered or directed her to do so, or that plaintiff negligently or carelessly got off at said station, and but for her own negligence and carelessness she would not have been left at Sutherland, or, that the getting off of the train by the plaintiff at Sutherland Station was her own negligence and carelessness, then the jury should find for the defendant."

The instructions given were more favorable to the plaintiff than she was entitled to have, but we will not point out wherein they were more favorable, except to the extent that we deem it necessary in this opinion.

Instruction No. 1 submitted to the jury the question as to whether the conductor had put the plaintiff off at Sutherland under the circumstances claimed by her. The jury found against her on that question.

Instruction No. 8 denied her right to recover if she voluntarily left the train at that point. The conductor had no right to suppose that she would get off the train at a station other than the one for which her ticket called. He had the right to presume that a girl of her age was possessed of sufficient intelligence to remain on the car until her station was called out. So if she left the train voluntarily at Sutherland, the failure of the conductor to discover that fact and have her to return to the train was not a breach of duty. In the case of Louisville & Nashville R. R. Co. v. Jordon, 112 Ky., 473, an infant eight years old was left at a station other than the one to which it was destined, and the court said: "The law required of appellant that it should exercise the highest degree of care to safely transport appellee to her point of destination. But this duty did not require that appellant's conductor should act as a special attendant to plaintiff during the journey to see that she did not leave her seat. He had the right to presume that the friends and relations of appellee would not have consented to her going alone upon such a journey unless she was possessed of sufficient intelligence to obey the instructions given her to occupy her seat until her destination was reached. His duty was to see after the comfort and safety of the passengers generally and not one in particular."

On the trial of the case the court permitted Wilson and his wife (the two persons whom we have designated as disinterested witnesses) to testify that they invited the plaintiff to remain with them over night. Had she done so she would have escaped the consequences of the trip through the cold to Utica. This testimony was competent. In the first place, it was not prejudicial to the plaintiff on the question as to whether the conductor wrongfully put her off at Sutherland, because it did not in the slightest degree tend to prove that he had not wrongfully put her off at that point. Under the instructions of the court, notwithstanding this testimony, the jury was authorized to allow her damages for her time and suffering in consequence of her trip to Utica, if it believed the conductor had wrongfully put her off at Sutherland. It was competent evidence to go to the jury, because if a prudent person under the same circumstances would have accepted the invitation to remain with the Wilsons, rather than to have made the trip through the sleet, she is not entitled to recover for injuries resulting therefrom, because she could not be thus allowed to enhance her damages by reason of imprudent conduct. The first instruction was prejudicial to the

appellee because it did not submit this question to the jury. Where a passenger is wrongfully put off of a train in a field or woods, he has the right to go to a place of safety, or if it is a reasonable thing to do, to proceed to the place of destination, and may recover damages proximately flowing from the wrongful act. If the same passenger is put off in a city or town, or other place where reasonably comfortable quarters may be had, he would not have the right to journey in bad weather over bad roads to his destination, which would cause suffering and pain, and recover therefor, for he would thus produce an injury to himself which did not proximately flow from the wrongful act. As the verdict was for the defendant we deem it unnecessary to discuss the question of the plaintiff's right to recover for mental suffering, hence we express no opinion on the part of instruction No. 1 relating to that question.

The judgment is affirmed.

FENLEY, &c. v. CITY OF LOUISVILLE.

(Filed January 27, 1905.)

Sale of land for taxes—Life estate—Remaindermen—Process—In a proceeding to enforce a lien on land for city taxes listed by the life tenant, it was error to sell the land for the taxes primarily owing by the life tenant, where process was only served on the owner of the remainder interest, although there was an allegation that the life estate was insufficient to pay the taxes. The life tenant should have been before the court, and his interest first sold so that the remainderman could protect himself by buying in the life estate.

W. O. Harris for appellants.

Henry L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

This action was instituted in the Jefferson Circuit Court, Chancery Division, for the purpose of recovering against William Johnson and Mary E. Fenley and Oscar Fenley, her husband, municipal taxes for the years 1895, 1896, 1897 and 1898, on a parcel of land 57 by 92 feet, with improvements thereon, on the southeast corner of Green and Floyd streets, being lot No. 1 in block 75 on the city assessor's maps.

It is alleged in the petition that the above-named persons were, on the 1st day of September of each of the years 1894, 1895, 1896 and 1897, the owners and holders of the land and improvements above described; but in each of the four paragraphs it is alleged that the land was assessed as the property of "William Johnson, etc."

The original tax bills for the four years, authenticated as by law required, are filed as exhibits with the petition, and made part of the pleading. These tax bills show that the property was assessed in the name of William Johnson, "holder present estate." Process was issued against all of the defendants, and served on Mary E. Fenley and her husband, Oscar Fenley, but not on William Johnson. No answer was made by Fenley and wife, and after the expiration of the time allowed by law for answer the case

was submitted, and judgment by default entered against them for the full amount of the taxes for the various years as shown by the bills, with accrued interest and costs. It was further adjudged that the city had a lien upon the land and the improvements described in the petition, and this was enforced, and the property ordered to be sold by the commissioner for the satisfaction of the judgment. This was afterwards done, and the city became the purchaser for the tax claim ascertained to be due it, \$340.99, although the property was appraised at the sum of \$4,300. From this judgment Fenley and wife have appealed.

There seems to be a substantial variance between the allegations of the petition and the tax bills filed as exhibits, the allegations of the pleading being that Johnson and Mary E. Fenley were joint owners of the land; but the tax bills show that Johnson was the holder of a life estate, with remainder to Mary E. Fenley. Section 2990, Kentucky Statutes (charter of cities of the first class), provides that "where remainders and reversions of future estate are outstanding, the holder of the particular estate shall be assessed with the words 'holder of the present estate' added to his name." * * * Section 2996 provides, among other things, that "each bill shall be authenticated by the assessor by his signature, or a stamped fac simile thereof, and when so authenticated it shall be prima facie proof that all steps have been taken to make it a binding tax bill for the amounts and purposes and against the person and property therein named or described." * * *

The tax bills, therefore, as said before, show that Johnson was the holder of the particular estate, and Mary E. Fenley was remainderman. The rule is that, where the allegations of a pleading are contradicted by the exhibits filed, the latter control. (*Union Boiler and Tube Cleaner Co. v. Louisville Railway Co.*, 25 Ky. Law Rep., 122; *Newman's Pleading and Practice*, 252, and cases there cited.)

The question, then, presented is whether or not it was error to sell the remainder interest for the taxes primarily due from the holder of the particular estate. This very question arose in *Dumesnil v. City of Louisville*, 2 Ky. Law Rep., 431, wherein it was said: "In case 193 the chancellor, at the time the cross petition of the city was filed, had no jurisdiction to sell the real estate for the payment of taxes, and, besides, if the jurisdiction subsequently attached, the life tenants were liable for the taxes, and that interest should have been subjected, and not the interest of the infants. The remainderman has neither rents or profits, nor the right to enjoyment of the estate; and we see no justice or equity in having the interest of the party in remainder sold until the estate of the life tenant is exhausted. Nor will the allegation that the life estate is insufficient authorize a sale of the remainder. It must appear that the life tenant has no other property out of which the taxes could be made. The tenant for life is primarily liable, and why should the chancellor subject the estate of the remainderman to the payment of the taxes when the party primarily liable is able to pay; and especially when those in remainder are infants or married women, and when no possible injury can result therefrom to the city?" (*Johnson v. Smith*, 5 Bush, 102.)

As Johnson was not before the court, no interest of his passed under the judgment or sale. It, therefore, results that the remainder interest alone

has been sold to satisfy a claim for which it was, at furtherest only secondarily liable. We are not called upon to decide, and we do not decide, that the city has not a lien to secure its taxes upon the fee-simple estate (section 8006, Kentucky Statutes); but we are of opinion that, in all fairness and justice to the remainderman, the holder of the particular estate should be brought before the court and his interest first sold, so that the remainderman could protect himself by buying in the life estate, and not, as in this case, sell the remainder interest and leave the real debtor, the holder of the particular estate, in full possession of his property, free from any lien for taxes, that having been paid off by the sale of the remainder. No better illustration of the injustice arising from the error pointed out in the sale of the property in this case could be made than the result of this particular sale. The remainder interest in property worth \$4,800 is put up at public outcry and purchased by the plaintiff for the amount of its debt, \$840.99; whereas, if the life estate had been first put up the remainderman could have forced the life tenant to buy in his estate, and thus pay the taxes he owed, or she could have purchased his estate, and, in this way, paid the city its debt, and afterwards owned the fee simple.

For the foregoing reasons the judgment is reversed for proceedings consistent with this opinion.

CARPENTER v. CARPENTER'S TRUSTEE.

(Filed January 31, 1905.)

Wills—Devise in trust—Action to vacate—Construction of will—Extrinsic evidence—By the will of John B. Carpenter the following trust was created: "6. I direct the share of my son, E. A. Carpenter, to be paid into the hands of a trustee to be appointed by the Hart County Court, to be used for his benefit and to keep him from want, but that it be not paid into his hands." A trustee having been appointed under the will, the cestui que trust has instituted this action to vacate the trust, alleging that it was made by his father under a misapprehension of plaintiff's physical and mental condition, etc. Held—That the case at bar presents an active trust where the trustee has the sole management and control of the estate, and the question involved is whether evidence aliunde can be introduced to establish for a testator a motive for his action when he has expressed none in his will, and where his language is perfectly plain and unambiguous. This we hold can not be done, and the opinion of this court in Webster v. Bush, 19 Ky. Law Rep., 565, is no longer to be regarded as authority.

C. B. Larimore, H. W. Curle and C. B. Dowling for appellant.

D. A. McCandless for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Barker.

This action involves a construction of the following item of the will of John B. Carpenter, deceased:

"6. I direct the share of my son, E. A. Carpenter, to be paid into the hands of a trustee to be appointed by the Hart County Court to be used for his benefit and to keep him from want, but that it b not paid into his hands."

The will of the father was admitted to probate, and the appellee, Truax Sturgeon, appointed trustee by the Hart County Court. Afterwards the cestui que trust instituted this action in the Hart Circuit Court against his trustee, setting up in his petition the foregoing item from his father's will, and alleging, substantially, that for three or four years before his father's death he (plaintiff) had suffered greatly from paralysis, and was unable to labor for his support, and that his father, "probably thinking or believing that his mind was impaired, or would become impaired by reason of the paralysis, which this plaintiff denies, and which was a wrong conception if it was conceived by his father that his (plaintiff's) mind was impaired, or would become impaired, by reason of the severe stroke of paralysis," placed his (plaintiff's) estate in trust as shown in the foregoing item of the will; that since his father's death his health has so improved as to render him physically able to prudently manage and control his estate, which is now withheld from him by his trustee, Truax Sturgeon; and he prays that the trust be vacated and the fund constituting it be turned over to his hands for management, etc. A general demurrer was interposed to this petition, which was sustained by the court, and the appellant declining to plead further, was dismissed.

This action is based upon the opinion of this court in the case of Webster v. Bush, Trustee, 19 Ky. Law Rep., 565, which involved the construction of a clause in a will in all respects similar in principle to that at bar, in which it was held that where a testator devised an estate in trust for his daughter, under the supposition that she was of feeble mind, the court was authorized, upon an allegation that the physical incapacity had ceased to exist, to try this question, and if it was established by the evidence, to discharge the trust. In that case Judge DuRelle delivered a dissenting opinion, which contains an admirable exposition of the law, and from which we adopt the following:

"With the wisdom or unwisdom of the clause above quoted from the will this court has nothing to do, except in so far as it might shed light on the intention of the testator, if ambiguity existed. There was no ambiguity. The testator had the absolute and unconditional right to place upon the devise to his daughter the limitations which he imposed, and no court has a right to assign to him a motive for these limitations, and by denying the existence of a reason for that motive create a new will for the testator. To adjudge that a court, in construing unambiguous language in a will, may surmise a reason in the testator's mind for his clearly-expressed intent, and then, upon evidence introduced by devisees, denying the existence of that suppositious fact, proceed to set aside the plain expression of intent, is to nullify the statute of wills. No trust could then be so carefully guarded as not to be at the mercy of the imagination of the chancellor.

"There can be no doubt that this trust comes within the class which do not vest a legal estate in the cestui que trust, being a case 'where such powers or duties were imposed with the estate upon a donee to uses that it was necessary that he should continue to hold the legal title in order to perform the duty or execute the power.' (Perry on Trusts, section 800; also Ibid, section 805; Kay v. Scates, 78 Am. Decisions, 299, and note.)

"It seems to be equally well settled that 'where the instrument is free from ambiguity, and there is no imperfection or inaccuracy in its language,

the testator's intention is to be collected from the words used by him, and parol evidence is not allowable for the purpose of adding to, or explaining, or subtracting from it, or to raise an argument in favor of any particular construction. (Phil. Ev., 545; 8 Bingham, 244; Wigram on Ec. Evidence, 65.) Extrinsic evidence of intention is inadmissible for the purpose of supplying a devise, or any other material provision, omitted by mistake, or to superadd any qualification to the terms used, or to evince a mistake in writing the instrument.' (Stephen v. Walker, 8 Ben Mon., 602.)

"It is not necessary here to inquire whether the evidence introduced would be sufficient to justify a discharge of the trust if the will had provided that it was to continue only until the daughter became competent to manage her estate. The proposition here stated is that, under the terms of the will as written, no evidence can be introduced to show what the reason was for the devise to the trustee, and that that reason never existed, or has ceased to exist. To do so is to superadd a qualification to the terms used, and by parol to import into the will an intention which is not there expressed. (34 Am. State Reports, 64.)

"It is to show by evidence aliunde a different intent on the part of the testator in reference to the devise to Euphemia from that manifested by the language of the will.

"The rule was stated by Judge Simpson in Stephen v. Walker, supra: 'The inquiry must be confined to the meaning of the words used, and hence all extrinsic evidence tending to prove, not what the testator has expressed, but what he intended to express, is inadmissible.' "

The question involved in the case at bar is not to be confused with the principle that a dry or simple trust will be vacated by the chancellor upon the request of the cestui que trust. A dry or simple trust is one as to which the trustee has no duties to perform, and the cestui que trust has the entire management of the estate. It is a simple separation of the equitable and legal estates which can be united at the option of the cestui que trust. (Woolley v. Preston, 82 Ky., 415.) Nor is it to be confounded with those trusts which are created upon a declared condition which has passed away, the reason ceasing, the trust also ceasing. Such, for instance, a trust established for the benefit of a married woman, and she becomes discoverd. In that case the trust will cease to exist when the declared disability ceases. (Thomas v. Harkness, 18 Bush, 23.)

The case at bar presents an active trust, where the trustee has the sole management and control of the estate, and the question involved is whether evidence aliunde can be introduced to establish for a testator a motive for his action, when he has expressed none in his will, and where his language is perfectly plain and unambiguous. This we hold can not be done, and Webster v. Bush is no longer to be regarded as authority. It seems to us a safer rule to leave intact this trust, the result of loving foresight reaching into the future to shield the object of its solicitude after the heart which it inspired has ceased to beat, than to subject it to the vicissitude of a judicial inquiry, based upon the careless opinions of witnesses as to the sufficient restoration of the beneficiary's mind to warrant the nullification of the will of the donor.

The judgment dismissing the petition is affirmed.

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COURT OF APPEALS OF KENTUCKY.

CITY OF LOUISVILLE v. LOUISVILLE SCHOOL BOARD.

(Filed January 27, 1905.)

1. City taxes—Distribution—Interest on delinquent taxes—While Kentucky Statutes, section 2981, provides that the various named subdivisions of the city government, including the schools, shall receive their proportionate part of the tax bill after it is collected, there is no provision which in terms imports that they shall receive any part of the interest accruing on delinquent taxes. Each must receive that which the statute gives it, but they have no right to any part of the interest on the delinquency in the absence of an express provision of the law governing the matter.

2. Contemporaneous construction—The contemporaneous construction of legislation for a long period of time by those charged with its enforcement is highly persuasive of the correctness of that interpretation, and the city council having acted upon this construction of the statute for a long period of years, illustrates the necessity of the courts giving great weight to such contemporaneous construction of the statute.

Henry L. Stone for appellant.

Randolph H. Blain for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

This action was instituted by the appellee, the Louisville School Board, against the city of Louisville to recover what it claims to be its share of the interest collected by the city on delinquent taxes.

Section 2981 of the Kentucky Statutes requires that the levy ordinance for each year shall be subdivided as follows: "A levy for schools, a levy for the sinking fund, a levy for police purposes, a levy for the fire department, a levy for street and sewer cleaning, a levy for sprinkling streets, a levy for reconstructing streets, a levy for street repairs, a levy for construction and repairs of sewers, a levy for the house of reform, a levy for charitable institutions, a levy for parks, a levy for library purposes, and a levy for general purposes and a deficit tax. The general council shall cause the foregoing

levies to be made for the purpose stated by an ordinance fixing the tax rate each year."

Section 2998, Kentucky Statutes, is as follows: "All tax bills uncollected in whole or in part, and which remain in the hands of the tax receiver on the first day of May succeeding the date on which they were listed with him for collection, against any person (not under the disability of infancy, coverture or of unsound mind) owning property in his own right, together with interest at the rate of one-half of one per cent. for every month or fraction of a month from date, shall be deemed a debt from such person to said city, arising as by contract, and may be enforced as such by all remedies given for the recovery of debt in any court of the Commonwealth otherwise competent for that purpose, and those bills assessed against an administrator, executor or trustee shall be a charge against the whole succession of trust estates, and may be enforced accordingly, aside, in either case, from the other remedies hereinafter given. The above rate of interest shall prevail until the tax bills are merged in a judgment."

Section 3001 provides that where the amount of the warrant for the delinquent tax is more than \$300 a penalty shall be imposed of five per cent. on the first \$300, and one per cent. on the residue, and section 3004: "The penalty provided for herein shall go to the tax receiver for the benefit of the city."

The contention of the school board is that the interest is a part of the tax, and, when collected by the city, the same proportion should be paid to appellee as is due of the principal. On the part of the city it is insisted that the interest is not a part of the tax, and that under the provisions of the levy ordinance it is only required to pay over to each department of the government, for whose benefit the annual levy is subdivided, its proportionate part of the principal of each tax bill collected; and it is pointed out that the city is put to great expense in collecting delinquent taxes, no part of which is borne by the various departments of government which are beneficiaries of the levy; that it is more than probable that the expense of collection equals the interest received; that all of this expense necessarily falls upon the general fund, and, therefore, it is but just that the interest and penalty should be passed to that fund to cover the expense of collection.

The city and its various departments of government are not presumed to deal with each other at arm's length as debtor and creditor; whatever they need for their annual support it gives, varying the per cent. of the levy coming to each in accordance with its necessity. On the part of the school board great weight is given the provision of section 3004, that "the penalty provided for herein shall go to the tax receiver for the benefit of the city." This, it is said, indicates that the interest is to follow the principal, the affirmative provision, that the penalty should go to the city, negating the idea that the interest also is to go to it. And on the surface of the statute there is some force in this contention; but it is overlooked that in the original tax law of the city of Louisville, enacted in 1884, which was substantially the same as the tax law now provided for cities of the first class, that which is now called a penalty was then called a commission, and went to the tax receiver for his own benefit. The original act on the subject in hand is as follows: "Where the warrant calls for more than \$300 it shall allow

ve per cent. commission on the first \$800, and only one per cent. on the residue. * * * For issuing each warrant he (the clerk) shall be paid 10 cents by the city, and the commission provided for shall, when collected, go to the receiver of city taxes." (City Code, 779.)

It will be observed that this is the language of the present law, except that "penalty" takes the place of "commission," and the city, instead of the officer, receives the money.

Afterwards the law as to the remuneration of the receiver of taxes was changed, he being placed upon a salary, and then, that there might be no doubt on the subject as to who should receive the penalty, as between the city and the officer, the name of the city as recipient was substituted for that of the officer. But then, as now, the interest of one half of one per cent. for every month, or fraction thereof, was claimed and kept by the city. The specific enactment, that the city is to get the penalty, was not placed in the law to draw a distinction between its right thereto and its right to the interest, but was for the purpose of showing who is entitled to the penalty, as between the officer collecting the money and the city for whom he acts.

It is further pointed out by the school board that the statute changes the old rule that taxes do not bear interest, and that by section 2998 uncollected tax bills shall be deemed a debt, and bear interest at the rate of one-half of one per cent. for each month and fraction thereof. But this statute only accentuates the weakness of appellee's contention. The provision is that all delinquent tax bills "shall be deemed a debt from such persons (the taxpayers) to said city." * * * It will be observed that this language does not import that it is a debt due in part to the various departments of the municipal government for which the tax levy is made, but it is deemed a debt due to the city, and naturally the interest on the debt goes to the creditor. The law provides that the various named subdivisions of the municipal government shall receive their proportionate part of the tax bill after it is collected; but there is no provision which, in terms, imports that they shall receive any part of the interest accruing on delinquent taxes. Each must receive that which the statute gives it, but they have no right to any part of the interest arising from the delinquency, in the absence of an express provision of the law governing the matter.

Strictly speaking, the appellee is not a department of the municipal government, but is an independent corporation having in charge the education of the youth of the city of Louisville, and that city is one of the school districts of the State; but in dividing the tax levy it is classed along with the departments of the municipal government, and no substantial difference can be pointed out between its right to the interest in question and that of the board of park commissioners, the commissioners of charity, or the trustees of the public library. We are of opinion that on the face of the statute the claim of the school board is without foundation; but if we were less certain of the soundness of this conclusion, we would be controlled by the long and uniform construction given the law by all the departments of the municipal government having the matter in charge. As said before, the fiscal law of cities of the first class, as it is now contained in the statute, was enacted in 1884. From that time until this, without question or doubt

as to its correctness, all of the interest arising on delinquent tax bills has been retained by the city, and passed to its general fund, while that part of the principal due appellee has been paid over to it as by law required.

The learned lawyer who drew the original act was elected assistant city attorney for the purpose of properly enforcing it. The learned counsel who now represents the school board then represented it, and neither he nor the draftsman of the act ever had any doubt of the correctness of the original interpretation of the law on the question at bar. With this interpretation before them, the general assembly re-enacted the act of 1884 in the charter of cities of the first class, thus adopting the original language with regard to the interest on delinquent taxes, with the practical construction given to it by the officers having its enforcement in charge. The contemporaneous construction of legislation, covering a long period of time, by those charged with its enforcement is highly persuasive of the correctness of that interpretation. Especially is this true when, as above stated, that interpretation has received the seal of approval from the legislature to the re-adoption of the act without change, after the construction has been given. (*Fuqua v. The Auditor*, ante, 46; *Auditor v. Cain*, 22 Ky. Law Rep., 1188; *City of Louisville v. Louisville Water Co.*, 105 Ky., 754.)

The case at bar fully illustrates the necessity of the court's giving great weight to the contemporaneous construction of such statutes as that under discussion. For a long period of years the city has acted upon this construction, the council has made the various levies for the consecutive years since 1884, based upon its correctness and the money that it would produce, for the support of the several departments of the city government. Each year they have decreased the amount of the levy for the general expense fund for the reason that it receives accretions from the interest on delinquent taxes. All of the annual fiscal budgets for many years past have been based upon this construction, and now, after the lapse of this long period of time, we are asked to go back and uproot all that has been done in this matter, and to affirm a judgment against the city in favor of appellee for the aggregate sum of \$28,450.88, that being the amount of the interest due to appellee, on its construction of the law, for the period of five years next before the institution of this action, its claim beyond that time being barred by the statute of limitation.

We are unable to adopt this view of the statute, and for the reasons given the judgment is reversed, with directions to dismiss the petition.

SILVA, FOR, &c. v. CITY OF NEWPORT.

(Filed January 31, 1905.)

Ordinances—Relating to more than one subject—Validity—Under Kentucky Statutes, section 8059, part of the charter of cities of the second class, providing that "no ordinance shall embrace more than one subject and that shall be expressed in the title," an ordinance passed by the council of the city of Newport for the furnishing of the city with light, heat and power, by means of either gas, hot water or steam, relates to at least three subjects, and is, therefore, invalid.

Matt Herald and L. J. Crawford for appellants.

Jas. T. Thornton for city of Newport.

Harvey Meyers for himself and associate bidders.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Campbell Circuit Court to test the validity of an ordinance of Newport, a city of the second class. So much of the ordinance as we deem essential to the decision of the question before us is as follows:

"ORDINANCE FOR LIGHT FRANCHISE IN NEWPORT.

"An ordinance providing for the letting at public bidding of the franchises, rights and privileges of entering in and upon the streets and public ways of and in the city of Newport, Ky., for the purpose of laying, maintaining and operating mains and pipes, with all necessary appendages, and therefrom to supply the city of Newport and its consumers with light, heat, fuel and power, by means of either gas alone, or by means of gas and hot water, or by means of gas and steam, or by means of gas, hot water and steam, for a term of twenty years from the acceptance of the successful bid therefor, and granting such franchise, rights and privileges to the highest bidder.

"Be it ordained by the general council of the city of Newport, Ky."

We do not recall ever having seen an ordinance framed precisely like the above. It will be observed that in the first line it is entitled "Ordinance for light franchise in Newport," and then follows, at the place usually set apart for the preamble (where there is one), what is nothing more nor less than a second, or more extended title, containing the purposes of the proposed ordinance. This is not a preamble, for that is a history or recitation of the necessity for the legislation in question. Bouvier defines it as follows: "It (preamble) is no more than a recital of some inconvenience, which does not exclude any others for which a remedy is given by the enacting part of the statute."

We conclude that all above "Be it ordained by the general council of Newport, Ky.," constitutes the title of the ordinance. It is apparent that the title relates to at least three subjects, to wit, the furnishing of the city with light, heat and power, by means either of gas, hot water or steam, or a combination of these. Here are three separate and distinct franchises provided for in one ordinance.

Section 3059 of the Kentucky Statutes (charter of cities of the second class) provides, among other things, that "no ordinance shall embrace more than one subject, and that shall be expressed in the title." As the title and ordinance under consideration contain more than one subject, the whole is void. (Hind v. Rice, 10 Bush, 528.)

The demurrer to the petition should have been overruled.

Wherefore, the judgment is reversed for proceedings consistent herewith.

MOSELEY v. COMMONWEALTH.

(Filed January 31, 1905—Not to be reported.)

In this case a father and his two sons were jointly indicted for a conspiracy to kill E. L. Hart, and in separate paragraphs each of the three is charged with the murder of Hart, and the other two with aiding the one who did the killing. A separate trial was had as to Kelsie.

1. The evidence shows a previous preparation by all three of the defendants for an expected hostile meeting with Hart, who was a vicious and desperate man, and who was attempting to prevent them from hauling off their own timber which he claimed, and had threatened to kill them if they moved it. On the day of the tragedy the defendants, in going with wagons after their timber, met Hart in the road on horseback, with his gun across his lap. After passing a few words, on a slight motion of Hart with his gun, one of the sons drew his pistol and shot Hart in the side, when the other two defendants opened fire also, and riddled Hart's back with bullets, of which he died in a few hours. It afterwards appeared that Hart's "Winchester" had eight or ten loads in the magazine, but none in the barrel. Held—That while a conspiracy was not proven, the evidence, if true, authorized the conviction of the defendant for manslaughter. Although the defendants were amply warranted in believing they stood in great danger if they persisted in taking out their timber, they were not justified in killing Hart wherever and whenever they met him, and it was for the jury to say how far under the evidence they were justified in shooting him as they did.

2. The defendant was not prejudiced by the fact that the court instructed the jury under the conspiracy count, as he was only found guilty of voluntary manslaughter.

3. The fact that the trial court ordered a jury summoned from an adjoining county to try the case was not error, and, moreover, this court is without jurisdiction to review the decision of the trial court in the matter of selecting the jury, under Criminal Code, section 281.

B. B. Golden, John C. Eversole, L. D. Lewis and Lewis & Calvert for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Barker.

Wiley Moseley, Kelsie Moseley and Robert Moseley were jointly indicted by the grand jury of Leslie county, charged with the murder of E. L. Hart. The indictment contains several paragraphs, in the first of which the three defendants are charged with a conspiracy to murder Hart, in pursuance of which he was afterwards shot and killed. The second charges them jointly with his murder, and the third, fourth and fifth charge each of them with aiding and abetting the other two in the murder. Separate trials were had, that of Kelsie resulting in his being found guilty, and sentenced to a term of twenty-one years in the penitentiary. Of this he is now complaining. The facts are these: Wiley Moseley is the father of Kelsie and Robert. He had a quarrel with Hart as to the ownership of certain standing timber in the neighborhood where they lived. There seems to be no doubt that Moseley had a valid title to the timber, and that Hart knew his own claim was without foundation, but persisted in asserting it nevertheless. He had forbidden Wiley Moseley to cut or haul timber from the place, and threatened

to kill him if he persisted in so doing. He is shown by the record to have been a man of ferocious temper, and wild and reckless courage, anxious at all times for a personal altercation, regardless of consequences, and not to be influenced for good either by friend or foe. The Moseleys, and especially Wiley, showed every disposition to avoid trouble with him that was consistent with a fixed determination to cut and haul the timber in dispute at all hazards. Wiley sent messengers to Hart on several occasions to influence him from his avowed intention of preventing him (Moseley) by force from cutting and hauling the timber. Among these was the father-in-law and the father of the dead man. All overtures were without avail, and there is no doubt in our minds that Hart was simply biding his time, and watching for a favorable opportunity to do violence to Wiley Moseley, and that he had been deterred from this by the fact that the father never went after the timber unaccompanied by his sons, and generally one or two of his friends in addition.

On the day before the homicide Hart, with Winchester in hand, abused Wiley Moseley, calling him the vilest of names, and on that night the Moseleys, intending the next day to again go for timber, made preparations to protect themselves from violence. One of the boys loaded his double-barreled shotgun with bullets, the other prepared his Winchester, and on the morning of the 11th of November, 1902, the father, armed with a pistol, his two sons armed as before stated, accompanied by Russell Wooten and William Oliver, with several yoke of cattle, started into the woods to bring out timber. While on their way, in a narrow road, they met Hart, who was on horseback, astride a "turn" of corn, with a Winchester across his lap. Russell Wooten was in front, and turned the cattle out of the road to pass Hart. When he reached the side of the latter he stopped to talk with him a moment. While so doing the two Moseley boys passed by without speaking, and last of all Wiley Moseley came up.

The evidence is not quite clear as to who opened the conversation as between Wiley Moseley and Hart Oliver and Wooten stating that the first they heard was Wiley Moseley say "I don't know, Lon (familiar name), whether I would know those logs if I saw them," to which Hart responded, "I know them," and made a slight motion with his Winchester, whereupon Wiley Moseley quickly drew his revolver, and fired twice, shooting Hart in the side. At this point of the affray the horse of the latter commenced to move in a trot down the road, whereupon the Moseleys opened a fusillade with pistol, shotgun and rifle, riddling Hart's back with bullets. After going some thirty or forty yards he fell from his horse, and died in about five hours. The Moseleys all testify that Hart attempted first to shoot Wiley, who fired in self-defense. The boys claimed that they shot in defense of their father, but their shots all entered the back of the deceased, and his horse was trotting off with him when they fired.

The evidence shows that while Hart's Winchester had eight or ten loads in the magazine, there was neither cartridge nor shell in the barrel; the gun had not been recently fired, an examination showing rust in the barrel rather than the black of recently exploded powder. The first error urged by the appellant is that the judge directed the sheriff to summon the jury from an adjoining county. Section 194 of the Criminal Code is as follows: "If

the judge of the court be satisfied, after having made a fair effort, in good faith, for that purpose, that, from any cause, it will be impracticable to obtain a jury free of bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summon a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest probability of obtaining impartial jurors, and from those so summoned the jury shall be formed."

It is insisted, first, that this section is in violation of that part of section 11 of the Constitution which guarantees to a defendant a "speedy public trial by an impartial jury of the vicinage;" and if this be not sound, it is urged that the judge violated the section of the Code by not, in good faith, attempting to obtain an impartial jury in the county where the case was tried. Neither of these propositions can be maintained. The validity of section 194 has been upheld by this court in *Brown v. Commonwealth*, 20 Ky. Law Rep., 1552; *Massey v. Commonwealth*, 18 Ky. Law Rep., 367, and *Roberts v. Commonwealth*, 94 Ky., 502. We will conclusively presume, in the absence of anything in the record to the contrary, that the court followed the law in selecting the jury. (*Massey v. Commonwealth*, supra.) Moreover, we are without jurisdiction to review the decision of the trial court in the matter of the selection of the jury. (Criminal Code, section 281.)

We are not able to see our way clear to reverse this case on the facts. There was evidence which, if true, authorized the conviction; and although the Moseleys were amply warranted in believing they stood in great danger from Hart if they persisted in taking out the timber in dispute, they were not justified in killing him wherever and whenever they met him; and it was for the jury to say how far, under the evidence, they were justified in shooting him as they did. Under our rule, if there be any evidence at all to support verdicts in criminal cases, we decline to revise them. It is very doubtful that the court was authorized to instruct on the conspiracy count, the only evidence on this subject being the preparation of the Moseleys to protect themselves from an unlawful and deadly assault at the hands of Hart while prosecuting their lawful right to take their own property. But the jury did not find the appellant guilty of conspiracy, as is shown by their verdict; they only found him guilty of voluntary manslaughter, and, therefore, his substantial rights were not prejudiced by the instruction as to conspiracy. The instructions given on the other counts are not complained of, and correctly embody the law of the case. We shall not notice specifically any of the various exceptions to the competency and relevancy of the testimony adduced upon the trial, deeming it sufficient to say that the trial judge, in ruling upon these questions, fully protected the rights of the accused, and that, upon the whole case, he had a fair and impartial trial.

The judgment is affirmed.

HOSKINS' ADM'R V. BROWN, &O.

(Filed January 31, 1905—Not to be reported.)

1. Instructions—Where upon motion and grounds for a new trial no complaint was made of instructions given by the court, they will be regarded upon appeal as the correct exposition of the law.

2. Payments—Application of—While there are rules of law that determine the application of payments of debtor and creditor, it may be a question of fact to be found by the jury as to the debt upon which the payment was made. It is the business of the court to direct the jury how the payment should be applied upon a state of facts which it may find to exist.

Lane & Harrison for appellant.

Caruth, Chatterson & Blitz for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Paynter.

The appellees were lumber dealers, and the evidence in the record tends to show that R. H. Hoskins was a customer of appellees, and that at his instance they kept three separate accounts with him—one in his own name, one known as the school account, and the other in the name of his son, J. C. Hoskins. The appellees claim that all the lumber was purchased by R. H. Hoskins on his own account, but for his convenience the accounts were kept separate. On a certain date Hoskins paid appellees \$450. It is claimed by the appellant that it was paid on the school account. This was denied by appellees. The real question involved on the trial was whether the \$450 had been properly credited. The court gave instructions to the jury submitting the questions raised by the pleading and evidence.

The court must regard these instructions as being the correct exposition of the law, because in the grounds for a new trial no complaint was made as to the instructions given by the court. The ground for a new trial, that the verdict is contrary to law, is too vague and indefinite to be considered. (Jones v. Woche, 90 Ky., 231.)

Another ground for a new trial is that the court admitted evidence on the question as to the application of the payment of the \$450. This certainly was not error, because that was the real question at issue. It is insisted that the application of a payment is a question of law to be determined by the court, not by the jury. On this question Nuttal v. Brannon, 5 Bush, 19, is cited. There are rules of law that determine the application of payments of debtor to creditor. It, however, may be a question of fact to be found by the jury as to the debt upon which the payment was made. It is the business of the court to direct the jury how the payments should be applied upon a state of facts which it may find to exist. The ruling of the court was criticized in Nuttal v. Brannon, because the court allowed the jury to apply the payment as it pleased in the absence of evidence as to the debt upon which it was paid.

The judgment is affirmed.

LAWSON v. LIGHTFOOT, &c.

(Filed February 1, 1905—Not to be reported.)

Specific performance—Alienation—Appellees were devised certain real estate by the will of Lightfoot. To the widow the devise was for life and the daughters were devised the remainder, and by another clause of the will it was provided that the same should not be sold for any purpose until the

death of his wife. Held—That appellant, who had bought the land, but who, when tendered a deed refused to accept it, denying the right of appellees to convey, could not be compelled to perform the contract, the accepted doctrine in this State being that restraints upon alienation may be imposed for a limited length of time. The manifest intention of the testator was to preserve the property intact during the life of his wife, and she being beyond middle life when the will was probated, her expectancy was not so great as to render the restriction placed upon the devisees unreasonable.

A. S. Kendall for appellant.

W. G. Dearing and Robert L. Greene for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Settle.

The appellees, Sarah F. Lightfoot, Ida Lightfoot and Anna Grace Sherrill, the first being the widow and the last two daughters of R. A. Lightfoot, deceased, sold to the appellant, John A. Lawson, for the sum of \$2,000, a house and lot situated on Main and Cross streets in Flemingsburg, this State, and to consummate the sale tendered to the purchaser a proper deed of general warranty, conveying to him the house and lot in question, which deed he refused to accept upon the ground that it would not invest him with good title to the property.

Because of appellant's refusal to accept the deed and to pay the agreed consideration for the property this suit was brought against him by appellees for a specific performance of the contract. The answer of appellant admits the contract for the purchase of the house and lot as alleged in the petition, but denies the appellees' right to sell and convey the same during the life of appellee, Sarah Lightfoot, and the issue made by this denial having been decided by the lower court upon demurrer to the answer adversely to the appellant's contention, he asks of this court a further consideration of the question involved. The real estate in question with other real estate was devised by the will of R. A. Lightfoot to his widow for life, with remainder to his two daughters named above, under the following restriction as to the alienation of that in controversy: "And in order to secure to my said two daughters, Ida and Anna Grace, my said office property, it is my will and desire that the same shall not be sold for any purpose whatever until the death of my said wife."

As bearing upon the powers of the testator's wife and executrix of his will to sell the real estate devised, we find this further provision in the will: "I hereby invest my said wife with full power and authority to sell, or otherwise dispose of, any of my real estate, except the said office property, that may be necessary for the purposes recited in this item, conferring hereby full power upon my said wife to convey the same in her own name by title in fee simple."

It must be conceded that the great weight of authority outside of Kentucky is to the effect that where the fee-simple title to real estate passes under a deed or will, any restraint attempted to be imposed by the instrument upon its alienation by the grantee, or devisee, is to be treated as void, and such is clearly the rule announced by Mr. Gray in his excellent work on "Restraints of Alienation." But the contrary view has been adopted by

this court in repeated decisions, beginning with *Stewart, & Co. v. Brady*, 8 Bush, 623, and ending with *Wallace, & Co. v. Smith*, 24 Ky. Law Rep., 189. (*Stewart v. Barrow*, 7 Bush, 868; *Rice v. Hall*, 18 Ky. Law Rep., 814; *Kean v. Kean*, 18 Ky. Law Rep., 956; *Johnson v. Dumeyer*, 23 Ky. Law Rep., 2243.)

In other words, the accepted doctrine in this State is that restraints upon alienation may be imposed for a reasonable period. This court has, however, never fixed a limit to such restraint, but in *Stewart v. Brady*, supra, it was held that a devise of land to the testator's daughter, with the limitation that it should not be disposed of by her until she became thirty-five years of age, was reasonable, and in *Kean v. Kean*, 18 Ky. Law Rep., 956, it was held that a restriction accompanying a devise of real estate to a son of the testator that he should not have the power to dispose of it until he became twenty-eight years of age, was good. If such a restriction may be imposed for the periods indicated by the cases supra, why may it not endure for a longer time, or, as contemplated by the testator in this case, during the life of his widow, the tenant for life of the real estate, the alienation of which is attempted to be restricted.

The manifest intention of the testator, R. A. Lightfoot, was to preserve the property intact during the life of the widow, and until it should be taken in possession by the daughters. The widow was beyond middle life when the will was probated, so after all her life expectancy was not then so great as to render unreasonable the restriction placed by the testator upon the right of the devisees to dispose of the property. After a careful consideration by the whole court of the question presented by the record, it is deemed safer to adhere to the former decisions of the court thereon, though this conclusion has not been reached without misgiving as to its correctness upon the part of a minority of the court, the writer of this opinion being of that minority. It may not, however, be improper to suggest that, notwithstanding the restriction imposed by the will upon the power of the devisees to dispose of the real estate in question, if the deed of general warranty tendered appellant by them should be accepted, they probably could not thereafter recover the property, at any rate they could not do so without being made to account upon their warranty for the consideration received by them, with interest.

For the reasons indicated the judgment is reversed and cause remanded for proceedings consistent with the opinion.

Whole court sitting.

WARNER V. COMMONWEALTH.

(Filed February 1, 1905—Not to be reported.)

1. Indictment for murder—Venue—On the trial of defendant for murder, where the trial was held in the city of Louisville and the evidence showed the offense was committed at the Louisville & Nashville railroad depot, on the corner of Tenth and Broadway streets, in said city, the evidence was sufficient to authorize the jury to find that the offense was committed in Jefferson county.

2. Attorney for defendant—Reading extract from book—It was not error in the court to refuse to allow defendant's attorney, during his argument to

the jury, to read to the jury an extract from "a book on the Guiteau trial," there being no avowal as to what his counsel intended to read from the book.

8. Previous threats—Failure of court to instruct as to effect—The court did not err in failing to instruct or admonish the jury that they should consider evidence of previous threats made by the defendant only for the purpose of showing the motive or state of defendant's mind at the time of the killing.

4. Voluntary manslaughter—Where the defendant relied upon insanity as his defense and there was no evidence tending to show any angry altercation between defendant and the deceased at the time of the killing, or that deceased said or did anything tending to insult or assault defendant, the court did not err in failing on the trial to give the jury an instruction on voluntary manslaughter.

Suter & Solinger for appellant.

N. B. Hays, Loraine B. Mix and Aaron Kohn for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge Nunn.

The appellant, George B. Warner, prosecutes this appeal from the judgment of the Jefferson Circuit Court upon a verdict of guilty found against him by a jury, fixing his punishment at death for the crime of murder. The facts proven, as they appear in the record, are in substance as follows: Pulaski Leeds was superintendent of machinery of the L. & N. R. R. Co.; was about sixty years of age, and occupied an office in the depot building of the railroad company at the corner of Tenth and Broadway, in the city of Louisville, Ky., where he was killed by appellant.

The appellant was about forty-one years old; his occupation was that of an electrician, which business he had followed since his maturity. Before engaging in work for the L. & N. R. R. Co. he had for several years followed his occupation in Logansport, Ind., and before leaving there he obtained a letter of recommendation, signed by the mayor, several councilmen, contractors and other prominent people of that city. With this letter he went to Louisville, and was employed by the L. & N. R. R. Co., being given a position at New Decatur, Ala. There he worked at his calling until about June 19, 1908, when for some reason, not explained, he was discharged. The appellant and one or two of the Commonwealth witnesses indicate that his discharge was by reason of his expression of sympathy for some laborers who were discharged from the shops at that place. The proof also tends to show that appellant received information that the L. & N. R. R. Co. had placed his name upon the "black list," or "unfair" or "debarred list."

Appellant appeared at first to think that Messrs. Swoyer and Dupont, two of the officials of the company, were responsible for his discharge, and the placing of his name upon this list. Afterward it appears that he included Leeds. Several witnesses from Decatur testified that appellant at different times said that he would go to Louisville and would fix somebody before he got through with the matter," and before his departure for Louisville pulled a pistol from his pocket and said: "You see this? Well, you will hear from this." He also said: "I am going up there to Louisville. I have been discharged, and what I will do to that G—d—s— of a b— will be a plenty."

In the same conversation Leeds' name was mentioned as the party referred to. After leaving Decatur appellant stated he went to Nashville, Evansville, and three or four other places, seeking employment, and failed for the reason he did not have a letter of recommendation. He then went to Louisville, arriving there on Saturday morning, July 4. He stated that he saw Mr. Leeds on the street, and asked for a letter of recommendation; that Leeds told him that it was against the rules of the company to give such a letter, but if he would find some place in his line and come to him, he would aid him all he could. Appellant remained in the city until Monday morning, when the killing occurred. The Commonwealth proved that on Monday morning appellant purchased the pistol with which he killed Leeds; that he went to the depot at Tenth and Broadway, arriving there about 8 o'clock; asked the janitor the situation of Leeds' office; whether he was in, and when was the best time to find him in his office alone. He took his seat in the waiting room, and remained there until after the hour of eleven, when he went upstairs and into Mr. Leeds' office. When appellant entered the office Leeds was at his desk, writing. It appears that he did not notice appellant enter. Leeds after a minute or two ceased to write, turned his head, and saw and spoke to appellant, who had taken a seat near him, and said to him: "You are the engineer from Henderson?" Appellant answered: "No, I am the electrician from Decatur." Some few words passed between them in rather a low tone, which were not noticed or heard by those present. Then appellant said to Leeds: "I have seen Mr. Swoyer, and he says you are responsible." Mr. Leeds said: "I will assume the responsibility then; but wait until Mr. Swoyer returns; he will return in a few days." Appellant then asked Mr. Leeds to give him a letter of recommendation. Mr. Leeds explained to him that it was against the policy of the company to give such letters, but that if he would make application for a position, and refer the party to him he would do the best he could for him.

Appellant then said to Leeds: "Give me a letter, and state in it why I was discharged." Leeds answered, and said: "I have told you I could not give you a letter, and probably I don't know why you were discharged." Appellant then drew a pistol, and arising from his chair, said: "Mr. Leeds, by G—, you will give me that letter before I leave here," and as he uttered the word "here" he shot Mr. Leeds in the breast, then leaned over him and shot him in the face, when he turned the weapon upon himself, fired, and, seriously wounded, sat back in the chair. Mr. Leeds died within a few days from the effect of his wounds. Appellant was removed to a hospital, remaining there until he was sufficiently recovered to be confined in jail. It appears from the proof that during their conversation Leeds did not speak an unkind word to appellant, and made no movement or demonstration of any kind to assault or harm appellant in any manner.

Appellant testified, and denied all threats proven by the Commonwealth; stated that Leeds was his friend; admitted purchasing the pistol on the morning of the killing; stated that he had carried a pistol for twenty five years; that he had accidentally left his pistol on the steamboat on Saturday morning, July 4, the day of his arrival in the city of Louisville. He gave a complete and intelligent history of his life from prior to his arrival at the

age of maturity until to within a few minutes of the time of the killing. He designated the place where he slept on the night of the 4th and 5th, where he took his meals, the places he visited in the city from the time of his arrival to the hour or within a few minutes of the killing. He stated that his arrival at the depot was later in the morning by an hour or two than that fixed by the Commonwealth witnesses. He admitted asking the porter where Mr. Leeds' office was, and whether he was in, but denied having asked him when was the best time to find him alone. He stated that he did not remain in the waiting room more than thirty or forty-five minutes before he started to Leeds' office; that while in the waiting room he concluded to go to Leeds, and endeavor to get his Logansport letter of recommendation, which he had left with some employe there, upon his entering the service of the L. & N. R. R. Co.; that he started up the stairway, but before he arrived at Mr. Leeds' office he lost consciousness; did not remember seeing Leeds upon that occasion; did not know that he had shot Leeds or himself until several days afterwards. Appellant also stated that several of his relations had been insane. He introduced two or three physicians as experts who gave it as their opinion that appellant was insane at the time he killed Leeds. The Commonwealth introduced about the same number who testified that, in their opinion, appellant was sane at the time of the homicide.

It appears from the record that the real defense interposed by appellant was insanity. Upon this question the court was lenient to appellant, and permitted all evidence offered by him to go to the jury, and the court's instructions upon this issue were correct. Appellant filed many reasons and grounds for a new trial. But his counsel in their oral argument and briefs only urge four reasons why the judgment of conviction should be reversed:

1st. They contend that it was not proven that appellant's alleged crime was committed in Jefferson county.

2d. That during the argument of one of appellant's counsel to the jury he proposed to read to the jury an extract from a book relating to the Guiteau case, to which the Commonwealth objected, and the court refused to allow him to read the extract.

3d. There was evidence admitted of previous threats made by the accused some days prior to the killing, and appellant contends that the court erred to his prejudice in failing to admonish the jury that they must consider such evidence of threats only for the purpose of showing the motive or state of mind of the accused at the time of the killing.

4th. That the court erred in failing to give the whole law of the case to the jury, and especially erred in failing to give an instruction on voluntary manslaughter.

With reference to appellant's contention that the crime was not proven to have been committed in Jefferson county, it is sufficient to say that while the proof did not show that fact in the use of the words "Jefferson county," yet there was an abundance of proof showing that fact. It was proven by many witnesses that the shooting occurred at the Union Depot of the L. & N. R. R. Co., at Tenth and Broadway, in the city of Louisville, where the trial was had, and the record shows that the trial took place in Louisville, Jefferson county. The appellant fixed the venue in his testimony. He

stated that he arrived in the city of Louisville and remained until Monday morning, when he took a street car to the depot at Tenth and Broadway, showing that the depot, the scene of the killing, was in the city of Louisville, and he was asked also when on the witness stand with reference to the situation of certain places he had named as having visited on the day prior to and morning of the killing, he answered: "I can not tell. I am not much acquainted in this city."

In the case of *Commonwealth v. Patterson*, 10 Ky. Law Rep., 167, the trial was had in Springfield, Washington county. The prosecuting witness stated that his watch was stolen in "Springfield," but did not state the county. This court, in that case, said: "The courts and juries have the right to take cognizance of public cities and towns within their jurisdiction, without proof allunde of the particular county in which they are situated; they are presumed to have knowledge of that fact; for instance, the court and jury are presumed to know that Springfield is the county seat of Washington county, and that it is situated in that county." (*Hays v. Commonwealth*, 12 Ky. Law Rep., 611; *Combs v. Commonwealth*, 15 Ky. Law Rep., 659.)

The court instructed the jury that before they could convict appellant they must believe from the evidence, beyond a reasonable doubt, that the offense was committed in Jefferson county, before the finding of the indictment, and we are of the opinion that the jury was authorized, under the facts proven, to find that the offense was committed in the county of Jefferson. The second ground relied on is the refusal of the court to permit the attorney for appellant during his argument to read an extract from a "book on the Guiteau trial" to the jury. We are of the opinion that the court did not err in this. (18 Ky. Law Rep., 195; 8 Ky. Law Rep., 515; 4 Ky. Law Rep., 853; 111 Ky., 458.) Besides, this could not have availed appellant on this appeal for the reason there was no avowal made as to what his counsel intended to read from the book, and this court can not say that appellant was prejudiced in any way by the court's refusal to allow the extract to be read to the jury.

We are of the opinion that the court did not err in failing to admonish or instruct the jury that they should consider evidence of previous threats made by appellant, only for the purpose of showing the motive or state of appellant's mind at the time of the killing. The jury could not have misunderstood the purpose of the proof of threats as they appear in this case. (*Brooks v. Commonwealth*, 100 Ky., 194; *Trusty v. Commonwealth*, 19 Ky. Law Rep., 706; *Duncan v. Commonwealth*, 11 Ky. Law Rep., 620.)

It is only when the threats proven may relate not only to the question of malice or motive, but to some other fact not germane to the subject of inquiry, that the court should admonish or instruct the jury as to their consideration of evidence of previous threats. Such were the facts in the cases of *Thacker v. Commonwealth*, 24 Ky. Law Rep., 1585, and *Bess v. Commonwealth*, 25 Ky. Law Rep., 1091.

The fourth and last ground relied upon for a reversal is that the court should have given an instruction of voluntary manslaughter. This ground is urged by appellant's counsel upon the idea that in the conversation between appellant and Leeds, immediately prior to the shooting, there were

some words passed between them, which the three or four witnesses present did not notice or understand, and counsel for appellant, therefore, contends that it was possible that something was said by Leeds to appellant that might have aroused sudden heat and passion.

We can not accept this view of the matter, and for reasons that all the witnesses present say that their conversation was in a low and ordinary tone of voice; that there was no angry altercation between them indicating any feeling or passion. There was not the slightest evidence that Leeds said anything to appellant to insult him, or made any move or motion indicating an intention to assault or injure him in any manner. There was nothing whatever in the words, acts or conduct of Leeds upon that occasion to arouse the passions of appellant in the slightest degree. There was a total absence of evidence on this point, and we are of the opinion that appellant was not entitled to such an instruction. The proof, as it appears from this record, shows that appellant was either guilty of murder or he was insane. As stated, his real defense was that of insanity. The court submitted this question to the jury by proper instructions, and the jury found he was sane. The proof clearly shows that he had made threats against Leeds prior to the day of the killing; that on that morning he purchased a pistol, went to his office, and after a few words, and without any provocation, fired the fatal shots. Under these circumstances the jury had the right to conclude that he was guilty of murder.

If it was true that some officials there had his letter of recommendation, received from Logansport, Ind., it should have been delivered to him, but their failure to do so did not authorize him to kill Leeds, or any one. Neither did he have the right to kill Leeds, or any one in the employ of the L. & N. R. R. Co., for placing his name upon the "black," "unfair," or "debarred list," even if his name was so placed there. If he was damaged thereby, his remedy was by an action for damages.

The judgment is affirmed.

Whole court sitting.

SHADE'S ADM'R v. THE COVINGTON-CINCINNATI ELEVATED RAILROAD AND TRANSFER AND BRIDGE CO.

(Filed February 1, 1905.)

1. Deceased persons—Declarations to physician—Competency—Declarations by a person, since deceased, and who was suffering from a physical injury, made to her physician, as to anything it was necessary for him to know in order to treat her injuries intelligently, are competent to be given in evidence as part of the *res gestæ*.

2. Same—If the patient is suffering it is necessary for the physician to know where the pain is and its character; also how the injury was inflicted, whether by a blow on the head or how she was otherwise hurt; but it was wholly immaterial to his understanding of the case whether she fell on a bridge or on ice, or elsewhere, and statements by her to her physician as to where she fell are incompetent.

Myers & Howard for appellant.

Galvin & Galvin for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge O'Rear.

Eliza Shade was discovered on the 18th of February, 1902, on or near the northern end of appellee's bridge, injured, her leg. or one bone of it, being broken. Possibly she was otherwise hurt. She was sent in a carriage to her home in Covington, and died in a few weeks. Whether she died of the injuries received on the bridge was not proven. In this suit by her administrator against appellee, the owner of the toll bridge, to recover damages for her injury and death, the plaintiff declared upon the negligence of appellee, in suffering its bridge to be and remain in unfit condition by the accumulation of ice and snow upon the passenger footway. At the close of the evidence the court peremptorily directed a verdict for the defendant.

It is doubtful whether there was any evidence that the bridge was in an unfit condition for travel by pedestrians at the place and at the time where Mrs. Shade fell, if she fell on the bridge; that there was considerable ice and snow elsewhere and at other times on the bridge does not satisfy plaintiff's allegation, nor sustain his action. But assuming that there was at least a scintilla of evidence that the bridge was in dangerous condition throughout from the accumulation of ice and snow, negligently allowed by appellee during the whole of the day Mrs. Shade was injured, there is still a hiatus in plaintiff's case. There was no proof that she fell because of the ice and snow, or that she was herself in the exercise of due care, or that her injuries were caused by the condition of the bridge. The witness, Waring, does not at all identify Mrs. Shade as one of the persons whom he says he helped up from falls about that time. Indeed his evidence rather shows that she was not.

Plaintiff's case rested, if it can be maintained at all, upon the declaration made by Mrs. Shade to her physician some time after she had been taken to her home, that she had fallen on the ice on the C. & O. bridge (the name by which appellee's bridge is popularly called). It is contended by appellant that her declarations made to her physician in explanation of the cause of her injury, and made to him to enable him to treat it, are part of the res gestæ, and receivable in evidence as such.

"Where the bodily and mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. There are ills and pains of the body which are proper subjects of proof in a court of justice which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady." (Bacon v. Charlton, 7 Cush., 586.)

Here the party whose statement is offered to be proved was suffering from a physical injury. What she said to her physician as to the pain it then caused her, and the effect it had upon her senses, was necessary for him to know in order that he might intelligently treat the injury. Under such circumstances it is presumed that the party suffering will state truly how

she is affected, as otherwise the medical man might be at a loss as to the remedies needful to her condition. The incentive for a fair statement is so great that the presumption is she will not hazard an untruth to better her financial condition, by fabricating a basis of claim against the person charged with her injury, at the expense of her permanent health, or may be of her life. For that reason the law allows the proof of what she said to her physician at the time of his examination as part of the *res gestæ*. What the injured party may have said to any one at the time of the injury, or so immediately after it as to be regarded part of it, as being the verbal part of a continuing occurrence, would also be admitted upon familiar grounds. What was said after the lapse of some minutes, a half hour or so in this case, to the attending physician, to aid him in determining the nature of the injury, and to prescribe a remedy or treatment, is allowed as an extension of the same rule of evidence. It rests logically upon the necessity of the case. It is matter proper to be shown, and not susceptible generally of being otherwise proven. But it must stop with the necessity for it. It was necessary for the physician to know whether the patient was suffering, and where the pain was and as to its character. It was also proper that he should know how the injury was inflicted, as upon that knowledge his treatment in part might depend. So it was competent to show that the patient said she had received a blow on her head (if she did say it), and how she was otherwise hurt. But it was wholly immaterial to the physician's understanding, what it was necessary for him to know in treating the injuries, whether she fell on appellee's bridge, or elsewhere, or that she fell on ice.

The opinion in *Omberg v. U. S. Mutual Accident Ass'n*, 101 Ky., 303, is relied on by appellant. In that case the patient who was suffering from an inflamed toe, the result of septic poisoning, told his physician that it was caused by a mosquito bite at the affected spot. The evidence was held to be competent on the ground that the statement was necessary, or at least proper, to enable the physician to understand the illness, and was part of the description of the wound, and inseparable from the patient's complaint with respect thereto. But the court was careful to restrict the application of the rule to statements made by the patient to the physician in the treatment of the malady, and added: "A narrative of the events attending the mishaps would not be competent." Nor was a narrative of the events attending the mishap competent in this case.

The judgment must be affirmed.

FURNISH'S ADM'R v. LILLY, &c.

(Filed February 1, 1905—Not to be reported.)

1. Deeds—Title—Separate deed by husband—A deed made by a son and heir to his undivided interest in land which had descended to him from his deceased father in which the son's wife did not join, does not divest the wife of her contingent right to dower in her husband's interest therein.

2. Deed by married woman—A deed made by a married woman of her interest in land descended to her from her deceased father, in which the hus-

band did not join, is void, as a married woman can not alone convey her real estate.

3. "Expectancy"—The deed of an "expectancy" to land that a child may inherit from a parent, made while the parent is living, is void.

4. Sale of land—Distribution of proceeds—Accounting for money paid for void deeds—Where land is sold under decree of court, in which certain interests have been conveyed to the claimant of the land by married women by deeds in which their husbands did not join, in paying the proceeds of the sale to such married women they should be required to account to their vendee for the money he paid to them in purchasing their interest, but no interest should be charged to them and no rents charged to their vendee.

5. Limitation—Limitation can not be relied on by one holding land as a joint tenant against his cotenants.

W. A. Lee for appellant.

H. G. Botts for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Settle.

Samuel Lilly died in Owen county in 1887, intestate, but was survived by his wife, Delilah Lilly, and nine children, namely: J. E. Lilly, M. N. Lilly, E. T. Lilly, Dudley Lilly, C. R. Lilly, Mattie Stewart, wife of A. Stewart, Ellen Lilly, wife of D. A. Lilly, Jane Baxter, wife of D. Baxter, and Ollie O'Neal, wife of George O'Neal. The widow, Delilah Lilly, contracted a second marriage with Jacob Furnish, whom she also survived, but no children were born of this marriage.

At the time of Samuel Lilly's death he and his wife jointly owned and resided upon fifty-four acres of land in Owen county, the interest of each being an undivided half in fee. Shortly after the death of Samuel Lilly his daughter, Ollie O'Neal, sold to her brother, C. R. Lilly, her interest of one-ninth in the undivided half of the fifty-four acres of land owned by their father at his death, and her "expectancy" in the undivided half of the same tract owned by their mother, Delilah Lilly, who was then living. The interest thus sold by Ollie O'Neal to C. R. Lilly was attempted to be passed by a written transfer entered on the back of an old deed from Brown to Samuel and Delilah Lilly, conveying them the fifty-four acre tract, but the transfer, though signed and acknowledged by Ollie O'Neal, was never signed or acknowledged by her husband.

Later C. R. Lilly sold to his brother, J. E. Lilly, the interest supposed to have been purchased by him of Ollie O'Neal, together with his own one-ninth interest in his father's half of the land, and his expectancy in the half owned by his mother. Thereafter J. E. Lilly purchased of his brothers, E. T. Lilly and Dudley Lilly, and of his sisters, Mattie Stewart, Ellen Lilly and Jane Baxter, their interests respectively in the half of the land left by their father, and also their "expectancy" in the half owned by their mother, and the vendor's last named executed to J. E. Lilly a deed conveying him the several interests they had sold him, and in this deed C. R. Lilly also joined to convey the two shares he had sold J. E. Lilly. The deed was acknowledged by the grantors, but was not lodged for record until about eleven years afterwards.

The grantors were all married persons at the time of the execution of the

deed, but the wives of the male and the husbands of the female grantors did not join therein. Under and by virtue of this deed, and in his own right as an heir at law of Samuel Lilly, J. E. Lilly claimed to be the owner of eighth-ninths of the land in question, his brother, M. N. Lilly, never having parted with his interest therein; but if it be conceded that the deed was sufficient to pass title to all the interests owned by the grantors, it only conveyed the interests respectively of the grantors in the undivided half of the land owned by Samuel Lilly at his death, subject to the widow's right of dower therein. Not long after his purchase of the several shares of his brothers and sisters in the land J. E. Lilly sold and by deed conveyed his entire interest therein to his mother, Delilah, who continued in possession of the entire fifty-four acres until shortly before her death, when she conveyed it, by deed of general warranty, to her son, J. E. Lilly, May 28, 1902, in consideration of his undertaking to support and care for her during the remainder of her life. After her death this action was instituted by the appellant, A. Stewart, as administrator of her estate, for the ostensible purpose of settling the estate, selling the land to pay her debts, and dividing the surplus proceeds among her heirs at law. The children and heirs at law of the intestate, Delilah Furnish, except M. N. Lilly, were made parties to the action; but as he died before the action was instituted, his children were made defendants. Of the heirs at law whose interests respectively were purchased by appellee, J. E. Lilly, all but Jane Baxter and Ollie O'Neil joined in the action as plaintiffs. They were defendants, and have made no resistance to appellee's claim of ownership to the land.

The appellee, J. E. Lilly, by answer, denied the right of appellants to sell the land in controversy, and set up his claim to and ownership of the same under the sale and deed from his mother, and the prior sale and conveyance to him from his brothers and sisters. The reply denied the validity of the deed from the other heirs to appellee, and also the validity of the deed to him from his mother, and attacked the latter instrument upon the ground that it was procured by fraud and undue influence upon the part of appellee; and further, that the grantor was at the time mentally incapable of understanding its meaning and effect, all of which was controverted by appellee's rejoinder. The chancellor adjudged a sale of the land and division of the proceeds between appellee, J. E. Lilly, and the children of his deceased brother, M. N. Lilly, in the ratio of eighth-ninths to the former and one-ninth to the latter, and of that judgment appellants now complain.

It is clear that at the time the deed to appellee, J. E. Lilly, from his brothers and sisters was executed he and they owned an undivided one-ninth interest each in that half of the land to which their father held the title at the time of his death, subject to their mother's right of dower therein, as the other half of the land was owned by their mother in her own right. The deed, therefore, invested appellee, J. E. Lilly, with the title of the male grantors, who joined therein, to that half of the land of which Samuel Lilly was the owner at his death, subject, however, to the right of dower of the latter's widow. But as the wives of the male grantors did not unite with them in the deed to appellee, J. E. Lilly, they were not by the deed divested of their potential rights of dower respectively in the interests conveyed by their husbands. The question of dower, however, does not now concern us, as the husbands are still living.

The deed in question was absolutely void as to the female grantors, for a married woman can not alone convey her real estate. The conveyance may be by joint deed of husband and wife, or by separate instrument, but in the latter case the husband must first convey, or have theretofore conveyed. (Kentucky Statutes, sections 506 and 2128; General Statutes, chapter 24, section 20; chapter 52, article 2, section 8; Weber v. Towner, 23 Ky. Law Rep., 1107; Beverly v. Wallace, &c., 24 Ky. Law Rep., 2505; Sandefer v. Hardin, 3 Ky. Law Rep., 65; Brady v. Gray, 17 Ky. Law Rep., 512.)

The deed was also void as to the "expectancy" it purported to convey of the grantors in that half of the land to which their mother held the title. The mere fact that a child would inherit the real estate of the father, in the event of the latter's death intestate, does not invest the child with an interest in such realty which can be made the subject of sale or conveyance by him during the life of the father. (Smith, &c. v. Duguid, &c., 8 Ky. Law Rep., 64.)

As the deed in question only conveyed the appellee, J. E. Lilly, the one-ninth interest each of his brothers, C. R., E. T. and Dudley Lilly, in that half of the land in controversy to which their father, Samuel Lilly, had title, subject to their mother's dower therein, and these interests, together with his own of one-ninth, J. E. Lilly conveyed by deed to his mother, she thereupon became invested with the title in fee simple to four-ninths of the undivided half of the land formerly owned by Samuel Lilly, and by the deed which she subsequently made J. E. Lilly he became the owner in fee simple of his mother's half of the land, and of four-ninths of the other half, as well as his mother's dower interest therein. The appellant's contention that the deed from Delilah Furnish to appellee, J. E. Lilly, should be set aside because of her want of mental capacity and his alleged undue influence exerted upon her in procuring its execution, is not, in our opinion, sustained by the evidence.

It is true she was seventy-six years of age, and in feeble health when it was made, but according to the evidence she had sufficient mind to comprehend the terms and meaning of the deed. The consideration for the conveyance, which was the undertaking of the grantee to support and care for her during the remainder of her life, could not at the time have been regarded as inadequate. The land as a whole was not worth more than \$500, and her interest therein was of less value. The fact, too, that she had spent more of her time with appellee than her other children, and that she had always received kind and affectionate treatment at the hands of himself and family, doubtless had some effect in causing her to feel that he was entitled to compensation for her past as well as future support, and though she died shortly after the execution of the deed, she seemed to have received of appellee and his family proper nursing and attention.

Three of the ten witnesses introduced as to the condition of Mrs. Furnish's mind when the deed was made testified that she was not competent to contract, while seven others, including the physician who attended her in her last illness, testified that she was competent to do so. In view of the evidence presented by the record we are not disposed to find fault with the conclusion reached by the chancellor upon this point. This court has repeatedly held that such conveyances should be upheld, unless it is made to

appear that the grantor was not possessed of sufficient mental capacity to contract, or that the deed was obtained by fraud or undue influence. (Sullivan v. Hadkin, 11 Ky. Law Rep., 622; Bush v. Johnson, 11 Ky. Law Rep., 598; Rankin's Adm'r v. Wallace, 12 Ky. Law Rep., 97; Jones v. Gorham, &c., 12 Ky. Law Rep., 568; Duffey, &c. v. Sutherland, &c., 18 Ky. Law Rep., 447; Young v. Young, 20 Ky. Law Rep., 1228.)

We think the chancellor erred in adjudging appellee, J. E. Lilly, entitled to all the proceeds of the land except the one-eighth directed to be paid the children of M. N. Lilly. He is entitled to, and should have been adjudged, one-half the proceeds of the entire tract because of his ownership of the half thereof formerly owned by his mother, and to six-ninths of the other half of the proceeds, because, besides the one-ninth of that half of the land formerly owned by his father which he inherited, he acquired by purchase and deed from his brothers, C. R., E. T. and Dudley Lilly, the one-ninth interest of each in the father's half of the land, and in addition the one-ninth each of his sisters, Jane Baxter and Ollie O'Neal, in the father's half, as they have set up no claim thereto, though parties to the action, notwithstanding the invalidity of the conveyance under which their respective interests are claimed by appellee.

The judgment should also direct the payment to the children of M. N. Lilly, deceased, of one-ninth of one-half of the proceeds of the land, and to the appellants, Mattie Stewart and Ellen Lilly, each one-ninth of the one-half, but before making such payment to Mattie Stewart and Ellen Lilly they should be required to refund to appellee, J. E. Lilly, the consideration paid them respectively by him for their respective interests in the land, as the title thereto did not pass to him by the deed in which they attempted to join, but no interest should be charged them upon the consideration they are required to refund, nor should he be charged with rent for any part of the time he had the land in possession. We do not think the statute of limitation can be relied on by appellee to defeat the claim of appellants, Mattie Stewart and Ellen Lilly. Besides, his possession is not shown to have been actual and continuous by as much as fifteen years. As the deed by which they attempted to convey their interests in the land was void ab initio, such possession as appellee held of the undivided half of the land in which they owned an interest, if he ever had possession thereof independently of his mother, to whom dower in that half was never assigned, was that of a joint tenant, and, therefore, not adverse to his cotenants. But, in any event, Mattie Stewart and Ellen Lilly being married women and under the disability of coverture while appellee had possession of the land, limitation did not run as to them.

For the reasons indicated the judgment is reversed and cause remanded for further proceedings consistent with the opinion.

GUENTHER V. WISDOM.

(Filed February 2, 1905—Not to be reported.)

1. Conveyance—Consideration—Money advanced to redeem lots—Adjudged to be a mortgage—A conveyance made to appellants, by direction of appellee, of certain lots owned by appellee, upon a writing by which appellant

agreed to let appellee have \$211.87 in money to redeem same, and that appellee should sell the lots by a named date and repay appellant the money, with 8 per cent. interest, and to pay appellant the money which the lots sold for up to the amount of his debt, and those he failed to sell was to belong to appellant if the debt was not all paid at said date, is adjudged to be a mortgage, and appellee adjudged to be the owner of the unsold lots, with a lien thereon to appellant for the balance unpaid.

2. Usury—The contract having been adjudged to be a mortgage and not a sale, appellant is entitled to only 6 per cent. interest on his debt.

E. B. Anderson for appellant.

Hayes & Wells for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Wisdom, purchased the equity of redemption in eleven lots in Mechanicsville Addition to the city of Owensboro. Being unable to pay his bid, \$2.60 on the equity of redemption and \$208.77, the amount required to redeem the lots from the original purchaser, he obtained from the appellant, Guenther, \$211.87. Thereupon he directed the court to make a deed to Guenther for the lots, which was accordingly done. At the time the money was obtained and the deed directed to be made to Guenther the parties entered into a writing, a part of which reads as follows: "And, whereas, the party of the second part has agreed to redeem for the party of the first part the said lots from the first purchasers thereof, as well as to pay the amounts bid for the equities of redemption (amounting in all to \$211.87) upon the terms and conditions hereinafter set out, now, therefore, for and in consideration of the premises, and for the said sum of \$211.87, the receipt of which is hereby acknowledged, and in order to secure the payment to the party of the second part of the said sum, with interest thereon as hereinafter stipulated, the party of the first part has this day transferred to the party of the second part his bid for the said equities of redemption in said lots, and authorized the court to make a deed to said lots to the party of the second part; and the party of the first part further agrees and binds himself to pay the party of the second part, on or before the first day of January, 1900, the said sum of \$211.87, with interest thereon at the rate of 8 per centum per annum from date until paid. It is agreed between the parties hereto that the party of the first part may sell any or all of such lots as he may be able to do so, and that the party of the second part will at any time convey to the party of the first part, or as he may direct, any lot, or lots, hereinabove mentioned, upon payment to the party of the second part of the amount paid for and on account of said lots, together with interest thereon at the rate herein agreed upon, up to the date of said payment, and any expenses which the party of the second part may necessarily incur in connection therewith: Provided, That should the said Wisdom sell any lot, or lots, for an amount greater than that specified in this paragraph, the whole of the proceeds of same is to be paid to the said Guenther to the extent of the amount of money advanced by him, with interest thereon as herein specified. It is understood that the prices paid for said respective lots are as follows, to wit: Lot 4, block 7, \$18.68; lot 5, block 7, \$18.18; lot 7, block 7, \$18.18; lot 4, block 8, \$18.18; lot 6, block 8, \$20.83; lot 7, block 8, \$20.88; lot 4,

block 9, \$21.97; lot 7, block 9, \$19.78; lot 4, block 19, \$19.78; lot 7, block 19, \$16.48; lot 6, block 20, \$16.48.

It is further understood and agreed that in case the party of the first part shall well and truly pay the said sum of \$211.87, with interest thereon as herein provided, on or before January 1, 1900, the party of the second part shall convey to the party of the first part all lots therein remaining unsold. But if the party of the first part shall fail to pay the said sum, together with interest thereon as herein provided, on or before the said date, then the party of the second part is to retain all the lots remaining unsold, and the party of the first part is to have no further claim upon, or interest in, them. And in that event, the party of the second part accepts said lots as full payment and satisfaction of the money advanced by him as herein provided, and is to have no recourse or demand against the said Wisdom for the repayment of the same, or any part thereof."

The appellee sold one lot for \$78.75, and two other lots for \$50, which sums were paid to appellant on his debt. There was a small balance due appellant, found by the court to be \$42.41. The appellant claims that he is entitled to hold the remaining lots for the balance due him on his debt, because the contract was a conditional sale of them to him. The appellee claims that the contract was only intended to secure the money appellant advanced him, and that it is nothing more than a mortgage for that purpose. The instrument shows that it was intended only to secure the money borrowed from the appellant. It was nothing more than the borrowing and lending of money. Besides, the parties regarded it as such, because the appellee repaid nearly all of the debt. It would be most inequitable to allow the appellant to hold the unsold lots for the small balance due him. And to do so would be in violation of the letter and spirit of the contract and in disregard of the interpretation which the parties themselves gave it. It is urged that the appellant is entitled to 8 per cent. interest upon the theory that it was part of the consideration for the purchase of the property. When we reach the conclusion that the transaction only amounted to the borrowing and lending of money, it follows that the excess of 6 per cent. is usurious, and the court properly computed the interest at 6 per cent.

The court decreed that appellant should reconvey the property upon the payment of the balance due him. And it is urged that the court should have ordered it sold to pay it. The court did not deny appellant's right to have it sold, and has complete jurisdiction to have it done, if the appellee does not repay the balance due him. It is urged that the court erred in allowing the appellee his costs up to the entering of the judgment. This was proper, because the appellant forced the appellee to institute the suit to have his rights in the property adjudicated, and he obtained the relief sought. If appellant is compelled to enforce the sale of the property for the amount due him, then appellee will be compelled to pay the costs resulting therefrom, because his failure to pay the money makes necessary the proceedings to enforce the payment of the debt.

The judgment is affirmed.

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LEXINGTON HYDRAULIC AND MFG, CO. v. OOTS, &c.

(Filed February 2, 1905.)

1. Contract to supply city with water—Liability of appellant to individual owner of property—Under a contract by a city with a water company to supply the city with water, such company is liable to an individual property owner for damages by fire resulting to her property from lack of water.

2. Exclusive remedy—The fact that there is a provision in the contract that "for any failure of the company to comply with any material part of its covenant shall, at the option of the city, work a forfeiture of its right to claim the rentals stipulated, and the city shall have the right, if this failure continues for thirty days, to terminate the contract," does not make such remedy exclusive, and such remedy would in nowise remunerate one who has lost her property by appellant's breach of its contract.

3. Setting aside verdict—Where the evidence in a case is conflicting in its character we are not warranted in setting aside the verdict of the jury.

4. Construction of contract—Instructions to jury—Section 16 of the contract provides: "That the machinery and boilers shall throw, if necessary, six streams of water at one time, out of a two and one-half inch hose with a one inch nozzle to a height of between eighty and one hundred feet," and under the facts in the record the jury should have been told that under the contract the company was required, when necessary, to furnish a pressure on the whole system sufficient to throw six streams of water of the given dimensions and power at one time, from hydrants located at different points on the system, and that if at the time of the fire there was such proportionate pressure on the mains contiguous to appellee's property as would naturally result from the before described pressure on the whole system, appellant would not be liable, but if such proportionate pressure was not on the mains contiguous to her property, and the failure to have it there was the proximate cause of the destruction of her property, then appellant was liable for the resulting loss.

Breckinridge & Shelby for appellant.

Morton, Webb & Wilson for appellees.

Appeal from Fayette Circuit Cour .

Opinion of the court by Judge Barker.

On June 7, 1901, a cooper shop on West Main street, in Lexington, Ky., belonging to the appellee, Mary E. Oots, was burned in a general conflagration extending over a large area of the western part of the city. To recover damages for the destruction of her property this action was instituted by appellee in the Fayette Circuit Court, based upon the alleged failure on the part of the water company to supply the requisite quantity of water, as stipulated for in its contract with the city. A trial of the action resulted in a verdict and judgment in favor of the appellee for the sum of \$800, to reverse which this appeal is prosecuted.

So much of the contract between the water company and the city as we deem pertinent to a proper discussion of the issues involved in the case is as follows:

"Section 1. That there is hereby granted to the Lexington Hydraulic Co., or any other responsible company, their successors and assigns, the privilege of constructing and maintaining waterworks in the city of Lexington, and thereby to supply said city and its inhabitants with pure and wholesome

water for public and private uses on the following terms and conditions, to wit:

"Sec. 2. The said company shall build and put in operation, within one year from date of this contract, a system of waterworks of a sufficient capacity to supply said city of Lexington with pure and wholesome water, for public, private and manufacturing uses.

"Sec. 3. The said company agrees to furnish the said city of Lexington with two hundred double-discharge fire hydrants, to be located within said city, as shown on the map filed herewith.

"Sec. 4. The said city of Lexington agrees to pay the said company a sum not to exceed \$10,000 per annum rental for a term of twenty-five years from the date of completion and successful testing of said works for said two hundred fire hydrants, to be paid to the superintendent of said company in quarterly installments, or to such other persons as the said company may designate.

"Sec. 5. A failure by said company at any time to comply with any material term, condition and stipulation of this contract shall, at the option of the city of Lexington, work a forfeiture of any rights to claim the rental herein provided for, and said city shall have the right, if such failure continues for thirty days, unavoidable accidents and delays excepted, to terminate this contract. * * *

"Sec. 13. Said company, their successors or assigns, shall, within thirty days after the acceptance in writing of the privileges granted by this ordinance, proceed without delay to make suitable arrangements for carrying out the purposes of this privilege, and shall, within one year, lay in a suitable manner within said city suitable cast or wrought iron water mains of sufficient length to properly connect said 200 hydrants; and of capacity to deliver the requisite quantity of water for fire protection and domestic supply as herein provided for. The main pipe leading from the pumps to the city shall be sixteen inches in diameter, and the remainder of such mains shall be twelve, ten, eight, six and four inches in diameter; and there shall be located on said main pipes within the limits of said city two hundred double discharge fire hydrants at the points designated in said map, and the hose attachments are to be made to fit the hose now in use for the city of Lexington. The hydrants are to be provided and maintained by the company, their successors or assigns, and are to be connected with the street mains, but the connection of the hydrants with the mains are to be considered main pipes, and there shall be attached to the main pipes suitable valves to shut off the water from any line of pipe if found necessary. It is further provided that when said fire hydrants have been established and erected, their location shall not be changed. The said city council may, from time to time, by ordinance and resolution, require the said company, their successors or assigns, within a reasonable time, not to exceed in any case ninety days, to extend said mains and pipes to other parts of the city, the extension to be from the terminus of any main, or from the intersection of the mains at any two streets, as the case may require, and the said company, their successors or assigns, shall erect and maintain one double discharge fire hydrant to every 300 feet or fraction thereof of such extension,

the same to be located as the city may direct along the line of said proposed extension. * * *

"Sec. 15. In consideration of the benefits to said city and the inhabitants thereof, to be derived from the construction and operation of said waterworks, and for the unrestricted use of said 200 fire hydrants for the extinguishment of fires, the said city of Lexington agrees and binds itself to pay to the said company, their successors or assigns, the annual sum of \$10,000, for the full term of twenty-five years from the completion and testing of said waterworks, for the rental of said 200 hydrants, the same to be paid quarterly to the superintendent of the said company, or to such other person as said company may designate, and in the same manner to pay \$50 per annum for all hydrants on extended mains and all intermediate hydrants which are subject to rental as above, for the remainder of said term of twenty-five years after the water is turned on.

"Sec. 16. In consideration of the rights and privileges herein granted to the said company, their successors or assigns, and the \$10,000 annual rental to be paid as aforesaid, the said company, their successors or assigns, shall give at all times unto said city the free and unobstructed use for fire purposes of any and all the fire hydrants located and maintained as aforesaid; and the said city, by its proper officers and employes, shall have the right, at all times, for the purpose of extinguishing fires, to take water from said hydrants without further cost or charges to said city. And in the construction of said waterworks the machinery and hydrants shall be manufactured by the Holly Manufacturing Co., of Lockport, New York, or by any other company which may be agreed upon between said company and the waterworks committee, to be of equal efficiency, and shall have two separate boilers, which machinery and boiler shall throw, if necessary, six streams of water at one time out of two and one-half inch hose, with one-inch nozzles, to a height of between eighty and one hundred feet. And it is further provided herein that the said city shall have water free of charge for four troughs for watering animals, to be located by the city council, which, with the pipes and fixtures therefor, shall be furnished by the city, and to be provided with self-closing valves, and shall furnish water free of charge for the city buildings, the city paying for hydrants and fixtures, and the said company to furnish said hydrants and fixtures at actual cost. And it is further provided that no charge is to be made for water used for filling the public cisterns or for exhibition of the fire department or for cleansing the public gutters or sewers, provided that no more than one and one-half inch streams be used at a time, one hour each day for each gutter or sewer; and further provided, that water for filling cisterns, for exhibitions of the fire department and for cleaning gutters and sewers, shall be taken only at stated times, or on reasonable notice by the mayor or marshal of said city to said company."

It is insisted by appellant that the case should be reversed for the following reasons: First, the petition fails to state a cause of action because there is no privity of contract between appellant and appellee; second, the contract itself furnishes a remedy for the failure of the water company to perform its stipulations, and this remedy is exclusive; third, the verdict is

contrary to the evidence; fourth, the court misinstructed the jury. Of these in their order.

The first proposition involves the soundness of the principle first enunciated in this State in the case of the Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky., 840, that for breach of contracts, such as that under consideration, the company is liable to the individual property owner for damages by fire resulting from lack of water. At the urgent solicitation of the learned counsel for appellant we have reconsidered the opinion in that case, and have pondered long on the forceful argument with which he has sought to overthrow the conclusion reached therein, with the result that we have determined that the opinion furnishes a correct exposition of the law on the subject involved, and we, therefore, adhere to it as authority.

It is true, as well said by counsel, a principle ought never to be considered settled until it is settled right; but it is equally true, when settled right, it ought to be adhered to without reference to the number of adjudications in other jurisdictions holding a contrary view. The second proposition is based upon section 5 of the contract, which prescribes that any failure of the company to comply with any material part of its covenant shall, at the option of the city, work a forfeiture of its right to claim the rentals stipulated, and the city shall have the right, if this failure continues for thirty days (unavoidable delays and accidents excepted), to terminate the contract. This remedy is claimed to be exclusive of any other. To this we can not agree. While it is true the parties to a contract may stipulate a remedy for its violation, and oftentimes the remedy will be deemed exclusive, that principle has no application here. If it be true, as we have said, that appellee has an action for the loss of her property by reason of a breach of its contract by appellant, section 5 does not supply her with a remedy, or in anywise remunerate her for the loss she has sustained. If the principle we have stated, as to the responsibility of appellant, is to be maintained, section 5 must be deemed as affording a remedy to the city by which it can control the company, and prevent a prolonged failure on its part to perform its contract, which is different from, and additional to, the remedy of appellee for her loss. To say that the remedy provided in section 5 is exclusive of all others for breach of contract on the part of appellant, is but another mode of saying that Paducah Lumber Co. v. Paducah Water Supply Co. should be overruled, and the principle contended for by appellant, that there is no privity of contract between it and the appellee, should be substituted as the correct rule of law.

As to the third proposition, the evidence adduced on the trial was voluminous in its quantity, and very conflicting in its character, and we are unable to say that the conclusion reached by the jury on the facts is so obviously contrary to the great weight of the testimony as to warrant us in invading their province and setting aside the verdict. The fourth proposition urged by appellant is that the court misinstructed the jury, and the soundness of this position depends upon the construction to be given the contract as to the pressure to be furnished in case of fire. By section 13 it is provided that the company shall "lay in a suitable manner within said city suitable cast or wrought iron water mains of sufficient length to properly connect said 200 hydrants, and of capacity to deliver the requisite

quantity of water for fire protection and domestic supply as herein provided for. The main pipe leading from the pumps to the city shall be sixteen inches in diameter, and the remainder of such mains shall be twelve, ten, eight, six and four inches in diameter." On the water mains there was to be located 200 double-discharge fire hydrants at points designated on a map showing the system as contemplated. By section 16 it is provided that "in the construction of said waterworks the machinery and hydrants shall be manufactured by the Holly Manufacturing Co., of Lockport, New York, or by any other company which may be agreed upon between said company and the waterworks committee, to be of equal efficiency, and shall have two separate boilers, which machinery and boilers shall throw, if necessary, six streams of water at one time out of two and one-half inch hose, with one-inch nozzle, to a height of between eighty and one hundred feet."

This is the portion of the contract upon which the question now under discussion turns. It is insisted by the appellee that, by this language, the company was under contract to furnish pressure, when necessary, sufficient to throw six streams at one time and on one main out of two and one-half inch hose, with one-inch nozzles, to a height of between eighty and one hundred feet, and, therefore, it was its duty to have a pressure sufficient upon the mains contiguous to appellee's property to throw six streams of water at one time, to the prescribed height, out of the hydrants located thereon. Appellant insists that the language of the contract should be given its natural meaning, and there should not be interpolated into it words which would make it read as if the covenant was to furnish sufficient pressure to throw six streams of water of the given force at one time and at one place; that the real meaning of the contract is that the pressure at the pumping station should be sufficiently great on the whole system to throw six streams of water from six hydrants at different points thereon; and it is urged that the evidence shows that a pressure sufficiently great to force water through a four inch main with sufficient velocity to meet the requirements of appellee's construction of the contract would not only burst the pipe, but all of the plumbing in the city, and under the well-known rule of construction of contracts this (if it can be avoided) must not be given an interpretation which imposes a duty impossible of performance, but the more reasonable one contended for by the appellant should be adopted. This reasoning, we think, is correct. The contract is, of course, mutual, and the covenant in question bears a direct relation to the consideration moving from the city to the company; and while it, doubtless, would have been better to have had all the mains of a dimension sufficient to have sustained the pressure resulting from appellee's construction of the contract, that would have entailed a higher rental, and this, presumably, the city was unwilling to pay. The dimensions of the water mains are prescribed in the contract, four inch mains being authorized in certain parts of the city; and as the water was to be supplied from the pumping station by direct pressure, it would be an unreasonable construction to say that this pressure should be so great as to burst all the four-inch pipe and all the plumbing in the city, and thus render the whole system an absolute failure.

The water system of appellant was established in 1885, and has been in use ever since. The mains were laid under the supervision of a specially-

appointed waterworks committee, whose business, presumably, was to see that the interest of the city was protected; and after the system was completed a trial of its efficiency was had, and a favorable report made thereof to the city council, who, by resolution, accepted it as installed. This resolution, which was adopted on February 25, 1885, is as follows:

"Be it resolved by the Mayor and Board of Councilmen of the City of Lexington:

"That whereas, the Lexington Hydraulic and Manufacturing Co., having completed the system of waterworks provided for in the contract entered into between the city of Lexington, State of Kentucky, and said company, and complied fully with the tests and requirements provided for in said contract:

"Therefore, the mayor and board of councilmen, acting for and in behalf of said city, hereby formally accept said system of waterworks as required by said contract."

It thus appears that, at the very beginning, it was known by the city that the company had laid four-inch mains on certain streets, and it accepted this as a valid fulfillment of the contract. We are not willing, under these circumstances, to put a construction upon the contract which, if enforced, would result in the destruction of the whole system, and render abortive the very end sought to be attained by its establishment. The jury should have been told by the court, in substance, that, under the contract existing between the city and the company, the latter was required, when necessary, to furnish a pressure upon the whole system sufficient to throw six streams of water of the given dimensions and power at one time from hydrants located at different points on the system, and that the contract of the appellant was fulfilled if, at the time of the fire which damaged appellee, there was on the water mains contiguous to her property such pressure as would naturally result from the before-described pressure on the whole system; that if there was such proportionate pressure on these contiguous mains, when necessary for the purpose of extinguishing the fire in question, appellant was not liable; but if such proportionate pressure was not on the mains contiguous to appellee's property when the necessity for it arose, and the failure to have it there was the proximate cause of the destruction of her property, then appellant was liable to her for the resulting loss.

The instructions given on the former trial, modified to meet the views above expressed, will, in our opinion, correctly embody the law governing this case as shown by the record. Without particularity of statement, we think the trial court correctly ruled on the questions raised as to the competency and relevancy of the testimony. We deem it unnecessary to pass upon what is called the misconduct of appellee's counsel, as this will not be repeated on a retrial of the case. We perceive no error in the record other than as above pointed out.

The judgment is reversed for proceedings consistent herewith.

Whole court sitting.

Judge Nunn dissents from the proposition of law in the opinion upon which this case is reversed.

HIEATT, &c. v. SCHMIDT, EX'OR.

(Filed February 3, 1905.)

Judicial sales—Infants' real estate—Newspaper advertisement—Consent of guardian not to advertise—Legality of sale—Under Kentucky Statutes, section 14a, providing "that in addition to notices now required by law to be posted, all public sales of any kind of property when sold under execution, judgment or decree shall, unless otherwise agreed upon by the parties to such execution, judgment or decree, be advertised in some newspaper published in the county of the sale." * * * Held—That the word "parties" in this section includes infants as well as adults, and in a decretal sale of the land of an infant, its guardian has the right, with the approval of the chancellor, to agree to dispense with the newspaper advertisement of the sale of such land, and such agreement is binding on the infant.

Leopold & Pennebaker and Johnson & Hieatt for appellants.

B. F. Gardner for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle.

The sole question presented for our consideration by the record in this case is, can an infant party to an action brought to obtain a decree for the sale of real estate, of which such infant is part owner, with the chancellor's approval, consent through his statutory guardian to a sale thereof without the newspaper advertisement required by section 14a, Kentucky Statutes?

The section supra contains the following provision: "That in addition to the notices now required by law to be posted, all public sales of any kind of property, when sold under execution, judgment or decree, shall, unless otherwise agreed upon by the parties to such execution, judgment or decree, be advertised in some newspaper published in the county of such sale." * * *

The decree of sale in this case states "by consent it is further adjudged that no advertisement of said sale shall be made, as required under and pursuant to section 14a, Kentucky Statutes."

The infant, Henrietta Collier, and her statutory guardian were plaintiffs, and as much interested in obtaining a sale of the land as were the adult plaintiffs, joint owners with her of the property, and it is to be presumed that she and they were equally benefited by its sale. The language of the statute in question indicates that the legislature had in contemplation the fact that cases might arise in which it would not be beneficial to the parties, whether infants or adults, to be put to the expense of the newspaper advertisement, for which reason the provision allowing such advertisement by consent of parties to be dispensed with, was inserted in the statute.

It could not, we think, have been contemplated by the legislature that an infant may not, by agreement of his guardian and the sanction of a court of equity, avail himself of the provision of the statute in question when it would be beneficial to him to do so. Such a construction of the statute would deprive infants of equal protection under it, and confine its beneficent operation to adults alone. Neither would this construction extend the benefits of that provision of the statute to all adults, for those of that class owning real estate in which an infant has a joint interest would be ex-

cluded from its operation because of that fact. Should adult parties to an action like those in this case (both plaintiffs and defendants) be denied the right conferred by statute to dispense with the newspaper advertisement because an infant happens to be a party to the action? And especially where the infant and her statutory guardian are plaintiffs, and the latter, by and with the approval of the chancellor, elects for the infant to join with the other parties in interest to dispense with the newspaper advertisement? We think not.

Obviously it must have been the opinion of the parties to this action, and of the chancellor as well, that the posting of the written or printed notices in conformity to the requirements of the judgment would afford sufficient advertisement of the property to be sold, and it does not appear from the record that the sale was not attended by the usual number of people and bidders, or that the property sold for less than its fair market value. We are of the opinion that the word "parties" in the section supra includes infants as well as adults. While an infant can not personally enter into a binding agreement, or waive a legal right, he or his estate may for many purposes be bound by the act of another having authority to represent him, and especially is this true if the thing done be advantageous to the infant.

In this case the agreement to dispense with the newspaper advertisement was made for the infant by the statutory guardian; the agreement was beneficial to the infant and was sanctioned by the court, evidence of all of which is sufficiently shown by the approval of the guardian and infant's attorney, endorsed upon the order, and by the recitals of the judgment. A court of chancery has power to elect for an infant in a case properly brought before it to affirm or disaffirm the transaction to which the infant is a party. (A. & E. Ency. of Law, volume 10, page 659.)

In *Kentucky Union Land Co. v. Elliott*, 12 Ky. Law Rep., 812, it was held that though a judgment, under which certain lands in which infants owned an interest had been partitioned, was void and would have to be reversed, because the infants were not served with summons, yet if, following such reversal, the infants were brought before the court, and it should appear that the partition made under the void judgment was equal and just, the guardian of the infants might in open court adopt the report. (*Kingsbury v. Buckner*, 134 U. S., 681; *Andrews v. Hall*, 15 Ala., 85; *Chambers v. Rainey*, 56 Texas, 17.)

We are clearly of opinion that the guardian of the infant appellee, Henrietta Collier, had the right, with the approval of the chancellor, to make, as he did for her, the election authorized by the statute, consequently the agreement of the parties to dispense with the newspaper advertisement of the sale of the real estate in controversy was, and is, binding upon her. The authorities relied on by counsel for appellant do not conflict with the views herein expressed. While they illustrate the zeal of this court in protecting the rights of infants, it will be found that they are cases in which the lower court was without jurisdiction to act upon the infant's rights, or there was an attempt either by the infant himself, or some one assuming to act for him, to illegally bind his estate, or waive his property or other rights in a manner forbidden by law. It follows from the foregoing conclusions that the chancellor did not err in overruling the purchaser's exceptions to the report of sale, or in confirming the sale.

Wherefore, the judgment is affirmed.

BUTLER v. STEPHENS.

(Filed February 8, 1905.)

1. Judicial districts—Power of legislature to create—Section 132 of the Constitution provides that “the general assembly, when deemed necessary, may establish additional (judicial) districts, but the whole number of districts, exclusive of counties having a population of 150,000, shall not exceed at any one time one for every 60,000 of population of the State, according to the last enumeration.” The last Federal census shows that the State had in 1900 a population of 2,147,174. This would have entitled the State to as many as thirty-one judicial district, outside of the county of Jefferson, which had a population of 232,549. Section 128 of the Constitution provides that “the general assembly, having due regard to the territory, business and population, shall divide the State into a sufficient number of judicial districts to carry into effect the provisions of the Constitution concerning circuit courts.” Held—That the act of the general assembly of 1904, creating the Thirty-first Judicial District, composed of the counties of Floyd, Knott and Magoffin, was constitutional.

2. Size of districts—The inhibition in the Constitution is not against the size of the districts at all except where single counties may constitute a district, and the fact that the Thirty-first District contained only about 86,292 population does not affect the validity of the act creating it, as the population of the entire State by the last census was such as to empower the legislature to create an additional district.

3. Commonwealth's attorney—Any one elected to the office of Commonwealth's attorney takes it subject to the constitutional right of the legislature to make new districts as the necessities and population may require, and those affected by its exercise must yield to it as one of the conditions fixed by the Constitution upon which they took their office.

J. F. Butler, W. O. Bradley, James Goble and R. L. Greene for appellant.

Hazelrigg, Chenault & Hazelrigg, Geo. B. Gardner, B. G. Williams and J. J. C. Bach for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge O'Rear.

The Twenty-fourth Judicial District, prior to 1904, was composed of the counties of Floyd, Johnson, Knott, Martin and Pike. In 1903, at the regular election, a circuit judge and Commonwealth's attorney were elected and commissioned for the term of six years, and entered upon the discharge of their duties. Appellant was the Commonwealth's attorney elected for that district at that time. At the regular session of the legislature held in 1904 there was erected a new district, the Thirty-first, which was made to comprise the counties of Floyd, Knott and Magoffin. The governor appointed appellee as Commonwealth's attorney in the Thirty-first District until the next succeeding regular election, who qualified and entered upon the discharge of his duties.

This appeal presents for decision the controversy between appellant, John F. Butler, the Commonwealth's attorney in the Twenty-fourth District, and appellee, A. B. Stephens, Commonwealth's attorney in the Thirty-first District, as to who was entitled to administer the duties of that office in the

county of Floyd, they each claiming the right. The decision in the court below was in favor of Stephens. We waive the question of practice presented by which the controversy was brought before the court, having come to the conclusion that the judgment must be affirmed on the merits of the case as they are made out in the record.

The validity of the act of 1904 (Session Acts, 1904, page 125) is assailed on two grounds: First, it is contended that no new rural district can be created unless it contains at least 60,000 population; second, that as the effect of the act is to diminish appellant's salary or official compensation, it is repugnant to section 235 of the Constitution, and as to appellant is void. By section 97 of the Constitution a Commonwealth's attorney is to be elected in each judicial district. The Constitution of 1891 did away with all courts of general original jurisdiction save circuit courts. By section 128 the legislature was required, at its first session after the Constitution went into effect, to divide the State into judicial districts. It was in that section provided: "In making such apportionment no county shall be divided, and the number of said districts, excluding those in counties having a population of 150,000, shall not exceed one district for each 60,000 of the population of the entire State."

Section 132 of the Constitution reads: "The general assembly, when deemed necessary, may establish additional districts; but the whole number of districts, exclusive of counties having a population of 150,000, shall not exceed at any one time one for every 60,000 of population of the State, according to the last enumeration."

Section 134 is: "The judicial districts of the State shall not be changed except at the first session after an enumeration, unless upon the establishment of a new district."

Section 137 of the Constitution provides that counties having a population of 150,000 or over shall constitute a district, and be entitled to four judges. It also provides that the general assembly may increase the number of judges in such counties, but not to exceed one for each increase of 40,000 population, "to be ascertained by the last enumeration."

By section 138 it is further provided that each county having a city of 20,000 inhabitants, and a population including said city of 40,000 or more, may constitute a district, and when its population reaches 75,000 the general assembly may provide that it shall have an additional judge, and may have a judge for each additional 50,000 above 100,000. From these sections it is argued that there can be no district created, except in counties having a population of 150,000 or over, or in counties having a population of 40,000, and a city of 20,000, unless such district contains at least 60,000 population. It is also urged that as frequent reference is made in these sections of the Constitution "to the last enumeration," it was intended to adopt the Federal census enumeration as the sole evidence of the requisite number of population for determining the matter of dividing the State into judicial districts. There was not at the time of the adoption of the Constitution, nor has there since been, any provision of law for taking an enumeration by the State. It may, therefore, be conceded that these references were to the Federal census. It may also be assumed that the population of the entire State, and of each of its counties, as shown by the Federal census is a

matter of which the courts will take judicial notice. Proceeding upon these assumptions, it is found that the last Federal census shows that the State of Kentucky contained a population in 1900 of 2,147,174. The only county in the State then having a population of 150,000 or over was Jefferson, with a population of 232,549. This would have entitled the State to as many as thirty-one judicial districts outside of the county of Jefferson. At that time, and until the creation of the Thirty-first District, there were only thirty districts, including the county of Jefferson. Instead of the requirement being that each district must contain at least 60,000 population, save as expressly excepted, the Constitution carefully leaves the number of population to the wisdom of the general assembly. In section 128, where the duty is imposed to divide the State into judicial districts, it is said: "The general assembly, having due regard to the territory, business and population, shall divide the State into a sufficient number of judicial districts to carry into effect the provisions of this Constitution concerning circuit courts."

So that we see that something in addition to population was to enter into the consideration of the sizes of the districts. The inhibition is not against the size of the districts at all, except where single counties may constitute a district. The total number of districts only was limited by the population of the last preceding enumeration. Such was the construction of the first general assembly that convened after the adoption of the Constitution. They then divided the State into circuit judicial districts, thirty in number. The last preceding census, that of 1890, gave the State of Kentucky a population of 1,858,635. Jefferson county, then as now the only county having as many as 150,000 population, contained 188,698 inhabitants. If it was required by the Constitution that each district, except the counties which were singly entitled to be a district, must contain at least 60,000 population, deducting the population of Jefferson, there could have been only twenty-seven other districts provided. Giving the counties of Kenton, Fayette and Campbell each one district (they each being entitled to be a separate district), would have left only twenty-five districts that the State could have been apportioned into. Yet that general assembly created thirty districts, making one district each for Jefferson, Kenton, Campbell and Fayette counties. It will be observed that in determining when single counties may be created into separate districts the Federal census is not adopted as the basis of ascertaining the population. (Section 137.) The same session of the legislature created the Twenty-third District (in which Magoffin county was placed) and the Twenty-fourth. Neither of these districts contained in 1890, according to the census of that year, as many as 60,000 population. The Twenty-third had only 42,122, and the Twenty-fourth 49,308. A number of other districts in the State, having more than one county, also contained less than 60,000 population. This apportionment has never been questioned, so far as we know. The fact that the Thirty-first District contained only 86,292 does not affect the validity of the act creating it, as the population of the entire State, by the last census, was such as to empower the legislature to create an additional district, if in their wisdom the conditions required it. Whether they did or not is a matter entirely beyond the jurisdiction of this court to look into.

Section 235 of the Constitution reads: "The salaries of public officers shall not be changed during the term for which they were elected." * * *

By section 98 it was provided that "the compensation of the Commonwealth's attorney shall be by salary and such percentage of fines and forfeitures as may be fixed by law, and such salary shall be uniform, ~~in~~ so far as the same shall be paid out of the State treasury, * * * not to exceed \$500 per annum."

By statute Commonwealth's attorneys receive in addition to the \$500 salary, payable out of the treasury, 50 per cent. of all fines and forfeitures recovered in the circuit courts of their districts. Appellant contends that by taking from his district the counties of Knott and Floyd his salary is diminished. It may be conceded that the percentage of fines and forfeitures given by statute to Commonwealth's attorneys are to be regarded as salary, as the term is used in section 98 of the Constitution. The legislature would not, therefore, have the power to provide a less or greater per cent. of fines and forfeitures to the Commonwealth's attorneys, or increase or diminish the salary of \$500, payable out of the treasury. But that is the extent of the limitation. Any person elected to the office of Commonwealth's attorney takes it subject to the constitutional right expressly reserved to the legislature to make new districts as the necessities and population of the State may require. The exercise of this power by the legislature is presumed to be in behalf of the State and its citizens. Commonwealth's attorneys affected by its exercise must yield to it as one of the conditions fixed by the Constitution upon which they took their offices.

Wherefore, the judgment of the circuit court is affirmed.

HOWARD v. WESTERN UNION TELEGRAPH CO.

(Filed February 7, 1905.)

1. Telegram—Delay in delivery—Ineffectual if delivered—The fact that a telegram announcing a son's illness was unreasonably delayed in its transmission and delivery will not entitle the father to damages for mental suffering in not seeing his son before his death where the evidence fails to show that he could have reached his son before his death if there had been no delay.

2. Burden of proof—In an action for damages for delay in the transmission or delivery of a telegram announcing the illness of a son, the burden is on the plaintiff to prove not only the negligence in its transmission and delivery, but that such negligence was the proximate cause of the failure of the parent to reach the son before his death.

3. Interstate—Telegram—Mental suffering—Nonliability of foreign State—Effect on this State—In an action in this State for the negligent transmission or delivery of a telegram from another State to this State, damages for mental suffering may be recovered in this State, although the laws of the State from which it was sent do not allow a recovery for mental suffering unless accompanied by physical injury.

A. G. Patterson for appellant.

Richards & Ronald, Geo. Fearons and Wm. Low for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Settle.

This case is before us the second time. It was reversed upon the former appeal because of error upon the part of the lower court in dismissing the action as a result of appellee's refusal to make his petition more specific. (Howard v. Western Union Telegraph Co., 25 Ky. Law Rep., 828.)

Upon the trial that followed the return of the case to the lower court that court at the conclusion of appellant's testimony gave the jury a peremptory instruction to find for the appellee, and they returned a verdict as instructed. We are asked by appellant to review the rulings of the lower court as to the giving of the peremptory instruction and in refusing him a new trial. The appellant brought the action to recover damages of the appellee for mental suffering caused him by the alleged negligent failure of its agents to transmit and deliver within a reasonable time the following telegraphic message:

"To John Howard, Pineville, Ky. :

"Lark shot dangerously bad. Come at once.

"L. JACKSON."

The appellant lives at Pineville, this State, and the "Lark" referred to in the telegram was his son, Larkin Howard, who was shot at Hurley, W. Va., on the afternoon of October 4, 1902. The message was telephoned from that place, a distance of twelve miles, to Devon, W. Va., where it was received by appellee's agent in charge of its telegraph office at that place, about 5 o'clock, p. m., October 4, and was by him later forwarded to appellee's office at Pineville, Ky., where it was received at 11:45 p. m., of the same day, but was not delivered to appellant until 8.05 a. m., Sunday, October 5.

It was averred in the petition that by reason of the negligence of appellee's Devon agent in delaying the sending of the message, and that of its Pineville agent in delivering it, appellant was prevented from reaching his son's bedside before his death, which occurred at 1:30 a. m., October 6, 1902. It appears from the evidence that appellee was about seven hours in transmitting the message from Devon to Pineville, and that about sixteen hours intervened between the time of its receiving the message at Devon and its delivery to appellant. This delay seems to us unreasonable and inexcusable. But conceding the negligence of appellee on this point, if as a matter of fact the message had been transmitted and delivered in reasonable time, and it was nevertheless out of appellant's power to have reached his son's bedside before his death, he was not entitled to recover, and it was because the lower court was of opinion that there was no evidence conducing to prove that appellant, if the message had been promptly transmitted and delivered, could, in the usual course of travel, have reached his son before his death, that the peremptory instruction was given the jury to find for appellee.

It was held by the Court of Appeals of Texas in Western Union Telegraph Co. v. Hendricks, 63 S. W., 841, that where a message was sent to a father informing him of the illness of his son, and he could not have reached the son before he died, if the message had been promptly delivered, a delay in delivering the message would not warrant a recovery of damages for the failure to reach the son before his death. This doctrine was recognized by this court in Western Union Telegraph Co. v. Parsons, 24 Ky. Law Rep.,

2008, though it could not be applied to the facts of that case. It is conceded that appellant's son died at the house of Lee Jackson, in Hurley, W. Va., at 1:30 o'clock, a. m., October 6, 1902.

The evidence introduced as to how and when appellant might have reached his son consisted mainly of his own testimony, according to which there were two routes from Pineville, one over the Louisville & Nashville Railroad to Winchester; thence over the Chesapeake & Ohio Railway to Ashland; thence over an electric line to Kenova, W. Va.; thence over the Norfolk & Western Railroad to Devon, from which point a dummy line runs a distance of twelve miles to Hurley. The other route is by the Louisville & Nashville Railroad from Pineville to Norton, Va.; thence to Bluefield; thence over the Norfolk & Western Railroad to Devon. It was stated by appellant that if the message announcing the wounding of his son had been promptly transmitted and delivered to him on the evening of October 4, 1902, he could have taken a train by way of Winchester that left Pineville at 10 p. m., the same day, or gone by way of Norton, by taking a train that left Pineville at 7:50 a. m., October 5, upon either of which he thought he could have reached Hurley before his son's death. All that appellant testified as to the Winchester route was mere hearsay, for he admitted that he had never been over that route, but said that had connection been made with the different railroads indicated at Winchester and Ashland, by this route the train would not have arrived at Kenova at 4 p. m. Sunday, October 5, which place was still one hundred miles from Devon, and he was unable to say whether a train run from Kenova to Devon on Sunday, or, if so, when it left Kenova or arrived at Devon. No time tables were introduced by appellant to show the time of the running of the trains on either route, nor did he introduce any of the employes of any of the railroads to prove these facts.

We do not think there was any competent testimony conducing to prove that appellant, by the Winchester or Kenova route, could have reached his son before the latter's death. Besides, it is apparent that for some cause, satisfactory to himself, he was unwilling to take the Winchester route, though he could have done so on Sunday, October 5, at 10 p. m., instead of doing which he went Sunday afternoon as far as Middlesboro to obtain a pass over the Norton route, which he secured, and on the morning of the 6th (Monday), started from there by way of Norton to go to his son, but he got no further than Norton, as he there received a telegram informing him of his son's death, whereupon he at once returned to Pineville. Appellant further testified that if the message from Jackson announcing the condition of his son had been promptly delivered he believed he could have taken the Louisville & Nashville train at 7:50 a. m., on Sunday, October 5, and by the Norton route have reached his son in time to see him alive.

This conclusion was not based upon his knowledge of the running of the trains on that route as of the date of his son's death, but from knowledge derived by going over that route in December, 1902, two months afterwards. He did not, however, testify that the time schedule was then as it was at the time of his son's death. All that he knew was that if the trains on the Norton and Bluefield route ran on October 5, 1902, as they did in December following, by taking the 7:50 train on the morning of Sunday, October 5,

he could, if close connection had been made at Norton and Bluefield, have reached Devon at 12:18 Sunday night, and from that place he could have gone upon another line of railroad in an hour's time to Hurley, which would have enabled him to reach the latter place at 1:18, just seventeen minutes before his son's death.

It does not appear from appellant's testimony, or from that of any other witness, how far Lee Jackson, at whose house the son died, lived from the depot at Hurley; whether he was a resident of the town, or lived some distance in the country, consequently the evidence does not show whether appellant, if he had arrived at Hurley at 1:18, could have gotten to his son in the seventeen minutes of time intervening between the arrival of the train and his death. The burthen was upon appellant to prove not only that appellee was guilty of negligence in transmitting, or delivering, the telegram, but in addition that such negligence was the proximate cause of his failure to reach the bedside of his son before the latter's death. We are of opinion that the lower court was authorized to conclude that there was no evidence conducing to prove that appellant could have reached his son before his death if the telegram had been promptly delivered; consequently there was no error in the giving of the peremptory instruction.

It is contended by counsel for appellee that the peremptory instruction was also authorized upon the ground that a contract for the transmission of an interstate telegram is governed by the law of the State where it is made, and that the telegram in this case was sent from West Virginia, under a contract made in that State, which was in part performed in that State, and under the laws of that State a recovery of damages for mental suffering, unaccompanied by physical injury, is not allowed. This defense was specifically pleaded in the third paragraph of the answer, to which a demurrer was sustained by the lower court. In some of the States the courts have held as contended by appellee, but the weight of authority supports the contrary view.

"Where contracts are made in one place to be performed at another, they are to be governed by the law of the place of performance, as to validity, nature, obligation and interpretation. But the remedy upon it will be governed by the law of the State in which the remedy is sought. * * * Where a contract is made in one State and intended to have effect in another, it must conform to the laws of the latter State." (Am. & Eng. Ency. of Law, volume 8, page 561; *Goddin v. Shipley*, 7 B. M., 575; *Tyler v. Trabue*, 8 B. M., 306; *Stephens v. Gregg*, 89 Ky., 461; *Chapman v. Western Union Telegraph Co.*, 90 Ky., 268.)

In American and English Ency. of Law, volume 27, page 1079, 2d edition, we find the following under the head of Conflict of Laws: "The fact that damages for mental anguish alone are not recoverable under the laws of the State from which the message was sent will not preclude a recovery of such damages in the State to which the message was directed, where the laws of the latter State permit such recovery. Likewise, a recovery for such damages may be had in the State whence the message was sent, although they may not be recoverable under the laws of the State where the message was to be delivered. But when the law of the place whence the message was sent and that of the place of delivery both refuse to recognize such dam-

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ages, they can not be recovered, although the action may have been brought in a jurisdiction which recognizes the right to recover them."

In *Western Union Telegraph Co. v. Eubank & Russell*, 100 Ky., 591, it was said by this court: "The general rule is that the law of the place where the contract is to be performed governs, subject, of course, to the rule that a contract which is void by the law of the place where made is void elsewhere."

The most recent decisions of this court upon the doctrine in question are to be found in *C., C. & St. Louis Ry. Co. v. Drum*, 26 Ky. Law Rep., 108, and *Adams Express Co. v. Walker*, 26 Ky. Law Rep., 1025. In the former case it was held that where the contract is valid in the State where it is made the law of that State governs insofar as it is to be performed outside of this State, but that the law of this State governs insofar as it is to be performed in this State. In the latter case it was held that an interstate contract of carriage, to be partially performed in Kentucky and partially performed in the State where made, is governed by the law of the State where made and partially performed to the extent of its performance outside of this State, and governed by the laws of Kentucky so far as its performance in the latter State is concerned. If the negligence or breach occur wholly in the State where the contract is made and partially performed, it is governed by the laws of that State, but if the negligence or nonperformance occur in Kentucky, it is governed by the laws of this State. We see no reason why the doctrine announced in the several cases *supra* should not apply to the case at bar. The contract, though made in West Virginia, was to be consummated in Kentucky, and the negligence complained of occurred mainly in the latter State. We are, therefore, of opinion that the demurrer to the third paragraph of appellee's answer was properly sustained.

For reasons herein indicated the judgment is affirmed.

Whole court sitting.

Judge Nunn dissenting.

UNITED STATES FIDELITY AND GUARANTY CO. v. OVERSTREET.

(Filed February 7, 1905—Not to be reported.)

Indemnity bond—Liability thereon—An indemnity bond conditioned that the surety "will make good and reimburse to the employer any pecuniary loss sustained by him of money, securities or other personal property in the possession of the employe in the discharge of the duties of his office" amounting to larceny or embezzlement," does not make the surety liable for money advanced by the employer to the employe to enable him to prosecute his work, expecting him to be charged with it all in his final settlement, or for money that the employer paid to his employe's creditors, but is responsible for money collected by the employe on contracts for the employer.

Bodley, Baskin & Flexner for appellant.

J. B. Wickliffe for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee had in his employ one J. L. Davidson as compiler of material for an edition of appellee's newspaper. Davidson's duties as compiler seem to have been confined to soliciting advertising matter for the special edition, and collecting the pay for it. He was required by appellee to execute a bond indemnifying appellee against certain defalcations, which he did with appellant as surety. The obligation of the bond was that the surety would "make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of money, securities, or other personal property in the possession of the employe (Davidson) in the discharge of the duties of his office or position as set forth, amounting to larceny or embezzlement, and which shall have been committed during a continuance of the bond." It was further stipulated in the bond: * * * "It being the true intent and meaning of this bond that the company (appellant) shall be responsible only as aforesaid, for moneys, securities or property diverted from the employer through fraud or dishonesty, amounting to larceny or embezzlement aforesaid, on the part of the employe within the period specified in this bond, while in the discharge of the duties of the office or position to which he has been elected or appointed."

Appellant advanced money and other property and credits to his compiler to enable the latter to prosecute his work, expecting that Davidson would be charged with it all in his final settlement. Upon the same idea appellee engaged to certain of Davidson's creditors that he would be responsible for his bills, and accordingly paid them. Before completing his work Davidson decamped, without repaying his employer the sums so advanced to him and on his account. In addition Davidson turned in certain contracts which turned out to have been forgeries, so it is said. The parties in whose names they appear to have been made repudiated them as not genuine. This suit against the surety sought to charge it with all of those matters, and in addition with \$16, collected by Davidson from persons from whom he had taken contracts for appellee. We are of opinion that the last-named item, the \$16 mentioned, was the only one covered by the bond. Appellant did not undertake to secure Davidson's debts, nor that he would fulfill his contract to do the work for appellee that he had engaged to do. It merely undertook to indemnify the employer against Davidson's peculations by which he might have misappropriated the former's funds to the latter's own use, without the consent of the former, and which had been entrusted to the latter's care, or which had come into his possession, or to which he had got access, by virtue of his employment.

Whether or not the old rule that a surety is a favorite of the law, and his contract will be construed strictly in his favor, applies to those who make it a business to become surety for pay, or whether the contract in the latter case is to be construed as any other insurance contract, that is, most strongly against the insurer, still the obligation can not be extended beyond the plain meaning of its expressed terms. The contract in this case is a limited one. It covers only a narrow liability. The parties have so agreed. And that is the end of it. (Chas. Brown Grocery Co. v. Wasson, 118 Ky., 414.)

We decide the case upon the record before us. What the application may

have shown to enlarge the contract, if it showed anything on that point, is not before us.

The judgment must be reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

SPENCER CHRISTIAN CHURCH'S TRUSTEES, FOR USE v.
THOMAS, &c.

(Filed February 7, 1905—Not to be reported.)

Lands—The lot in controversy was properly adjudged to appellees, it having been shown they have the title and that appellants have neither pleaded nor shown one.

B. F. Day & Son and C. F. Thomas for appellants.

Robt. H. Winn for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is prosecuted by the appellants by which they seek to reverse a judgment of the Montgomery Circuit Court, rendered at its September term, 1902, in which a small strip of land, 107 by 169 feet, is adjudged to appellees as against appellants.

It appears from this record that appellees are the owners of and have the paper title to a tract of land lying on the north side of and adjoining the Spencer turnpike road; that prior to appellees becoming the owners thereof the appellants received a conveyance from one Ellis, the then owner of this tract, for one acre of land, the deed giving the metes and bounds thereof. This strip of land in controversy lies between this one acre belonging to the church and the turnpike road. It appears that this strip of land has never been enclosed by any character of fence, but it has been open and used by the persons occupying and attending a blacksmith's shop, situated at the east end thereof, and by persons attending the church, in fact, by all persons who desired to use or pass over it for sixty or seventy years. Appellees erected a tobacco barn on the west end of this strip. When they commenced to erect the barn this suit was instituted. It is conceded that the paper title to this property is in the appellees, but the appellants claim to be the owners of it by reason of the long adverse possession. Appellants prove the long use of it as stated, but they do not prove that the use was adverse or under a claim of right. There is not a scintilla of evidence to that effect. There is no claim of dedication of the property by the owners to this charity, or for any other purpose. There is no proof at all of adverse possession. The proof is that appellees and their tenants used this property as much, or more, than the appellants.

There can be no constructive possession of the same land by conflicting claimants. It is obvious that two persons claiming against each other can not at the same time be in the actual possession of the same premises, either in law or in fact. If both are present, claiming the title, the possession is his who has the title. In this case the appellees have the title, and the appellants have neither pleaded nor shown one. (Owsley, Sr. v. Owsley, Jr.,

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25 Ky. Law Rep., 1187; Taylor v. Shields' Heirs, 5 Lit., 295; Jones v. McCauley's Heirs, 2 Duv., 14; Wait, &c. v. Gower, &c., 11 Ky. Law Rep., 750. The court gave appellees the land, with passway to appellants.

Wherefore, the judgment of the lower court is affirmed.

Judge O'Rear not sitting.

HAMILTON v. MAYSVILLE & BIG SANDY R. R. CO., &c.

(Filed February 7, 1905—Not to be reported.)

Lands—Condemnation of—Tender—In this case it appears that appellant announced in open court that she would not accept the money awarded her for her land, and this being true, a tender was unnecessary, and appellee was excused when the money was deposited by it in open court.

A. D. Cole and T. R. Phister for appellant.

Worthington & Cochran and W. H. Wadsworth for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

Appellee, the Maysville & Big Sandy R. R. Co., August 10, 1899, instituted proceedings in the Mason County Court to condemn a strip of land for its roadbed, through a lot belonging to appellant, containing about one acre. The commissioners awarded her \$300. Exceptions were filed to the commissioner's report, which were tried before a jury in the county court. The jury also allowed her \$300. She appealed therefrom to the Mason Circuit Court, and on a trial there she was awarded \$500. She accepted this sum, and the same was paid to her and she conveyed the strip to appellee in March, 1900.

In March, 1903, she brought this action against appellees, claiming \$1,000 damages for trespasses committed on this strip of land, alleged to have been done by appellees in October, 1899, which was after the rendition of the judgment in the Mason County Court, which she had appealed from. Appellees answered her petition, denying that she owned the land when the alleged trespasses were committed, and by a second paragraph set up the condemnation proceedings, making the transcript thereof a part of it, and also setting up the fact that on the rendition of the judgment in the county court she objected and excepted to the verdict and judgment, and announced in open court that she would not accept the verdict or receive payment of that sum for her property; and thereupon the appellees deposited with the court the \$300, and paid all the costs of the proceeding to that date, and thereupon the court adjudged that the appellees were entitled to take possession of this strip of land and use and control same for the purpose for which it was condemned. Appellant demurred to this paragraph of the answer, which was overruled. She filed a reply, controverting the allegation as to the offer to pay and the deposit of the money. She, however, did not deny that she announced in open court that she objected and excepted to the verdict, and that she would not receive or accept that sum.

The question involved on this appeal is whether or not the judgment of the county court authorizing the appellees to take possession of this strip of

land at the time and under the circumstances was void. Appellant claims that it was unauthorized and void for two reasons, to wit: First, the appellees did not tender the money to her as required by the statutes; second, that if section 889 of the statutes authorized the county court to make such an order, then the statute is violative of section 242 of the Constitution, and is void.

The last proposition was settled by this court in the case of C., St. L. & O. R. R. Co. v. Sullivan, 24 Ky. Law Rep., 860. It is true that this case was considered by Burnam, C. J., in chambers on a motion to reinstate an injunction, but the whole court heard and considered the case with him, and his opinion was delivered as the opinion of the whole court. The opinion in that case decides that such an order of the county court and the taking possession of the property thereunder by the party at whose instance it is condemned is legal. As to the proposition of tender, it is sufficient to say that a tender in money is excused when the party to whom it should be made declares he will not receive it. (Dorsey v. Barbee, Litt. Sel. Cas., 204.)

In the case at bar it appears without contradiction that appellant announced in open court that she would not accept the money, and it would have been futile and unnecessary to do otherwise than to deposit the money with the court, as was done in this case.

Wherefore, the judgment of the lower court is affirmed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO. v.
BURGESS.

(Filed February 7, 1905—Not to be reported.)

1. Instructions—In this action against appellant for the killing of stock the court properly instructed the jury that while it is the duty of the engineer to keep a lookout ahead of the train to see if the track is clear of obstructions, yet he is not required to keep his eyes constantly on the track in front of him, but only that he should exercise reasonable care in the discharge of his duty.

2. Same—The rule in this State is that if there is any evidence the question is for the jury, and in cases like this, where the circumstances showed that the stock might, by the exercise of ordinary care, have been seen in time to avoid a collision, and warranted such finding of the jury, this court has uniformly held that a peremptory instruction should not be given.

V. F. Bradley and John Galvin for appellant.

Montgomery & Lee for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant's fast train going south about 9 o'clock at night ran into a lot of mules owned by appellee, killing eight and wounding another. To recover for this he filed this suit. The jury to whom the case was submitted returned a verdict in his favor for \$705, on which the court entered judgment, and the defendant appeals.

There is no complaint of the instructions of the court or of the admission or rejection of evidence. The only complaint is that the evidence does not warrant a verdict for the plaintiff, and that at the conclusion of the testimony the court should have directed a verdict for the defendant. The proof for the defendant is to the effect that the mules were on a curve, and that by reason of the curve the engineer of the train could not see them until he got within two hundred and fifty or three hundred yards of them; that the train could not be stopped within less than a quarter of a mile, and that after the mules were discovered on the track everything was done which could have been done to avoid striking them. The train was furnished with an electric headlight, which was so arranged as to throw the light straight ahead on the track, and where the track curved the light would follow a straight line and would not be thrown upon the track around the curve. If there had been no other evidence but that of the defendant there would be great force in the argument made for it. But the plaintiff showed that the mules were struck and knocked from the track at a point only five rail lengths from the beginning of the curve, and that from this point there was a plain view northward for about seven hundred yards. His proof also showed that there was blood on the ties two rail lengths north of where the mules were knocked from the track, and that for three rail lengths north of this point there were tracks of the mules cupping the ground, caused evidently from running in front of the train. If this proof was true the mules when they began to run were at or about the beginning of the curve, with a straight track north of them for some distance. A rail is thirty feet long, and the distance that the mules ran before they were hit by the train running about forty-five miles an hour was some evidence that the train was pretty close to them when they began to run, or that it then had entered on the straight track north of them. One of the mules was caught upon the pilot and carried there something like two hundred yards to where the train stopped. This mule may have been the first one struck, and may account for the blood found two rail lengths north of where the other mules were knocked off. The proof for the plaintiff showed that the electric headlight lighted the place where the mules were knocked off when the train was at least seven hundred yards from it, and while some of this proof is not entitled to much weight, that of the surveyor who measured the ground is of more value.

The court properly instructed the jury that while it is the duty of the engineer to keep a lookout ahead of the train to see that the track is clear of obstructions, yet the law does not require that he should keep his eyes constantly on the track in front of him, but only he should use reasonable diligence and caution in the discharge of this duty. The rule in this State is that if there is any evidence the question is for the jury, and in cases similar to this, where the circumstances showed that the stock might, by the exercise of ordinary care, have been seen in time to avoid a collision, and warranted such a finding by the jury, this court has uniformly held that a peremptory instruction should not be given. The law raises a presumption that the injury of stock is due to the negligence of the railroad company, and this presumption can not be said to be overthrown as a matter of law when the evidence shows such a state of facts as appears here.

Judgment affirmed.

MANDERS' COMMITTEE v. EASTERN STATE HOSPITAL.

(Filed February 7, 1905—Not to be reported.)

1. Lunatics—Pleading—A motion to dismiss an action by an asylum for the keeping of a lunatic for want of demand upon the committee before suit brought was properly overruled, as this was waived by filing a demurrer to the petition.

2. Depositions—While the Virginia officer in his certificate to the depositions does not certify that the witnesses were sworn, he does so state in the caption, and the whole deposition, including the caption, must be read, and when so read it sufficiently appears that the witnesses were sworn.

8. Jurisdiction—Limitation of actions—Where Manders took his wife to Virginia temporarily on a visit, where she became insane and was committed to an asylum in that State, but he kept his residence in Kentucky, keeping her estate here, an action by the asylum for keeping her could only be maintained in this State, and, therefore, the limitation provided for by the Kentucky Statutes in such cases must govern, for a Virginia statute of limitation could not be applied to an action that could not be enforced in that State.

Beard & Marshall for appellant.

Pickett & Barrickman and Gilbert & Gilbert for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Hobson.

Mary T. Manders has been confined in the Eastern State Hospital of the State of Virginia as a lunatic since the year 1897. C. S. Weakley, as her committee, appointed in Shelby county, Kentucky, has in his hands an estate amounting to something over \$2,800 belonging to her.

This action was brought by the Virginia asylum against Mrs. Manders and her committee to recover for her keeping during the time that she has been in the asylum at the rate of \$260 a year. The circuit court allowed five years of the claim at \$150 a year. From this judgment the committee appeals, and the asylum prosecutes a cross appeal. Before proceeding to the merits of the case we will dispose of some preliminary matters. The motion to dismiss the action for want of demand on the committee before suit brought was properly overruled, as this was waived by filing a general demurrer to the petition. Objections of this character must be made at the threshold. A general demurrer goes to the merits of the case. A litigant can not ask the judgment of the court on the merits of the case, and after being defeated on this plead matter in abatement, such as want of demand, accompanied by proper verification before suit. While the Virginia officer in the certificate to his deposition does not certify that the witnesses were sworn, he does so state in the caption. The whole depositions must be read, including the caption as well as the certificate, and when they are so read it sufficiently appears that the witnesses were sworn.

The motion to transfer the case to the ordinary side of the docket was properly overruled, as there was unreasonable delay in making the motion. (Chenault v. Eastern Kentucky Timber and Lumber Co., 96 Ky. Law Rep., 1078.) The motion for continuance was also properly overruled, as the plaintiff consented that the affidavit for continuance might be read as the

deposition of the witnesses. There was no show that a further delay of the case was necessary.

The facts of the case are that Mary T. Manders was a married woman, living with her husband in Shelbyville, Ky., and about the year 1895 was adjudged a dangerous lunatic, and sent to the Eastern Kentucky Asylum. After being in the asylum for some time she was released as a harmless patient, and returned to Shelbyville. Not long after this she was again taken to the asylum, where she remained a short time, when her husband, at the request of her sister, who lived in Richmond, Va., took her from the asylum to her sister's house, hoping that the change would benefit her. After she had been in Richmond a short time, in February, 1897, on the application of her husband a writ of lunacy was obtained against her, which was heard under the statutes of that State by three magistrates, who committed her to the Eastern State Hospital of Virginia, and there she has remained since. At the time of this inquest Manders and his wife were both in Richmond, and he appears to have remained there a year or two afterwards, and in fact died there in the year 1901, though he returned to Kentucky between times, and seems to have always claimed Shelbyville as his home, and only to have voted in Kentucky. They had only one child, a son about fourteen years of age, who went with his father. Mrs. Manders was then about fifty-three or fifty-four years of age. Her lunacy was due to the drowning of her eldest son at Shelbyville. She is subject to illusions; calls herself Miss Wouldridge, and says that she has had four husbands. It is apparent from the record that she was sent to the asylum in Virginia, and has been kept there, as a resident of the State of Virginia. It is also apparent that while John Manders has lived much of his time in Richmond, he has claimed his home in Shelbyville, Ky. The son died before his father. At the time of the inquest in Virginia John Manders was committee for his wife. He kept in communication with the asylum authorities and was informed by them of her condition, which seems to have been much the same during the whole time. When Manders resigned as committee and Weakley was appointed, Weakley was informed of the whereabouts of his ward. The authorities of the asylum did not know that Mrs. Manders had an estate until just before this suit was filed, when the husband brought a suit against the committee to have the property turned over to him. The laws of Virginia as to the lunatic asylums are in substance the same as the laws of Kentucky, that is to say, if a person is committed as a State patient, an action may be brought in the name of the asylum to recover for his keep if it turns out that he has property; but the statute of limitations there is three years instead of five as in this State. This is proven in the record, although the Virginia statute of limitations is not sufficiently pleaded by the defendant.

The rule is that a foreign statute must be pleaded as any other fact, and not being pleaded is not available. But in this case we have a suit against a lunatic and her committee to take her estate from the hands of her committee. She is a ward of the court, and her committee is subject to the control of the court. In such a case, if there is a formal defect in the pleading of the committee, the court must order an amendment, and find the facts according to the proof as shown by the record. The committee at-

tempted to plead the statute, but did not plead it sufficiently. We will, therefore, consider the case as though the statute had been sufficiently pleaded. The circuit court applied the Kentucky statute of five years. The cross appeal questions the correctness of this ruling, as it is insisted that the Kentucky statute was also not properly pleaded. But for the same reason we must disregard the defect in the plea as the circuit court treated it as sufficient, instead of ordering a forthwith amendment to conform to the facts, as he would no doubt otherwise have done.

The general rule is that limitation is governed by the law of the forum and not by the law of the place where the contract took place or cause of action accrued, but section 2542, Kentucky Statutes, is as follows: "When a cause of action has arisen in another State or country between residents of such State or country, or between them and residents of another State or country, and by the laws of the State or country where the cause of action accrued an action can not be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this State."

In *Labatt v. Smith*, 88 Ky., 599, the court considered this statute, and held that it applied only to a cause of action arising in another State between citizens of that State, or between them and citizens of another State or country other than Kentucky; and that it did not apply in favor of a resident of this State when sued in the courts of this State upon such a cause of action. It is unnecessary for us to determine how far the rule laid down in that case is applicable here. The proof shows clearly that John Manders and wife were, in 1897, citizens of Kentucky; that he took his wife to Richmond, Va., at the invitation of her sister, hoping that the change of climate would benefit her, and that he always recognized Shelbyville, Ky., as his home. There is nothing in the record to warrant the conclusion that he changed his domicile to Virginia, and, therefore, he remained a citizen of Kentucky. He evidently had her placed in the Virginia asylum without intending any wrong on the State of Virginia, and in ignorance of the fact that she, being a resident of Kentucky, should have been brought back here to a Kentucky asylum. Though the lunatic has been in Virginia since the year 1897, her estate has been in Kentucky, and her committee has been here. The courts of Virginia could have no jurisdiction to subject her estate, and no personal judgment could have been rendered against the lunatic. Her estate could only be reached in the courts of Kentucky, and, therefore, the Kentucky statute of limitation must govern the action, for the Virginia statute of limitation can not be applied to a cause of action which could not be enforced in the courts of Virginia.

It is insisted, however, that the Virginia statutes defining the appellee's powers have no extra-territorial effect, and that a Virginia asylum can not sue in this State under those statutes. It is also insisted that it is not shown that the plaintiff is incorporated, or that it had authority to receive Mrs. Manders. It appears from the evidence that the Virginia asylum was incorporated early in the history of the State, and that the original articles of incorporation have been burned. Aside from all this, the Virginia statutes, which are exhibited, make it at least a quasi corporation, with power to sue in such cases as this. It is also authorized to receive patients other than those sent there by law on such terms as the board may direct, and a wife's property is made responsible for her keeping.

While there is some evidence that the relatives of Mrs. Manders were willing to give a bond and keep her at home, it is clear from the evidence that both they and her husband acquiesced in her being kept in the asylum, and the weight of the evidence does not show that any bond was in fact offered, or at least that the Virginia authorities ever so understood. But, however this may be, the lunatic has been cared for by the asylum with not only the acquiescence of her relatives, but by the procurement and acquiescence of her husband, who was also her committee; and this has also been acquiesced in by her present committee. The proof is clear that somebody had to take care of her, and as her keeping was necessary to her, her estate is liable upon a quantum meruit to the asylum for what she has thus received. Our statute allows \$150 a year for similar services, and from the proof in the case this is a reasonable allowance here. We, therefore, conclude that the circuit court properly allowed the sum of \$150 for five years, and see no reason for disturbing his judgment on the original or on the cross appeal. The circuit court retained the case for such further orders as may be necessary. To prevent further costs, as all the parties are before him, and it is important that the committee be directed in the discharge of his duties, under the plaintiff's prayer for general relief the court should, on the return of the case, make an order directing the committee to pay the asylum at the same rate, \$150 a year, for the subsequent time as long as his ward remains in the asylum, and he has funds in his hands sufficient for this purpose.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. SMITH.

(Filed February 9, 1905—Not to be reported.)

1. Railroads—Damages—Evidence—In this action by appellee against appellant for damages caused by appellant's servants in moving its cars, his statements while testifying to the jury that his physicians had advised him that an operation was necessary and would have to be performed, and in relating a dream that his hand would have to be amputated, and proof by other witnesses of what he had told them several months after his injury of the sufferings he had undergone, were incompetent for any purpose. The testimony as to what the physician stated would have been competent had it been testified to by the physician, but coming from appellee it was mere hearsay, and the testimony as to the dream can not be justified upon any ground, nor should others have been permitted to relate conversations had with him in which he related the nature and extent of his sufferings.

2. Same—Conduct of counsel in argument—Where statements of counsel are made outside of the record and were otherwise improper and calculated to inflame and excite the passions of the jury, and thereby induce them to disregard the evidence and go to an extreme and unjustifiable length in arriving at a verdict, it was error in the trial court not to admonish the jury to disregard them.

Benjamin D. Warfield and W. C. McChord for appellant.

Henry & Woodward for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge Settle.

The appellee, H. O. Smith, recovered a verdict and judgment in the Green Circuit Court for \$2,750 in damages for an injury to his hand, caused by the alleged negligence of appellant's servants in moving its cars.

It was averred in the petition that at the time of receiving his injuries the appellee was in a closed car, which appellant had put upon its side track at Greensburg for his use, placing therein, for shipment, buggy rims that were being handed him by a colored boy on the ground, when the appellant's servants in charge of an engine and certain of its cars detached two of the latter from the train, and without notice to appellee negligently permitted them to be run backward with great and unnecessary force against the car in which he was at work, which would have caused appellee to be thrown down, or perhaps out of the car, but for the fact that he in some sort maintained his equilibrium by suddenly throwing out his hand, but in doing so it came in contact with the car, or buggy rims, thereby greatly bruising and injuring it.

The material statements of the petition were specifically denied by the answer, which interposed the further defense that appellee's injuries were caused wholly by his own negligence. The plea of contributory negligence was denied by reply, and upon the issues thus made the parties went into trial, with the result indicated. It is contended by counsel for appellant that the lower court erred in refusing to give a peremptory instruction directing the jury to find for appellant. We do not think a peremptory instruction would have been proper. While the evidence as to the manner in which appellee received his injuries was conflicting, it left no doubt of the fact that appellant for hire put the car on the side track for his use. He was, therefore, a licensee, and it was the duty of appellant's servants in making up its train to use ordinary care to protect him from injury, if they knew, or by the use of such care could have known, of his presence in the car. It appears from the appellee's evidence that they knew appellee was in the car and what he was doing, and with such knowledge, if they, without notice to him, as the evidence of appellee further conduced to show was the case, turned loose two cars on the side track without a brakeman on either, and the cars collided with that in which appellee was at work with such force as to cause his injuries, such a state of facts would seem to warrant a verdict in appellee's favor.

Upon the other hand, if, notwithstanding the negligence of appellant's servants, appellee knew, or by the exercise of ordinary care could have known, of the turning loose of the cars, and of the danger to him from a collision between them and the car he was in in time to have protected himself from injury, and yet negligently failed to take such steps as would secure his safety, he was not entitled to recover. Much of appellant's testimony conduced to prove that appellee was familiar with the movements of appellant's trains at the place of the accident, and that on the occasion of his injuries he knew or by the exercise of ordinary care could have known, of the approach of the cars and of the danger of a collision between them and the one he was on in time to have prevented his injuries. It was the duty of the jury to pass upon the evidence, and though it was conflicting, they had the right to accept the testimony of appellee's witnesses, and reject

that of appellant's witnesses. This court will not invade the domain of the jury and disturb their verdict upon the ground that it is against the weight of the evidence.

It is only when there is no evidence to support the verdict, or when it is so flagrantly against the evidence as to indicate that it was superinduced by passion or prejudice upon the part of the jury, that the court will be authorized to set it aside, in the absence of errors of law upon the part of the court occurring upon the trial. We find no substantial error in the instructions. Though unnecessarily elaborate, they fairly presented all the law necessary to enlighten the jury and guide them in arriving at a verdict. Another complaint urged by appellant is that the lower court admitted incompetent evidence in appellee's behalf upon the trial, that is, appellee was allowed to state that he had been advised that his injury was very bad; that Drs. Van Meter and Shively advised him that he would be compelled to have an operation performed, and he was also permitted to relate the following: "I dreamed one night that my hand was to be amputated. It troubled me a great deal how I would get my hand back again. I dreamed I told my wife to take the hand and put it in ice to preserve it so that all of my body could be buried together."

In addition to the foregoing the court permitted appellee to prove by the witnesses, George Perkins, Joe Cantrill and Charles Mudd, what he told them several months after he was injured of his suffering from the wounded hand. It seems to be well settled that where the physical or mental suffering of a person resulting from an injury are the proper subjects of inquiry, the usual expression of such suffering manifested or made at the time may be admitted as original evidence.

In *Bocan v. Charlton*, 7 Cush., 586, it is said: "Where the bodily and mental feelings of a party are to be proved, the usual and natural expression of such feelings made at the time are considered competent and original evidence in his favor. There are ills and pains of the body which are proper subjects of proof in a court of justice which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady."

The above statement of the law was quoted with approval by this court in *Shade's Adm'r v. Covington, &c., Bridge Co.*, ante, 224, and ordered to be reported. Shade's administrator sued to recover damages for the death of his intestate caused by a fall on the ice on the defendant's bridge. The only evidence as to the manner of her fall was furnished by the statement of the intestate made to her physicians after she had been taken home, to whom she said: "She had fallen on the ice on the C. & O. bridge." It was contended that this and other declarations made to her physician in explanation of the cause of her injury, and to enable him to properly treat her, were of the *res gestæ*, and receivable in evidence as such. In discussing the admissibility of the declaration in question the court, speaking through Judge O'Rear, said: "Here the party whose statement is offered to be proved was suffering from a physical injury. What she said to her physician as to

the pain it then caused her, and the effect it had upon her senses, was necessary for him to know in order that he might intelligently treat the injury. Under such circumstances it is presumed that the party suffering will state truly how she is affected, as otherwise the medical man might be at a loss as to the remedies needful to her condition. The incentive for a fair statement is so great that the presumption is she will not hazard an untruth to better her financial condition, as by fabricating a basis of claim against the person charged with her injury at the expense of her permanent health or maybe of her life. For that reason the law allows the proof of what she said to her physician at the time of his examination as part of the *res gestæ*. What the injured party may have said to any one at the time of the injury, or so immediately after it as to be regarded part of it, as being the verbal part of a continuing occurrence would also be admitted upon familiar grounds. What was said after the lapse of some minutes, a half hour or so, in this case, to the attending physician, to aid him in determining the nature of the injury and to prescribe a remedy or treatment, is allowed as an extension of the same rule of evidence. It rests logically upon the necessity of the case. It is matter proper to be shown, and not susceptible generally of being otherwise proven. But it must stop with the necessity for it. It was necessary for the physician to know whether the patient was suffering, and where the pain was, and as to its character. It was also proper that he should know how the pain was inflicted, as upon that knowledge the treatment in part might depend. So it was competent to show that the patient said she had received a blow on her head (if she did say it), and how she was otherwise hurt. But it was wholly immaterial to the physician understanding what it was necessary for him to know in treating the injuries, whether she fell on appellee's bridge, or elsewhere, or that she fell on the ice."

In the light of the foregoing authorities it is manifest that the testimony complained of in the case at bar was incompetent for any purpose. If the physician called to treat appellee's injuries expressed to him the opinion that amputation of his hand was or would become necessary, that fact would have been competent if testified to by the physician as an expert, but coming from appellee, as it did, as a fact communicated to him by the physician, it was mere hearsay, and should have been excluded. The admission of appellee's relation of his dream as evidence can not be justified upon any ground. It was competent for him to testify fully as to the nature and extent of his suffering, and if at the time of the trial the wounded hand gave him pain, he had the right to state that fact; but in reciting his dream he violated all rules of evidence. It is true certain learned writers maintain that dreams are due to the physical and mental condition of the dreamer, but we apprehend that no law writer of note will venture to recommend, or court of last resort will hold, that dreams be admitted as evidence to prove the existence of pain or suffering.

For the reasons mentioned it is equally clear that the statements made by appellee to Perkins, Cantrill and Mudd, several months after his injuries were received, in which he told them of his sufferings, were incompetent.

They might have been allowed to testify that he suffered from the wounded

hand at the times named by them, and even that he complained of pain from that member, but should not have been allowed to relate conversations had with him in which he related the nature and extent of his sufferings.

We think the incompetent evidence was prejudicial to the appellant because it unduly emphasized and enlarged appellee's injuries. We do not know to what extent it influenced the jury, and it is useless to speculate as to its effect, but there was so much of it, and it was so calculated to reach the sympathies of the jury, that it is safe to say it must have given them an exaggerated idea of appellee's injuries, and perhaps served to swell the verdict far beyond what it would have been if the incompetent evidence had not been admitted.

In the closing argument to the jury learned counsel of appellee said to them: "The defendant in this case is a soulless corporation, making millions of dollars every day. Its money is worth 150 cents on the dollar, and Heck Smith's (appellee) money is only worth 100 cents to the dollar. Notwithstanding the great wealth of this soulless corporation, it doesn't know who owns it; whether it is J. Pierpont Morgan & Co., or J. W. Gates, the great trust magnate, God Almighty only knows."

At this point objection was made by appellant's counsel to these remarks of the speaker. The court thereupon told counsel for appellee that his line of argument was improper, but did not command him to desist or admonish the jury to disregard the improper language. After being thus told by the court that his line of argument was improper, counsel for appellee in reply to, and without rebuke from the court, said in the presence and hearing of the jury: "That may be so, but every word of it is true, and you know it."

Again counsel for appellee made this further statement to the jury: "To show how this great soulless corporation treats widow women, a widow woman brought suit against this company down in Hart county." At this point counsel for appellant again objected to the remarks of the speaker; the court said to counsel that his statements were not proper, but did not tell the jury to disregard them. The speaker then facing counsel for appellant said to him in the presence of the jury: "I will give you \$2.50 to let me tell the story."

Finally counsel for appellee said to the jury: "I cross the track of this company at the depot at Greensburg every day, and I know that you run your cars wild there, and it has got to be stopped if I have to bring an injunction suit to stop it."

The last statement of counsel does not appear to have been noticed by the court, though objected to at the time by opposing counsel. Exceptions were taken by appellant's counsel to the failure of the court to exclude from the jury the improper remarks of appellee's counsel. We are of opinion that the statements of counsel complained of were outside of the record and otherwise improper, calculated to inflame the passions and excite the prejudices of the jury, and thereby induce them to disregard the evidence and go to an extreme and unjustifiable length in arriving at a verdict. The trial court erred, therefore, in not admonishing the jury to disregard them.

For the reasons indicated the judgment is reversed and cause remanded for a new trial and further proceedings consistent with the opinion.

Whole court sitting.

BORUM v. ALLEN.

(Filed February 9, 1905—Not to be reported.)

Partnership—In this action to recover the amount alleged to be due upon a contract of sale of an interest in a partnership between the parties, the instructions fairly presenting the law applicable to the case, and there being evidence upon which the jury was authorized to find a verdict for appellee, the verdict and judgment in his favor will not be disturbed.

Robt. Harding, R. L. Greene and Denton & Robinson for appellants.

Sharpe & Siler for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Nunn.

The appellee, Allen, and the appellant, Borum, were copartners under the name of the "New Century Publishing Co.," and were engaged in publishing a magazine called "The Mistress of the Manse," at Somerset, Ky. Appellee Allen alleged in his petition, and introduced proof conducing to show, that the appellants formed a copartnership for the purpose of continuing this publication, and alleged that they purchased his interest therein for the price of \$654.05, one half payable in twelve months and the remainder in two years.

Appellants by their answer denied this, and introduced proof to show that they did not form a partnership nor purchase appellee's interest therein at the price named, or at any price. This action involves the first payment of one-half of the purchase price, the other half not being due at the institution of this action.

The court gave to the jury two instructions, as follows:

"1st, If you believe from the evidence that the defendants, W. A. Borum and W. P. Harvey, entered into a contract of copartnership, and as partners agreed to and did purchase the interest of plaintiff, in the magazine, 'Mistress of the Manse,' and agreed to pay plaintiff the amount of money he had expended with reference thereto, in installments at one and two years, and that in pursuance to said contract it was agreed between defendants that defendant Borum should submit the agreement defendants had made to the plaintiff for his acceptance or rejection; and you shall further believe that in pursuance to the agreement between the defendants said agreement, or the terms thereof, was submitted to the plaintiff by defendant Borum, and that the plaintiff accepted same, you will find for the plaintiff the one-half of the money he has invested in the magazine, to wit, the sum of \$327.02, with interest thereon from September 21, 1901, until paid, and unless you so believe, you will find for defendants.

"2d. Unless you believe that a partnership was entered into and existed between defendants Borum and Harvey at the time the contract with the plaintiff is alleged to have been made, you will find for the defendants."

These instructions fairly presented to the jury the issues to be tried. It is unnecessary to refer to and discuss in detail the evidence produced on the trial. There was evidence upon which the jury was authorized to find a verdict for the appellee. It appears that there were no errors committed at

the trial to the prejudice of appellants, and we do not feel authorized to disturb the finding of the jury upon the facts.

Wherefore, the judgment is affirmed.

CITY OF LOUISVILLE v. LOUISVILLE COURIER-JOURNAL CO.

(Filed February 9, 1905—Not to be reported.)

Taxation—Limitation — Construction of statutes—Where property was bought by appellee in 1896 from the United States Government, but was not assessed by appellant, the deed to appellee not having been recorded, for the years 1896, 1897 and 1898. In November, 1898, the appellant assessed the property retrospectively, in the name of W. N. Haldeman, the deed not being of record and appellant's officers being under the impression that he owned it. In an action against him, and while it was pending, he died, and it was revived in the name of his personal representatives, and afterwards appellee had a deed conveying the property to it recorded and pleaded the five years' statute of limitation, on the ground that the cause of action for the taxes for the fiscal year ending August 31, 1897, accrued to the city of Louisville on August 20, 1897, and that the cause of action was not commenced until November 8, 1902, or more than five years thereafter. Held—The provision that the property may be retrospectively assessed would be entirely nugatory under the provisions of the statutes in many cases if it was held that the statute ran from August 20 of the year, although the property had not been assessed. Such a construction would require the court to hold that the legislature contemplated not allowing five years for the assessment, but five years for all the other steps that were required to be taken before suit could be brought, which would not give fair effect to the statute.

H. L. Stone for appellant.

Lane & Harrison for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Hobson.

A lot on the corner of Green and Third streets in Louisville, Ky., was the property of the United States government. On it stood the customhouse which was used for many years. In the summer of 1896 this property was bought from the government by the Louisville Courier-Journal Co., of which W. N. Haldeman was president and owner of a majority of the stock. The deed for the property was made by the government to the Courier-Journal Co., but the city did not assess it for taxation in September 1896-7 or 8, the deed from the government to the company not having been recorded. Finally, in November, 1898, the property was assessed by the city retrospectively, but this assessment was made in the name of W. N. Haldeman, as the deed was not recorded and the assessing officers seem to have been under the impression that he was the purchaser. Finally this suit was brought on July 26, 1901, against W. N. Haldeman to recover, among other things, for the tax bill for the year 1897. Haldeman filed an answer, denying ownership of the property, and alleging that it was exempt from taxation as the property of the government. A reply was filed, and afterwards Haldeman died. An amended petition was then filed, reviving the case

against his executors and devisees. They then filed an answer, in substance the same as that filed by the testator. After this, on November 8, 1902, the deed to the Courier-Journal Co. having been in the meantime recorded, the city amended its petition, and made the Courier-Journal Co. a defendant, praying judgment against the property as before for its taxes. The Courier-Journal Co. answered, pleading the five years' statute of limitation, on the ground that the cause of action for the taxes in the fiscal year ending August 31, 1897, accrued to the city of Louisville on August 20, 1897, and that the action was not commenced against it until November 8, 1902, or more than five years thereafter.

It is provided in the statute that the fact that the property may be assessed in the name of the wrong person shall not invalidate the assessment if the property is correctly described. It is also provided as follows in the same connection: "Whenever, by the complaint of the party assessed, or otherwise, it appears that any property has been assessed in a name other than that of the owner or holder, the city assessor shall, after notice through the mail to the owner or holder, at the time of the notice, make the correction, whether for the current or any preceding year, in his books, and certify such correction to the tax receiver, and to the corrected assessment and to the retrospective assessments hereinafter authorized, the remedies of sections 2997 to 3009, both inclusive, shall attach, beginning with the first of May after the correction or retrospective assessment is certified to the receiver. When any lands or improvements shall not be assessed in any one year they may, when the omission is discovered, be assessed retrospectively for that year at any time not later than five years thereafter; but the lien thereby accruing to the city shall not prejudice the right of purchasers acquired in the meantime; and for any damage arising to the city by the loss of the lien the assessor guilty of the omission, together with his bondsmen, shall be liable. Any person thus retrospectively assessed may, within thirty days after the mailing of a notice thereof to him, file in the assessor's office the complaint provided for in the next section. If he does so, the assessment shall not become binding, nor shall any bill be issued thereupon until it be passed on as in the next section provided. (Section 2991, Kentucky Statutes.)

"The assessment books in the section named shall remain open in the assessor's office from the 15th to the 30th of November, and any one who thinks that his lands or improvements, or those in which he has an interest, though they be not assessed in his name, have been assessed beyond their value, may, before the last-named day, file with the assessor his complaint, specifying the parcel and alleged excess, and the complaint shall forthwith be investigated by the board of equalization, which shall, according to the justice of the case, approve or reduce the assessment. It may, after notice to the taxpayer, increase the assessment, if satisfied, on investigation, that it is too low, either as to real or personal property." (Section 2993, Kentucky Statutes.)

By section 2997, above referred to, it is provided when the tax bill shall be made out by the assessor and listed for collection with the tax receiver, and necessarily this is not to be done as to property omitted from assessment until it is assessed as provided in section 2991. By section 2999 notice

must be given by the tax receiver, and if the bills remain unpaid warrants are issued which, under section 2002, may be levied on personalty by the tax receiver. The taxes still remaining unpaid on the 1st day of May following may be enforced by action by the city. (Section 2998, Kentucky Statutes.) The provision that the property may be retrospectively assessed for five years would be entirely nugatory under these provisions in many cases if it was held that the statute ran from August 20th of the year, although the property had not been assessed. Such a construction would require us to hold that the legislature contemplated not allowing five years for the assessment, but five years for all the other steps that were required to be taken before a suit could be brought. This would not be to give a fair effect to the statute. The assessment is the basis of the proceeding. Until the assessment is made there is no liability which may be enforced, and the city has no cause of action against the property. The purpose of allowing five years for property, which has been omitted, to be assessed retrospectively is to guard against the negligence of the city officials and to prevent their negligence from releasing property from taxation or affecting the revenues of the city.

Judgment reversed and cause remanded, with directions to sustain the demurrer to the plea of limitation and for further proceedings consistent herewith.

COMMONWEALTH v. BECKETT.

(Filed February 9, 1905—Not to be reported.)

1. Indictments—Obtaining money under false pretenses—Where appellee swapped horses with another, it being agreed that he was to receive \$7.50 to boot, and after the exchange of horses had been made appellee handed the other party a \$10 Confederate bill, with the remark, "Give me \$2.50; here is a \$10 bill," he was guilty of the crime denounced by section 1208, Kentucky Statutes, and a demurrer to the indictment against him should have been overruled.

2. Same—A proposition to sell an article for \$10, without designating the currency in which the price is to be paid, implies that the seller is to get lawful money or currency of the United States, and the use of a worthless bill, pretending that it is valid, and with the intent to defraud, is a false token under the statute.

Ed. Daum and N. B. Hays for appellant.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge O'Rear.

This appeal involves the sufficiency of an indictment against appellee, charging him with obtaining money and property under false pretenses. (Kentucky Statutes, section 1208.) A demurrer was sustained to the indictment. It is charged that appellee fraudulently, knowingly and with the wicked intent to deceive and defraud one William C. French, induced the latter to part with \$2.50 lawful money of the United States, which belonged to said French, in exchange in part for a \$10 bill of the Confederate States of America. The particulars of the transaction were set forth in the indictment, the substance of which is that appellee and said French swapped

horses, it being agreed that appellee was to pay French \$7.50 to boot. The horses were exchanged, and appellee handed French a \$10 Confederate bill, with the remark, "Give me \$2.50; here is a \$10 bill." French believing it was a bill for \$10 of lawful money, its appearance being quite similar to the treasury silver certificates for that sum, gave appellee the \$2.50, and accepted the Confederate bill as good money, without knowledge or suggestion that it was what it was. It is charged that appellee knew at the time that it was a Confederate bill, and intended by his words and conduct to deceive French into believing it was a bill of lawful currency, and did so deceive him. It is said that the indictment was held to be bad because there was no specific statement by appellee that the bill was United States currency. The statute is (section 1208): "If any person, by false pretenses, statement or token, with intention to commit a fraud, obtain from another money, property or other things which may be the subject of larceny, * * * he shall be confined in the penitentiary for not less than one nor more than five years."

It seems to be conceded that all the conditions of the statute are satisfied except that of the false pretense, statement or token. It is the deceit, falsely and fraudulently superinduced by a beneficiary whereby the latter obtains money or property of value, that is sought to be repressed by the statute. When one intentionally creates a belief as to an existing fact, which is false, and with the intent to defraud another of his property, and does so, it can not matter whether the erroneous belief was induced by words, or acts, or both. The mischief may be done as effectually by one method as by another. Some words by their common employment may imply other words not spoken. A proposition to sell an article for \$10, without designating the currency in which the price is to be paid, in this country implies that the seller is to get lawful money or currency of the United States of America. When the buyer agrees to pay the price and offers a bill in payment, purporting to be a bill of the currency of the circulating medium of the country, it is implied that he thereby represents that it is of that currency, if nothing to the contrary is stated. This amounts to an assertion or representation by conduct, which may be as efficacious to convey an idea, or to constitute the basis of a reasonable belief, as though exact and appropriate words had been used. Words are used to express ideas. Signs might be used instead. Conduct that conveys necessarily the same idea, and intended to do so, is but a substitute for the words or signs expressive of it. We have no doubt but that the use of a worthless bill, pretending it is valid, and with the intent to defraud, is a false token under the statute. (*State v. Pallito*, 4 Hawks, N. Car., 348; *State v. Stroll*, 1 Rich., L., S. Car., 244; *State v. Grooms*, 5 Strobb. L., S. Car., 158.)

It may be said that a false representation or token is not within the statute "unless calculated to deceive persons of ordinary prudence and discretion." (2 Whart. Crim. Law, 2129; *Commonwealth v. Grady*, 13 Bush, 285.) This is true only in a limited sense, for the statute was not designed to protect only the ordinarily wary and prudent, who in spite of their vigilance might be overreached by the clever rogue, but must have been aimed at all scoundrelism who, by false statements or tokens, succeeded in hoodwinking the unwary, or even the foolish, into parting with their property.

The statute has a two-fold purpose: First. To protect the owner of property against cheats. Second. To punish the cheater. It can not be said that the law is partial to "persons of ordinary prudence and discretion" in protecting them in their property, whilst it leaves imprudent and silly persons as lawful prey for frauds. On the other hand, in punishing the wrongdoer, his motive and its results are the main subjects of inquiry. Under this statute the wicked purpose, the fraud, is equivalent to the same ingredients in theft. So is the result the same. The distinguishing feature is, in theft, the owner does not intentionally part with the title and possession of his property, while under this statute he does. It would not do to say that to steal from a careless or imprudent person is not punishable, though the statutes against larceny aim to protect the owner in the possession of his property, as well as to punish the thief who purloins it. Under the statute being considered the pretense or token must be false. Where a token is used it must be calculated to deceive, according to the capacity of the person to whom it is presented to detect its falsity under the circumstances. A token that might be calculated to deceive a blind man, or one in the dark, or a child, would not necessarily be a false token when used upon one who could see, and who had mature judgment. (*Peckham v. State*, 38 S. W., 582, *Texas Crim. App.*) Nor would absurd or irrational pretenses, not ordinarily calculated to deceive one of the intellectual capacity and discretion of the person upon whom it may have been practiced, be sufficient, it seems. (*Woodbury v. State*, 69 Ala., 242; 44 Am. Rep., 515; *People v. Crissie*, 4 Den., 525.) Or, where the representation is as to the state of the title to real estate, a record of which is accessible to the vendee, the representation, though false, can not be said to have induced the action, for a registration of deeds is provided for the express purpose of protecting purchasers of real estate, to which they are presumed to have recourse for final information concerning facts shown by them, and about the existence of which there need be no doubt, it can not be said that the vendee could have been deceived by the oral representations respecting the state of the title. This is the reason supporting the decision in *Commonwealth v. Grady*, 13 Bush, 285. While in *Commonwealth v. Haughey*, 3 Met., 223, the facts were that Jones, the person alleged to have been defrauded, really parted with nothing upon the misrepresentation. Furthermore, it appears that the misrepresentation was as to quality of a crop of tobacco, a matter of opinion, not the subject of the statute. Whether the false token is one calculated to deceive one of the capacity and understanding and in the situation of the prosecuting witness is a question of fact to be found by the jury. (*Wagoner v. State*, 90 Ind., 507.) In *People v. Oyer and Terminer*, 83 N. Y., 436, it is laid down distinctly that the pretenses must be calculated to deceive, leaving that to be determined by the jury, and if the pretense was capable of defrauding, it is sufficient. There may be a state of facts where it would not be apparent upon their mere recital that they alone were capable of defrauding, and it may be the better practice in such cases to aver in the indictment that they were capable of defrauding, as well as did defraud, the prosecutor. But where the facts recited show upon their face that they are capable of defrauding, and it is charged that the defendant by them did intentionally and wickedly defraud the prosecuting witness, it seems to us to

be useless to specifically charge that they were capable of defrauding. It is a matter of common and general knowledge that a Confederate \$10 bill is quite similar in appearance to treasury silver certificates of that denomination, and that it is entirely capable to defraud credulous persons by its use under many circumstances. Whether there were peculiar circumstances in the case at bar to rebut the probability of such an effect upon the prosecuting witness is more properly evidential matter by way of defense. The facts alleged in the indictment bring the transaction clearly within the statute, and the demurrer should have been overruled.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

Whole court sitting.

HERNDON, &c. v. OGG.

(Filed February 9, 1905.)

1. Recording deed—Failure of clerk to index record—Effect—Notice—Where the grantee in a deed lodged his deed with the clerk of the county court of the county, where his land lies, and said deed was recorded by the clerk in the deed book kept in said office for that purpose, such recording is legal notice of and protects the grantee in his ownership of said land against any subsequent purchaser thereof. The fact that the clerk failed to index the deed book containing such record does not affect the grantee's ownership of the land.

Wm Herndon and Lewis S. Walker for appellants.

C. H. Collins for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Nunn.

It appears from the record that appellants on the 29th of August, 1895, purchased from one Shelby Nunn one fifth undivided interest in a tract of land in Madison county, subject to the life estate of his mother, Sophia Nunn, and on that day Shelby Nunn and his wife conveyed this interest to appellants, and they had this deed, with the certificate of acknowledgment, duly recorded in the clerk's office of that county on the 3d of October, 1895. It also appears that on the 25th of July, 1892, Shelby Nunn executed and acknowledged a deed for this same undivided interest to Sarah C. Nunn, and on March 7, 1893, Sarah C. Nunn and her husband conveyed the same to appellee, William A. Ogg. The deed from Shelby Nunn to Sarah C. Nunn was on the 26th of February, 1893, lodged with the clerk of the Madison County Court for record, and she paid the clerk all the necessary and proper fees thereon, and the clerk recorded it in the deed book provided for that purpose, and returned the original deed to her on the 6th of March, 1893, and it has not been in the clerk's office since that day. This last-named deed from Shelby Nunn to Sarah C. Nunn, when it was recorded, was, by oversight of the clerk, not indexed, and there was not any index made thereof until the 28th of January, 1903. The deed from Sarah C. Nunn and her husband to William A. Ogg, appellee, was lodged and recorded on the 21st of October, 1895.

The appellants did not have any knowledge or information of either of the deeds last described until January, 1903. It is agreed that before appellants purchased the land that they caused an attorney to investigate, and they investigated themselves, the question as to whether or not Shelby Nunn was the owner of this interest in the land, and whether or not he had previously conveyed it, and upon such investigation they concluded that he was the owner and had never conveyed it. Shelby Nunn represented to them that he was the owner of this land, and they, by searching the records in the usual way (examining only the indices), failed to discover the deed from him to Sarah C. Nunn.

The appellants allege that Sarah C. Nunn was negligent in removing her deed from the clerk's office after it was recorded without seeing that the clerk had it properly indexed, and they asked the court to declare, for the reason named, that their title be held to be prior to that of appellee. Appellants admit that when a deed is lodged for record, and the tax paid thereon, it is notice under the statute, but contend that this lodgment will not operate as a notice against innocent purchasers when the deed itself has been withdrawn from the clerk's office without having been properly indexed; that he becomes a party to the negligence of the clerk in failing to see that the clerk has performed his duty before he withdraws his conveyance from the office. This is the only question for determination on this appeal. By section 500 of the Kentucky Statutes it is provided that any contract for the sale of land, or any interest therein, when acknowledged or proven as deeds are required to be, may be recorded in the county in which such lands are situated, in the same offices and books in which deeds are recorded, and the record of all such contracts recorded shall, from the time of lodging the same for record, be notice of such contracts to all persons. It appears from this section, and the preceding sections, that when a grantee presents a deed acknowledged according to law and lodges it for record, and has it recorded, he has done all that the law requires him to do to give notice for the protection of others. We are of the opinion that after the grantee has done all that the law requires he should not be held accountable and made to suffer for the mistake, carelessness or fraud of the clerk. It appears from section 513 of the statutes that the clerk of the county court is required to make and keep an alphabetical cross index of all conveyances. It is not intimated in the statutes that the grantees in conveyances are required to see that the clerk performs this statutory duty. They have the right to presume, upon withdrawing their conveyances, that he has performed it. If county clerks were agents of grantees in conveyances the case would be different, but they are not such agents; they are public officials who perform, or should perform, duties as required by the statutes for the protection alike of present as well as after purchasers. (2 Amer. R., 532; 5 J. J. M., 545.)

It follows from the views herein expressed that the action of the lower court was correct, and the judgment is affirmed.

ILLINOIS CENTRAL R. R. CO. v. HEAD, GUARDIAN.

(Filed February 9, 1905.)

1. Parties to action—An action for damages to Rupert Head, an infant, for failure to deliver him a railroad ticket, ordered by a telegram, should have been brought in his name, by his statutory guardian, Fred Head, and not in the name of Fred Head, statutory guardian of Rupert Head, suing for the use and benefit of Rupert Head.

2. Failure to deliver ticket—Order by telegram—Measure of damages—A railroad ticket from St. Louis, Mo., to Greenville, Ky., was paid for at Greenville, and a telegram sent to the agent at St. Louis to furnish R. Head such ticket, the object being to get R. Head to reach Greenville in time for his father's funeral; and another telegram was sent to R. Head, by his guardian, to call at "Illinois Central" for the ticket. R. Head called at the city office in St. Louis, which the agent said was the right place for the ticket to be, and after waiting two days, found it at the "Union Station," and reached home after his father's burial. Held—That in an action for damages by R. Head for delay in getting the ticket the measure of damages is simply a reasonable compensation for the time lost and any expense incurred by reason thereof.

Jonson & Wickliffe, Pirtle & Trabue and J. M. Dickinson for appellant.

R. Y. Thomas, Jr., for appellee.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Chief Justice Hobson.

George Head died on April 28, 1901, at Greenville, Ky. His son, Rupert Head, was then in St. Louis. His son, Fred Head, who was at home, on the 29th went to the up-town telegraph office to telephone out to the railroad station and ask what the fare from St. Louis to Greenville was, and was told that it was \$8. By an arrangement made with the agent, through one Jarvis, he paid Jarvis the \$8, and Jarvis having told the agent that the money was deposited with him the agent wired a ticket to St. Louis for Rupert Head, his telegram being as follows:

"Greenville, April 29.

"Ticket Agent, St. Louis, Mo.

"Please furnish R. Head ticket St. Louis to Greenville, Ky.; notify when done and I will remit to cover.

"T. L. PATTERSON."

Thereupon Fred Head sent from the telegraph office, where he was up town, the following message:

"April 29, 1901.

"Dated, Greenville, Ky.

"To R. Head,

"840 Chato Ave:

"Call Illinois Central for ticket; arrive here eleven to-morrow, sure.

"FRED HEAD."

The purpose of the arrangement was to get Rupert Head to Greenville in time for his father's funeral the next day, the understand being that the connections were such that he would reach there by 11 a. m.

Patterson's telegram went to the agent at the Union Station. Rupert Head, on getting his telegram, went to the city office of the railroad com-

pany, where he was told by the person to whom he applied, who was selling tickets, that that was the place for his ticket to be, but it had not come. This was said after he had showed the agent his telegram. He went back several times, but was each time told the ticket had not come, and after two days' delay went down to the Union Station with the intention of trying to come home in some other way, and found his ticket there. He reached home after his father was buried, and this action was filed to recover damages for the delay. Judgment was rendered against the company in the sum of \$200, and it appeals.

The suit was brought in the name of "Fred Head, statutory guardian of Rupert Head, suing for the use and benefit of said Rupert Head." The guardian had sustained no loss by the delay of Rupert Head; the cause of action was in the infant, and should have been brought in his name by Fred Head as his statutory guardian. This seems to be what the pleader was aiming to do, and the petition may be amended so as to make Rupert Head party plaintiff, suing by Fred Head as his statutory guardian. The court gave the jury the following instruction as to the measure of damages: "The measure of damages, if any, is such a sum of money as will reasonably and fairly compensate plaintiff for any mental suffering, if any, caused to him by the negligent failure, if any, of the defendant to deliver the ticket aforesaid, if it did fail, and the mental suffering, if any, caused to him by the failure to be present at the funeral of his father."

In giving this instruction the court followed the rule announced by this court in the telegraph cases where there is negligence in delivering social telegrams announcing the death or the sickness of a relative and the like. But this rule is never followed except where the telegram on its face shows its nature, and thereby apprises the company of its importance. It will be observed that in the case at bar there is nothing of this character. The contract which was made through Jarvis by the railroad agent with Fred Head was simply a contract to furnish transportation from St. Louis to Greenville. The ticket agent at Greenville had no authority presumably to make a contract to bring Rupert Head to Greenville at any specified time, and there is nothing in the record warranting the conclusion that he undertook to do so. The evidence presents simply a case where the railroad company agreed to furnish transportation and failed to do so promptly, if Rupert Head was not guilty of contributory negligence in going to the wrong place for his ticket, and of this the jury must judge. But if the railroad company was negligent in furnishing the transportation, the measure of damages is simply a reasonable compensation for the time lost by Rupert Head and any expenses he incurred by reason thereof. (Robinson v. Western Union Telegraph Co., 24 Ky. Law Rep., 452.) In 3 Sutherland on Damages, section 936, the rule is thus stated: "If the journey is delayed there will be a loss of time, and the passenger is entitled to compensation for it, and also for any increased expense reasonably incurred during the delay or to procure other conveyance when necessary."

The same rule is stated in 2 Sedgewick on Damages, section 863, and then this is added: "In Hamlin v. Great Northern Railway Co., 1 H. & N., 408, the plaintiff was delayed on the defendant's road so that he could not get from G. to H. in the evening, as he had intended to do. He, therefore, re-

mained for the night at G., and went to H. the next morning. It was held that he could not recover for a failure to keep appointments with customers at H. He could only recover the expense of his night's lodging."

If Rupert Head had, by reason of the delay, lost an option worth \$100, or had reached Greenville too late to be married, such damages could not be recovered for here. The damages would be too remote and not the natural or proximate result of the defendant's act. The same rule must apply to his failure to reach his father's funeral.

Judgment reversed and cause remanded for a new trial.

Whole court sitting.

DAMRON v. DAMRON.

(Filed February 9, 1905.)

1. Owner of adjoining tracts of land—Sale of one tract by sheriff for debt—Easement of purchaser over adjoining tract—Passway—Appellant owned two adjoining tracts of land, and by reason of the mountainous condition of the country the only practicable way to the upper tract was through the lower tract. Appellee bought the upper tract at sheriff's sale, under execution, and brought this suit in the circuit court to restrain appellant from interfering with his right to use a natural and reasonable route over the lower to the upper tract, which the lower court granted. Held—That the circuit court had jurisdiction as this was not a proceeding to condemn a private passway, and the sale by the sheriff's deed passed the same easements over the servient estate as if the sale had been made by the owner.

2. Occupancy of purchaser—The fact that the purchaser did not reside on the tract bought at the sheriff's sale does not affect his rights under his title, as the sale made by a sheriff of a part of the owner's tenement for debt is an involuntary conveyance by the owner of such parcel, and the sheriff's deed includes easements and quasi easements appurtenant to the land sold.

Roscoe Vanover for appellant.

N. J. Auxier for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was the owner of a boundary of land, consisting of two adjoining tracts. They were both located on the same small stream, one further up than the other. Owing to the mountainous condition of the country the only practicable way to get to or from the upper tract was to pass along the valley, by way of the lower tract. There was no public road or other passway to the upper tract. The upper tract was sold under execution against appellant, and appellee bought it. This suit involves the right of appellee to pass over appellant's other land so as to get to and from that which he bought. The suit was brought by appellee in the circuit court to restrain appellant from interfering with appellee's using a natural and reasonable route over the lower tract so as to reach the upper one. The circuit court granted the relief.

Appellant insists that the circuit court had not jurisdiction of the case, relying upon section 4818, Kentucky Statutes, which confers jurisdiction

upon county courts to open private passways, by condemnation, over the land of another, to enable one having no other accessible route to attend courts, elections, the meeting house, mill, ferry, railroad depot, etc. But that section does not apply to this proceeding at all. This is not an effort to condemn a passway, but to enjoin the obstruction of one already in existence. Of this action the circuit court alone had the original jurisdiction. The defense rested upon the fact that appellee was not shown to reside on his land, nor did he have a tenant upon it. From this it is argued that there was no necessity for the passway to enable him to discharge his civic duties, as by attending court, elections, meeting, etc., citing *Shake v. Frazier*, 94 Ky., 143, 14 Ky. Law Rep., 798; *Cody v. Rider*, 8 Ky. Law Rep., 59. But appellee's right asserted in this case rests upon an entirely different principle. It is elementary law that where the owner of land sells a part, with no outlet to a public highway, or to a private passway which may rightfully be used in connection with the parcel sold, it is implied that the vendor grants to his vendee a right of way over his remaining lands to enable the latter to get to and from the part sold to him. Without the easement the part sold and conveyed would be useless to the purchaser, hence there passes to the grantee those easements necessary to the enjoyment of the part conveyed.

A sale of a part of the owner's tenement by the sheriff for debt is an involuntary conveyance by the owner of the parcel sold and conveyed. In law the sheriff is the owner's proxy in making the conveyance. The sheriff's deed actually conveys the owner's title to the property embraced, including easements and quasi easements appurtenant to the land sold. If the situation be such that the parcel sold can not be enjoyed except by the use of an easement over the debtor's remaining parcel, it must be implied that the debtor, by the sheriff, sold and granted such easement over the parcel not sold as was essential to the use and enjoyment of the part that was sold. In such case the owner of the servient estate ought to have the right of selection, if reasonably exercised, and within a reasonable time. Otherwise, the owner of the dominant estate may select such route. In this case, no such selection having been made and being refused by appellant, the chancellor properly selected the route most natural and accessible.

The judgment is affirmed.

COMBS v. COMMONWEALTH.

(Filed February 10, 1905.)

Indictment—Selling liquor without license—Insufficient allegations—An indictment found on July 20, 1904, for selling liquor without a license, which alleges that the offense was committed on July 18, 1904, and that a former indictment for said offense, filed November 13, 1903, had been stolen and could not be found, is inconsistent and uncertain, and as the dates named neutralize each other, there is nothing in the indictment to show that the offense charged was committed within twelve months before the finding of the last indictment or within twelve months before the finding of the one that was stolen.

R. L. Greene for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Knott Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant was indicted in six cases for selling liquor without license in the county of Knott. He was found guilty in each case and his punishment fixed at a fine of \$100. The six indictments were returned into court on the 20th or 21st day of July, 1904, and were tried on the same day they were returned. The defendant entered a demurrer to the indictment in each case, which was overruled, and the correctness of this ruling is the only question to be determined on the appeal.

The indictments are in substance all the same with the exception of the name of the person to whom the sale was made. One of them, which may be taken as a sample of the others, is as follows: "The grand jury of Knott county, in the name and by the authority of the Commonwealth of Kentucky, accuse Henry Combs of the offense of unlawfully selling spirituous liquor without license so to do, committed as follows. The said defendant, on the 18th day of July, 1904, in the county and circuit aforesaid, did unlawfully sell spirituous liquors to Bob Thacker without a license so to do. A former indictment for said offense, filed on the 13th day of November, 1903, has been stolen and can not be found, against the peace and dignity of the Commonwealth of Kentucky."

The rule is that an indictment must show on its face, where an ordinary misdemeanor is charged, that it was committed within twelve months before the finding of the indictment, unless it is in lieu of a former indictment, and then it must show that the offense was committed within a year before that indictment was found or the prosecution was begun. In *Williams v. Commonwealth*, 18 Ky. Law Rep., 666, the court said: "Section 129, Criminal Code, is as follows, to wit: 'The statement in the indictment as to the time at which the offense was committed is not material further than as a statement that it was committed before the time of finding the indictment, unless the time be a material ingredient in the offense.' The offense with which the defendant is charged is a misdemeanor, and unless the indictment was returned within twelve months after its commission the statute of limitation operates as a bar to the prosecution, therefore, the time is a material ingredient in the offense."

In *Stamper v. Commonwealth*, 102 Ky., 36, the court again said: "Another objection is made on account of omission of the formal statement that the alleged offense was committed within twelve months before the indictment was found. The reason for requiring that statement in an indictment for a misdemeanor is that the plea of limitation should be by the Commonwealth anticipated, and made to appear prima facie precluded. But as the indictment in question was found and returned November 9, 1896, and contains a specific averment that the alleged offense was committed November 2, 1896, no further statement on the subject was needed."

In *Commonwealth v. Cook*, 102 Ky., 288, the above was approved in these words: "It is objected to the sufficiency of this indictment that there is no averment that the offense was committed within twelve months before the finding of the indictment. This court has recently held, in the case of

Stamper v. Commonwealth, ante, 83, that the averment mentioned was unnecessary, providing the date alleged for the commission of the offense was within twelve months before the finding of the indictment. It was, therefore, not necessary to the sufficiency of the indictment to make averments showing that this indictment was a continuation of a previous prosecution not barred by the statute."

As to what averments are necessary to show a continuous prosecution and avoid the bar of the statute thereby in **Commonwealth v. Megibben Co.**, 101 Ky., 198, the court thus stated the law: "On the other hand, it is claimed on behalf of the Commonwealth that this prosecution was a continuous one, the indictment containing the statement that 'the offense herein charged is the same offense charged in indictment No. 1014, filed in this honorable court on February 16, 1896.' This statement fails, however, to show whether the other indictment was pending, or whether it had been quashed and the case re-referred to the grand jury, or whether it had been dismissed by the Commonwealth's attorney and re-referred. In **N. N. & M. V. R. R. Co. v. Commonwealth**, 14 Ky. Law Rep., 197, following **Tully v. Commonwealth**, 13 Bush, 153, it was held that a new indictment found by a grand jury, to which the prosecution has been re-referred, can not be regarded as a continuation of a former prosecution so as to avoid the statute of limitations unless it alleges the facts as to the former indictment, its dismissal, etc., and thus clearly upon its face shows that the prosecution was intended to be a continuous one."

It will be observed that the indictment before us insofar as it relates to the previous indictment is insufficient under this rule, as it does not show the dismissal of that indictment or that the prosecution was then resubmitted to the grand jury. The statement in the indictment that the offense was committed on July 18, 1904, is inconsistent with the statement also made in it that a former indictment for the same offense was filed on November 13, 1903. If we reject both these allegations as neutralizing each other, there is nothing in the indictment to show when the offense was committed. The indictment, therefore, as a whole, is uncertain, and does not show that the offense charged was committed within twelve months before it was found by the grand jury, and the demurrer to it should have been sustained.

Judgment in each case reversed and cause remanded for further proceedings consistent herewith.

RUST, &c. v. RUST, &c.

(Filed February 8, 1905—Not to be reported.)

1. Will contest—Statement of the case to the jury—While it is proper for the attorney for the will to conclude his statement to the jury of the facts relied on to sustain the will, before the contestant's attorney makes his statement the fact that the court permitted the attorney for the will to make an additional statement after the opposing attorney had made his statement is not a reversible error.

2. Statements by counsel in argument—A statement made by counsel for the will in his argument to the jury, that "the proof fails to show, for twenty years, one act of kindness to the testator by any one of the contest-

ants," and "that only four of the children have appeared in the action, the others having washed their hands of the transaction," are legitimate conclusions from the evidence, and are not objectionable.

H. J. Moorman and W. J. Webb for appellants.

Robbins & Thomas for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Paynter.

This is a contest over the will of William Rust, deceased. The jury found it to be his last will and testament. A reversal is sought for reasons which will appear herein. After the jury was sworn counsel for the propounders read to the jury the paper purporting to be the will, and stated that it had been executed in the presence of witnesses and that unless it could be shown by contestants that it was procured by undue influence, or that William Rust was not of sound mind, that the paper must stand as his will. Thereupon counsel for contestants stated the case to the jury. After that the attorney for the propounders resumed his statement, and stated what the evidence would tend to show.

It is urged that as section 817 of the Civil Code provides that the plaintiff shall briefly state his claims, and the evidence by which he expects to sustain it, and that the defendant must then briefly state his defense, and the evidence he expects to offer in support of it, it was error in the court to allow the case to be stated in the manner indicated. Counsel for the propounders evidently thought that when they offered evidence as to the due execution of the paper that the burden of proof would shift to the defendant, and that the statement should proceed in the order in which the evidence would be introduced. We are of the opinion that it would have been proper for counsel for the propounders to have completed his statement before the statement was made for contestants. While this is true, we do not believe that the case should be reversed on that account, because it did not and could not have prejudiced the substantial rights of the contestants. While the Code prescribes an orderly way for stating a case, it does not follow that because it may not be strictly pursued that a prejudicial error has been committed.

It is urged that the statement made by counsel for propounders was not permissible under the Code. We have examined it, and are of the opinion that it is a substantial compliance with the Code, which requires the plaintiff to state his claim and the evidence which he expects to sustain it. Objections are urged as to the language used by counsel for propounders in his argument to the jury. The court's attention is called to some of the alleged objectionable language used by counsel for propounders. It is claimed that the testimony did not warrant counsel in making the statements. For instance, counsel stated that for twenty years the proof in this case fails to show one act of kindness to the old man by any one of the contestants. This was a conclusion that counsel drew from the testimony, and it was perfectly legitimate. Again, counsel said only four of these children have appeared in this action. The other children washed their hands of the transaction. It certainly was legitimate for counsel to draw the inference from the evidence that some of the children had apparently abandoned the

contest. The other alleged objectionable statements are no more objectionable than the ones we have mentioned.

It is urged that the court erred in allowing Mrs. Linn Rust to testify because of her husband's interest in the estate under the will. This can not be reviewed, because the will is not made part of the record by an order of court or by the bill of exceptions, therefore, there is nothing to show that her husband had any interest in the estate under the will. We are of opinion that the evidence abundantly supports the verdict of the jury.

The judgment is affirmed.

HANDSHOE v. CONLEY.

(Filed February 8, 1905—Not to be reported.)

Land—Adjoining tracts—Dividing line—Common title—In an action to determine the location of a division line between two parties who claim the land from the same source, it is not incumbent on the plaintiff to show that he derived title from the Commonwealth.

Phillips & Fugate for appellant.

Jas. Andrew Scott for appellee.

Appeal from Knott Circuit Court.

Opinion of the court by Judge Paynter.

The question involved in this case is as to the location of the division line between the lands of the appellant, Handshoe, and the appellee, Conley. Both claim to derive title through Alamander Coburn. He owned a boundary of land on the Salt Lick Fork of Beaver creek. In 1879 he conveyed part of it to W. C. Coburn, and W. C. Coburn conveyed part of the land which was deeded to him by Alamander Coburn to the appellant. Alamander Coburn remained in possession of the balance of his boundary for some years, when he conveyed it, or a part of it, to one Moore, and the latter conveyed it to appellee Conley. The conveyances to Moore and Conley called for the line of the boundary of the land which was conveyed to W. C. Coburn, so the controversy is settled when the true location of the line of the W. C. Coburn boundary is determined.

The description of the land contained in the deed of Alamander Coburn to W. C. Coburn reads as follows: "Beginning on a black walnut and buckeye on the bank of the creek; thence running up the hill on the east side of the creek to the top of the point; thence with top of the same to the top of the ridge between the old Field branch and Bee branch; thence down said ridge to the head of a small drain; thence down the same, crossing the creek; thence up the point on the west side of the creek between the Bulltail hollow and the hollow that said Alamander Coburn now lives at the mouth of; thence running with the point to the main ridge; thence running down the creek with the top of the ridge to opposite the beginning; thence a straight line to the same." * * *

The difficulty in locating the line is to determine the location of the small drain referred to in the deed to W. C. Coburn. For the appellee it is insisted that the small drain referred to is the small depression in the side of

the hill overlooking the creek. For the appellant it is contended that "Rocky hollow" is the drain referred to in the deed. There is testimony tending to show that the small drain referred to could not be the one claimed by the appellee, because it can not be reached by running down the ridge between old Field branch and Bee branch. The weight of the evidence tends to show that W. C. Coburn's line runs down "Rocky hollow." And in addition to that, the evidence tends to show that Alamander Coburn recognized that the line ran down Rocky hollow, as he said when building a splash dam across it that the land below it belonged to W. C. Coburn. So the court below should establish the line down Rocky hollow, and thence according to the calls of the deed to W. C. Coburn. The court below did not determine the question as to the true location of the line, but adjudged the appellant failed to show that he derived title from the Commonwealth of Kentucky, and, therefore, dismissed his petition. This court has heretofore decided that it is not necessary for the plaintiff to show that fact when he and defendant claim title through the same source.

The judgment is reversed for proceedings consistent with this opinion.

HOERTZ v. JEFFERSON SOUTHERN POND DRAINING CO.

(Filed February 10, 1905.)

1. Corporation—Draining swamp lands—Public benefit—Legislation—Constitutionality—Legislation creating a corporation for draining swamp lands near a city, and thereby improving the health of the community, is a matter of public concern, and is not unconstitutional as special legislation. The fact that it is attended by some private benefit not enjoyed by the general public does not take from the work the quality of being for the public service.

2. Uncertainty of location—An amendment to the charter of a corporation organized to drain swamp lands, which recognized the "Pond Settlement in Jefferson county," as being the district to be drained, is sufficiently explicit to refute the claim of uncertainty as to the subject of the legislation.

3. Charter—Provisions—Commissioners—Assessment of tax—Taking private property—Due process of law—Where the charter of a corporation organized to drain swamp lands provides for the appointment of commissioners, to assess a tax on certain adjacent lands, who were required to and did report their action to the Jefferson Chancery Court, which confirmed their assessment, a levy and collection of a tax so assessed is not a "taking of private property without due process of law," within the meaning of the Federal or State Constitutions, and the fact that the notice was by advertisement in the press and by posters instead of actual service of process, does not militate against the conclusiveness of the judgment of said court.

4. Estoppel—An owner of land whose grantors procured the charter authorizing the drainage of swamp lands and the assessment of the adjacent lands therefor, is estopped to deny the validity of the law under which the assessment is made.

W. McKee Duncan for appellant.

W. W. Thum and A. S. Brandels for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

The Jefferson Southern Pond Draining Co. was incorporated by an act of the legislature of Kentucky in 1858, and there were amendments to the original act in 1872, 1873, 1878, 1884, 1886 and 1888. The proceedings out of which arose the controversy at bar were had under the charter as amended in 1888. The appellee company was incorporated for the purpose of draining a large body of swamp lands about four or five miles south of Louisville, in Jefferson county, Kentucky, which, by reason of the water constantly standing upon them, were worthless, and, by the consequent propagation and dissemination of malaria, were a menace to the health of the citizens of the surrounding country, and of the city of Louisville. The drainage of these lands was to be effected by the digging of deep and wide ditches at intervals through them at sufficient grade to carry off the water, so that the owners between the main ditches could, by tilling, thoroughly drain and render productive their before worthless land. The digging of these ditches, of necessity, required money, and this was to be raised by assessment and taxation authorized by the charter. By the amendment of 1888 the system of taxation was to be a graded one in accordance with the benefits received, the maximum tax being 40 cents, and the minimum 10 cents, per acre; and it was provided that upon the petition of more than one half of all the land owners within the boundary of the district established, signed either by themselves, their agents, their guardians or personal representatives, the Jefferson County Court should appoint a board of commissioners, consisting of three land owners resident in Jefferson county and not interested in the Jefferson Southern Pond Draining Co., nor owning any of the lands within the boundary, and each over twenty-five years of age; that these commissioners should, on the 1st day of July, 1888, rate, assess, apportion, charge and fix upon the land within the boundary of the district a tax for the succeeding ten years, of not more than 40 cents nor less than 10 cents per acre, in proportion to the benefits conferred, fixing the rate at such an amount per acre as should be fair and just in each case, and report their assessment and apportionment in writing to the Louisville Chancery Court, the report to be filed with the clerk of the court. This assessment and apportionment was to be in lieu of the annual assessment and apportionment theretofore authorized by the charter. The commissioners, in making the assessment and apportionment, were required to enter on the assessment roll the names of all persons who at the time were the owners or holders of lands liable to be assessed under the provisions of the charter, and opposite the names of such persons the separate tract or tracts so owned or held, with the number of acres as near as practicable, the name of the nearest resident thereto, the rate of taxation per acre, and the aggregate tax upon each tract or parcel of land for each of the ten years.

The commissioners were required to publish in one English and one German daily newspaper, printed and published in Jefferson county, by insertions made in each of them once per week for three consecutive weeks, a notice of the assessment and apportionment, and the fact that it had been filed with the clerk of the Jefferson Chancery Court. Copies of the notice were required to be posted at various places in Jefferson county. Within thirty days after the filing of the report any person feeling himself aggrieved by reason of the assessment could file with the clerk, as authorized, his

complaint, in writing, specifying the land and the alleged excess or injustice. As soon as practicable after the expiration of thirty days the clerk was required to set the case for hearing, and of the justice or injustice of the apportionment the court was to determine.

The taxes provided for in the act were to be assessed as of the 1st day of July, 1888, and to be payable to the Jefferson Southern Pond Draining Company on or before the 1st day of October of the year for which the assessment was made, and become due on the 1st day of December thereafter, beginning with the year 1888, and so on for each of the ten years for which the levy and assessment was made. The corporation was given a lien for all taxes upon the land assessed, and upon all the personal property of the owner or owners found upon the premises, not exempt from execution, attachment or distraint, which was authorized to be enforced by equitable action in the Jefferson Chancery Court.

The appellant, or his grantors, owned the land in question which was within the tax limits established by the charter of appellee, and in 1888 commissioners were appointed, who assessed all of the land within the tax district, including that now owned by appellant, for the period of ten years next succeeding, and filed their report in the Jefferson Chancery Court. No complaint having been made by the then owner of the land in question of any injustice done him, the proceedings as to him were confirmed and approved, and the appellant having failed to pay the assessment, this action was instituted by the company in the Jefferson Circuit Court, Chancery Branch, to enforce its lien. No question is raised by the appellant as to the regularity of the procedure by the appellee under its charter. The objections made are fundamental—not technical. Upon the trial of the case the chancellor granted the relief prayed for in the petition, giving a judgment for the sum of the taxes due, and enforcing the lien.

The appellant insists that the legislation creating the corporation is unconstitutional in that it grants special privileges for which no public service is rendered. It is too late to question that the draining of vast swamps, and thereby improving the health of the whole community, is a matter of public concern. All public works of the nature of the one under discussion are attended by some private benefit not enjoyed by the general public; but this private benefit does not take from the work the quality of being for the public service. It is hardly necessary to cite authority upon a proposition so obvious, and of which the books are so replete. Perhaps the last utterance of this court on the particular subject in hand is contained in *Duke, &c. v. O'Bryan, &c.*, 100 Ky., 710, wherein the question is thoroughly discussed, and the distinction between a public and a private benefit, and the effect of the existence of the latter in public works, is pointed out. The amendment of 1888, in its preamble, recites the public benefit of the act as being the promotion of the health of the community, and this must be taken as true in the absence of any evidence in the record contradicting it.

A second objection to the charter is that the lands to be drained are not specifically located. This, we think, is error, but conceding it to be true the district to be drained was located under the original charter, and the amendments recognized this as being the locality involved. The act of 1888, under which the tax in question was assessed, speaks of and recognizes the

district as located, and recites the fact that the corporation has already a system of ditches constructed, which it will redound to the public health to maintain and extend. This legislative recognition of the Pond Settlement in Jefferson county as being the district to be drained is sufficiently explicit to refute the claim of uncertainty as to the subject of the legislation. Nor is the levy and collection of the tax the taking of private property without due process of law within the meaning either of the Constitution of this State, or of the fourteenth amendment of the Constitution of the United States. After the assessment by the commissioners they were required to, and did, report their action to the Jefferson Chancery Court, and appellant was given his day in court to show cause against the levy of the obnoxious tax upon his land. This he failed to do, and under the terms of the charter he was concluded by the judgment. The fact that the notice was by advertisement in the press and by posters, instead of actual service, does not militate against the conclusiveness of the judgment. The proceedings taken in this case with regard to the levy of the assessment, and the right and opportunity of the appellant to show cause against its validity, are substantially the same as those with reference to every other method of taxation, either State, municipal or local. In the levy of taxes for the support of the municipality of Louisville the assessment is made by the assessor, the board of equalization meets at a stated period, and notice is given to all concerned of the time when their complaints may be heard. No actual service of this notice is ever had, nor could it be given in any other way except through the public press, and yet the rights of the citizens are concluded by the final action of the board of equalization. Substantially the same process is had where improvements of the public streets and highways are made. After the work is done by the contractor, a day is fixed, and notice given through the public press to all concerned of the time and place at which the board of public works will take up the matter of receiving and hearing complaints against it. No other notice is given, or is possible, than through the public press. The argument of appellant, if successful, would overturn our whole system of levying, assessing and collecting taxes. That the procedure adopted is not inimical to the provisions of the fourteenth amendment of the Constitution of the United States with regard to the taking of property without due process of law is shown by the following adjudications: *Davidson v. New Orleans*, 96 U. S., 97; *Hagar v. Reclamation Dist.*, 111 U. S., 701; *Lent v. Tillson*, 140 U. S., 816; *Spencer v. Merchant*, 125 U. S., 345; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S., 113, 174; *Bauman v. Ross*, 167 U. S., 548; *Paulsen v. Portland*, 149 U. S., 30, and *Cooley on Taxation*, 8d edition, pages 629, 68.

The objection that the review of the assessment made by the commissioners is not a judicial procedure, and could not, therefore, be imposed upon the Jefferson Chancery Court, is untenable. Reviewing the legality and validity of the actions of parties in all matters, public and private, is eminently a judicial function, and we do not know how the charter could have better secured the rights of appellant than by giving him an opportunity to show cause against the assessment, in the first instance, in the very court which finally adjudicated upon the procedure of which he now

complains. (Cooley on Taxation, 3d edition, page 786; Burroughs on Taxation, page 338; Wilson v. Karle, 42 N. J. L., 612.)

But if we were less certain of the constitutionality of the act under review the case must be affirmed against appellant on this point for the reason that he, or his grantors, procured the legislation in question, and were the recipients of its benefits. It is alleged in the pleadings of appellee that appellant and his grantors procured the charter and its amendments, and obtained the appointing of the commissioners, and the levy of the assessment, and were its beneficiaries. The appellant was content with denying that he did the things charged in estoppel upon him and his grantors, leaving undenied the whole charge as against his grantors. The legislation, and the acts thereunder, constituting the basis of appellee's claim herein, were obtained and done in 1888 and prior thereto. The work was done and the benefits accrued then and shortly thereafter. The lien was fixed and became a public record, of which appellant had notice when he subsequently purchased. He can not now successfully claim that his land was not bound in the matter in question by the action of those who owned it at the time. He took the land with its burdens, and he is bound by the estoppel of his grantors. That one who procures unconstitutional legislation, and receives its benefits, is estopped to deny its validity is well settled in this State. (Cypress Pond Draining Co. v. Hooper, 2 Met., 350; Souffletown Fence Co. v. McAllister, 12 Bush, 315; Ferguson v. Landrum, 1 Bush, 548; Ferguson v. Landrum, 5 Bush, 280.)

The Constitution of 1891 did not repeal the charter of appellee, nor did it expire under the schedule of that instrument by the lapse of five years after 1891. All of the acts and proceedings had with reference to appellee's claims were performed under the Constitution of 1850, and are not affected by that of 1891. The evidence in this case, without contradiction, shows that the land of appellant has been vastly benefited by the tax which he seeks to escape. Before drainage it was worth from two to five dollars an acre, and after drainage from forty to fifty dollars an acre. Before, no crop could be successfully raised upon it; afterwards, its productivity was so greatly magnified as to produce from sixty to eighty bushels of corn per acre, and to yield crops of hay worth from twenty-five to thirty-five dollars an acre. But the public has been benefited in a still greater degree, although it can not be expressed in terms of money. Before drainage the district was uninhabitable because of the prevalence of malaria; now the health of the entire district is as good as that of any other in the State. Before, the health of the city of Louisville was seriously impaired by malaria disseminated from swamps and morasses which are now fruitful fields, and it is said, upon high medical authority, that the work of appellee has done more for the health of the municipality than its whole sewerage system, costing millions of dollars.

For these reasons the judgment of the chancellor is affirmed.

SECOND NATIONAL BANK OF RICHMOND, KY. v. FITZPATRICK, &c.

(Filed February 10, 1905—Not to be reported.)

1. Former appeal—Pleading—Upon the return of this case appellant offered to file amended petitions in two of the cases which were involved upon the first appeal, in which it sought to relinquish all claim to usurious interest. The court refused to permit them to be filed, but allowed them to be tendered and made a part of the record so as to obviate the necessity of a bill of exceptions. Held—The trial court ruled correctly in refusing to permit the amendments as tendered to be filed after the return of the case from this court.

2. Interest—Double penalty—From the evidence it appears that \$475 of payments was interest paid by the borrower, and as to it he was relegated by the statute for his remedy for double penalty for usury paid, and the evidence failing to support the bank's contention that any further part of the payments credited by the judgment appealed from was paid by the debtor as interest, without this specific appropriation, the lender had no authority to apply it except as was done by the court below.

J. A. Sullivan for appellant.

J. G. Fitzpatrick for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Barker.

This is the second appeal of this action. The opinion of the court on the first is found in 111 Ky., 228. The ample statement of the facts therein renders it unnecessary to repeat them here. All of the questions of law decided on the former appeal are *res adjudicata* on this.

Upon the return of the case to the circuit court the bank offered to file amended petitions in two of the three consolidated cases, which were involved on the first appeal, the purport of which was that it sought to relinquish its claim to all usurious interest contained therein. The court refused to permit these pleadings to be filed, but allowed them to be marked "tendered," and made a part of the record, to obviate the necessity of a bill of exceptions. It is now contended by the bank that the court erred in this ruling, and that until final judgment it had the right to what it denominates a *locus poenitentiae*. Conceding, for the present, that the bank may at any time before final judgment relinquish the difference between the lawful rate of interest and the usurious rate actually charged, and thus prevent a forfeiture of the whole under the Federal statute, we think this offer comes too late. In this case the bank sought a judgment for its debt and usurious interest. The defendant filed an answer pleading the statute, and praying for a forfeiture in accordance with its terms. This prayer was granted, and a judgment of forfeiture entered. From this judgment the bank appealed, and while the case was reversed for another reason, it was approved insofar as it forfeited the whole interest, the court, upon this question, using the following language: "The lender is forbidden to contract for interest at the illegal rate, and by such a contract, though unexecuted, forfeits the entire interest carried in the note." This language leaves no room for a *locus poenitentiae*.

The case of *Talbot v. Sioux City First National Bank*, 185 U. S., 179, does not, when correctly understood, support the right of the bank to relinquish the usury and recover the principal with lawful interest, although there is some general language in the opinion which, if disassociated from the real issue before the court, might appear to afford a basis for this conclusion. In that case the bank had loaned money in Iowa at a usurious rate. It brought suit to enforce its claim, and the borrower, erroneously supposing that he could not plead the Federal statute authorizing the forfeiture, pleaded the State statute, which forfeited only the excess over the lawful rate. His plea for a forfeiture, as presented, was sustained by the State court, which awarded judgment for the principal and lawful interest. Upon this judgment execution issued, which was levied upon property of the borrower, and this being sold, the proceeds were paid into court and withdrawn by the bank in satisfaction of its judgment. Thereupon the borrower, concluding that he had now paid usurious interest, brought an action under the Federal statute, seeking, not a forfeiture, but to recover the penalty of double the sum paid, as authorized by the Federal statute. Upon appeal to the Supreme Court it was held that no usury had been paid; that in the original case in the State court the borrower had, by his own action, procured the purging of all usury from the bank's claim; that according to the tenor of his own prayer a judgment had been awarded only for the principal and lawful interest; that when he afterwards paid this judgment he paid no usury. This is all that was involved in that case, and the opinion in nowise warrants us in overriding the plain letter of the statute, which provides: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carried with it, or which has been agreed to be paid thereon."

The trial court ruled correctly in refusing to permit the amendments as tendered to be filed after the return of the case from this court. The only question involved in the former appeal left open was the proper application of certain payments upon the two notes upon which suits were instituted by the bank. It is said in the opinion: "There remains the question of the application of the payments upon the two notes upon which suit was brought by the bank. Certain of these payments appear to have been specific payments of interest, as such, by the debtor, accompanied by a renewal of the obligation for its face. Others of the payments, however, appear from the evidence to have been general payments to the bank, with no application by the debtor, except insofar as such application may be presumed by law, or from his supposed acquiescence in the bank's mode of keeping its books, to which he did not have access. As we have held, there is no such presumption of law; and we do not think the debtor can be presumed to have made an application of his payment to interest, as such, from the fact that the bank so applied the payments on its books without his knowledge."

In carrying the opinion of this court into effect the trial judge allowed three payments to be credited upon the principal. Of this the bank complains, claiming that a part of each of these was made on the interest due,

and that this part ought to be disallowed as a credit, and the borrower relegated to his remedy under the Federal statute for the double penalty. The rule announced in *Marion National Bank v. Thompson*, 101 Ky., 277, and followed in the first opinion in this case, on the subject of partial payments on usurious contracts of national banks, so far as pertinent to the question in hand, is that, if the debtor specifically applies the payment, or any part of it, to the interest account as such, to that extent his right to a forfeiture is merged in his greater right to sue for the double penalty authorized by the Federal statute where usurious interest is paid; but if no specific appropriation is made by the debtor, then the lender has no right to appropriate any part of the payment to the interest account, but it must be applied to the extinguishment of the principal; and these principles are in line with the adjudications of the Supreme Court upon this subject.

Examining the payments applied in the judgment to the extinguishment of the principal of the debt involved here, we find the following question and answer contained in the deposition of C. N. Fitzpatrick, page 62 of the printed record:

"Q. Did you ever pay any interest on that note (the larger note sued on) after it started? If so, when?"

"A. On October 13, 1887, I paid the bank \$1,011.05."

R. E. Turley, the cashier of the bank, was questioned, and made answer, as follows (page 133 of the printed record):

"Q. Was there any understanding between the bank and C. N. Fitzpatrick as to how the payments were to be applied at the time they were made?"

"A. There was no understanding except that they were made to pay interest."

"Q. How were the payments applied each time?"

"A. They were applied to the payment of interest which had accrued on the notes."

"Q. What was done with the \$1,011.05 payment referred to on October 13, 1887?"

"A. Four hundred and seventy-four dollars and seventy-five cents of this payment went to pay the interest on note of \$6,036.80, dated August 31, 1886, and the balance of the payment of \$536.80 went to pay the interest which had previously been added to the principal of this note."

"Q. Did the \$474.75 represent the interest that had accrued on the note from the last renewal up to the time that the \$1,011.05 was paid?"

"A. It did."

Taking all of this evidence together, we conclude that \$474.75 of the payment of \$1,011.05, made October 13, 1887, was interest paid by the borrower, as such, and that as to it the borrower was relegated by the statute to his remedy for double penalty for usury paid. We do not think that the evidence supports the bank's contention that any further part of the payments credited by the judgment appealed from upon the principal of the debt was paid by the debtor as interest, and under the principles settled in the opinion on the first appeal, without this specific appropriation by the debtor, the lender had no authority to apply it in any other manner than was done by the court below.

For these reasons the judgment is reversed, with directions to credit the

larger note with the sum of \$586.80, as of October 13, 1887, instead of the sum of \$1,011.05, credited by the judgment as of that date. In all other respects the acts of the circuit judge are approved.

LEAHY v. JEFFERSON SOUTHERN POND DRAINING CO.

(Filed February 10, 1905—Not to be reported.)

Wm. McKee Duncan for appellant.

W. W. Thum and A. S. Brandels for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

The questions of law and the evidence in this case are substantially the same as in the case of *George Hoertz v. Jefferson Southern Pond Draining Co.*, ante, —, this day decided, and the judgment of the chancellor herein is affirmed for the reasons given in the opinion in that case.

CITY OF LEXINGTON v. BOWMAN.

(Filed February 14, 1905.)

1. Street improvements—Ten-year payments—Knowingly accepting—Request of debtor—Plea of limitation—Where a city loaned its credit to a lot owner for the cost of a street improvement paid for by the city, and which, at the implied request of the debtor, was payable in ten yearly installments, such debtor, after paying the two first installments and having knowledge that the city, in extending him the credit had acted upon the idea that he had requested it, will not be heard to say he had not requested it, and by a plea of limitation throw a loss upon the city which it would not have sustained but for his misleading it.

2. Estoppel—In such case the law must imply a request for the ten-year payment, whether it was made or not, and the debtor by his acquiescence therein is estopped to deny it.

Allen & Duncan for appellant.

Maury Kemper for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Hobson.

By an act of April 13, 1890, amending the charter of the city of Lexington, it was enacted that the general council might provide by ordinance for the construction and reconstruction of the streets of the city and order a special assessment to be made by the city assessor on the property fronting on the street that was improved. The assessment was directed to be returned to the council, and if confirmed by it, after notice to the property holders, it became final, and the council was authorized to levy a special tax on the property sufficient to pay for two-thirds of the entire cost of the improvement, the other one-third to be paid by the city. A lien was given on the property for the special taxes, which were authorized to be collected as other taxes. The act then made the following alternative mode of payment

For the improvement: "The general council may, at the request of parties liable for special taxes levied, lend such parties the credit of the city for a period not exceeding ten years, as provided in this section, for an amount sufficient to pay the entire cost of said improvements. The tax levied for the cost of construction shall then be divided into ten equal annual payments, payable one-tenth each year, and so levied on the assessed value of the property liable for said improvements. Said special taxes on this ten-year plan shall be a lien on the property on which they are levied, and their collection made and enforced as other taxes. Said taxes, when collected, shall be used exclusively in paying the street bonds issued on that street or block. In cases where the general council lends the credit of the city in paying the cost of construction or reconstruction, the city shall be liable only for the interest on said bonds, the property paying the entire cost of the improvement. The general council shall make all necessary regulations and prescribe the proper forms to be used in carrying out the provisions of this section."

The city council passed an ordinance reciting that all the owners of the front feet of property on appellee's block adjoining the improvement had petitioned the council to cause Broadway to be improved on the ten year plan, and it was provided in the ordinance that the improvement of the street should be made on the ten-year plan. After the improvement was made the city passed an ordinance levying the tax, which also recited that all of the owners of property on this block had petitioned to have this improvement made on the ten-year plan; that they had requested the general council to lend them the credit of the city for a period of ten years for an amount sufficient to pay the entire cost of the improvement. The city issued its bonds and paid for the improvement and appellee paid the first and second of the ten installments assessed against his property. He refused to pay the remainder of the tax, and on February 23, 1901, filed this suit on the ground that the proceedings of the council were void, and that there was no lien on his property. Among other things, he pleaded that he did not request the city to lend him credit for ten years, or for any period of time; that his liability for the improvement attached at the time of the completion of the work in the year 1892, and that the defendant's cause of action, if any it had, was barred by the limitation of five years. In answer to this plea the defendant alleged that the above ordinances were passed by the general council under the belief that all of the property owners on the block, including appellee, had requested the ten-year plan of payment; that the plaintiff knew that the ordinances were passed by the council in reliance upon this belief; that the plaintiff had actual knowledge that the ordinances contained the recitations above referred to, and knew that the city had issued its bonds and paid the entire cost of the improvement under the belief that the plaintiff and the other owners of the property on the block had requested the loan of the city's credit as aforesaid; that the officers of the city were unable to find any record showing that the plaintiff had requested the ten-year plan of assessment, but that the plaintiff had paid the first and second installments without objection, and that he had made no objection to the mode of assessment until his amended petition was filed in the action pleading limitation on March 12, 1903; that appellee had induced it by his con-

duot to extend its credit to him for the period of ten years for the entire cost of the improvement; that he had accepted the credit and acquiesced in the mode of payment adopted by the city, and thereby induced it to believe that no objection to the tax would be made by him by reason of the ten-year plan being adopted, and that the city, by reason of the conduct and acts of appellee, had made no attempt to enforce the tax, and but therefor would have instituted legal proceedings within the period of five years for the purpose of enforcing the payment of the special tax, and that by reason of these facts appellee was estopped to deny that he requested a loan of the city's credit, or to say that the ten-year plan should not have been adopted, or to plead or rely upon the statute of limitations. The court sustained a general demurrer to this much of the answer, and the city declining to plead further entered a judgment in favor of appellee on the ground that the claim was barred by limitation.

In the *City of Lexington v. Crosthwait*, 25 Ky. Law Rep., 1898, it was held that in case there was not a request by the abutting property holder to the city to permit the adoption of the ten-year plan of payment the statute made two-thirds of the cost and no more a charge against the abutting property, and made it due when the work was completed and accepted; that the city could not, without the request of the lot owner, enlarge his liability by increasing it and extending the time of its payment for ten years, and that where the property owner did not request the adoption of the ten-year plan, and notwithstanding this the city adopted that plan, the statute of limitation ran in favor of the property owner from the time the cause of action accrued. But no question of estoppel was considered in that case. The opinion proceeds on the idea that there was in that case no sufficient plea of estoppel. The question of estoppel is the only matter to be determined on the appeal now before us.

A lien was created on appellee's property when the improvement was made under the ordinances and was accepted by the council, and the cost of the improvement was assessed against the property and confirmed by the council. As to what mode of payment should be followed to release the property from the lien an option was given the property holder by the statute. He was entitled to have the ten-year plan of payment if he requested it. A request may be express or it may be implied. If the appellee did not in advance, request the council to adopt the ten-year plan, he might afterwards consent to its adoption. The choice was with him. If he knew that the city was acting on the idea that he had requested the ten year plan, and on this ground had issued its bonds and paid the contractor, or was about to do so, and instead of objecting went on and paid the first and second installments, which he knew were assessed against him on this basis, without objection on his part, and with the knowledge that the city authorities understood that he had requested the ten-year plan, he can not now be heard to say that he did not request it. If he received credit from the city knowing that the city was acting upon the idea that he had requested it, he can not be allowed, after enjoying the credit which he thus received, to say that he did not request it, and thus throw a loss on the city which it would not have sustained but for his misleading it. If A. is to pay B. \$500, or at B.'s request 500 bushels of wheat, B. would not be allowed to accept the wheat

from A., and after enjoying it to say that he did not request the payment of the debt in wheat. If appellee did not request the city to adopt the ten-year plan, he knew that it had adopted it, and he accepted and enjoyed the credit which the city thus gave him. The law must imply a request for what he has thus received and enjoyed, whether he expressly requested it or not. Equitable estoppels are not confined to acts willfully and intentionally done for another to act upon. If a person knows that another is altering his position for the worse on the idea that he has requested him to do something and knows that the other person is in good faith complying with the supposed request, he can not, after enjoying all the benefits, and the other party will be prejudiced thereby, be allowed to say that he made no request.

Proceedings to enforce the payment of assessments made on property for the improvement of streets are governed by the same rules as other actions. It is true that to create a lien on the property of a citizen the statute must be complied with. But here there is nothing involved but the mode of payment for an improvement already made. If appellee had not wanted the ten-year plan followed all he had to do was to go to the council and say, "you were mistaken about my requesting the ten-year plan; I will pay my assessment now on the cash basis." He was required to act in regard to this liability upon precisely the same principles as in the case of any other debt, and he can not be allowed to acquiesce in the mode of payment adopted by the council until after the lapse of five years, and then rely upon limitation in bar of the claim. (Richardson v. Mebler, 111 Ky., 408; Louisville v. Gast, 26 Ky. Law Rep., 412; Barber Asphalt Co. v. Gast, 24 Ky. Law Rep., 2227.)

Judgment reversed and cause remanded, with directions to overrule the demurrer to the second paragraph of the answer and for further proceeding consistent herewith.

Whole court sitting.

McNEILL v. THOMPSON, &c.

(Filed February 14, 1905—Not to be reported.)

1. Former appeal—Res judicata—All questions of law settled upon a former appeal are res judicata upon a second appeal of the same case.

2. Same—The judgment of sale recites that it was made by agreement of all the stockholders, both in their individual and corporate capacity, and from its language the corporation entered its appearance, and is bound by the order of sale.

Sam C. Hardin and Robt. L. Greene for appellant.

W. L. Brown, J. W. Alcorn and Hazelrigg, Chenault & Hazelrigg for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

This is the second appeal of this case to this court. The opinion on the first is to be found in 25 Ky. Law Rep., 622, styled Thompson, &c. v. Brownlie, &c.

The action, as originally instituted in the circuit court, grew out of a controversy as to the ownership of certain shares of stock in, and the management of, the Nickle Plate Mining Co. Pending the litigation a receiver was appointed, who assumed control of the property of the corporation. Subsequently, by consent of parties, the order appointing the receiver was extended, authorizing him to sell all the property, real and personal, of the corporation at public outcry, on credit of six and twelve months, due notice and advertisement of the sale being first given. In pursuance of this judgment the receiver sold the real estate to the appellant, Jonathan McNeill, for the sum of \$1,800, for which he executed two purchase bonds, each for the sum of \$900, due in six and twelve months, respectively, from date, and payable to the receiver. This sale was had on August 14, 1893. On October 11, 1893, the receiver moved the court to confirm the report of sale. No action seems to have been taken on this so far as the record shows. On October 18, 1895, it being ascertained, after examination into the question, that the report of sale had theretofore been confirmed, but by misprision of the clerk the order had not been entered, a nunc pro tunc order was then made, confirming the report as of two years before. On October 25, 1895, McNeill moved the court to set aside the nunc pro tunc order, and on June 13, 1897, this motion of the purchaser was sustained, the sale was set aside, and the purchase bonds quashed. From this order the receiver appealed, and the judgment setting aside the sale and quashing the sale bonds was reversed, the case being remanded for proceedings consistent with the opinion then rendered. Upon return of the case the purchaser filed additional exceptions to the original sale, which the court overruled, and instructed the receiver to proceed with the collection of the bonds of the purchaser; whereupon he prayed an appeal, thus bringing the record a second time to this court.

We can not review the opinion rendered upon the former appeal. There is no principle of practice more firmly established in this tribunal than that all questions of law settled upon a former appeal are *res adjudicata* upon a second appeal in the same case. Before, as now, the purchaser was urging, though for a different reason, that the judgment of sale was void, and that he took nothing by his purchase. The court in the former opinion said: "The judgment of sale was not void. The purchaser bought only such title as the corporation had. He has received, or can receive, all that was sold. The doctrine of *caveat emptor* applies especially to judicial sales."

It is true that on the first appeal the point was not made that the corporation was not a party to the proceeding between the stockholders, and for that reason the judgment of sale of its property was void. But that is immaterial now. It was the duty of appellant to have presented that question, and if he failed to do so, it was his own fault.

In the case of *Hopkins v. Adam Roth Grocery Co.*, 105 Ky., 357, the proposition that we have enunciated was thus stated: "The legal principles determined upon the first appeal of a case are not merely precedents for the guidance of this court on a second appeal of the same case, but the law as

first determined, right or wrong, is the law of the case, and must control not only the lower court upon a return of the case, but also this court in any subsequent appeal. Opinions of the appellate court on the first appeal can not be revised in the same cause on the second appeal."

In the case of *Simmons v. Samuels*, 22 Ky. Law Rep., 1870, it was said: "The case, therefore, comes simply to this, that on the former appeal the court directed a line to be established which gives appellee one and one-eleventh acres of land that clearly appellant had the better title to. If this be true, appellant can have no relief, for the reason that the opinion rendered on the former appeal is the law of the case, and is binding on this court no less than on the court below."

But passing the question of *res adjudicata*, all the stockholders of the corporation were before the court, either as plaintiffs or defendants. The judgment of sale recites that it was made by the agreement of all the stockholders, both in their individual and corporate capacity; and while there is a technical difference between the corporate entity and the aggregate of its stockholders, we understand the language of the judgment to mean that the corporation entered its appearance, and was bound by the order of sale. No other meaning can be given the language "in their corporate capacity."

For these reasons the judgment is affirmed.

RHODES v. NEGLEY.

(Filed February 14, 1905—Not to be reported.)

Limitation of actions—Appellee having paid appellant's taxes in December, 1897, this action to recover the amount of the money paid for her was not barred on April 2, 1902, when it was instituted.

Thos. E. & E. C. Ward for appellant.

Powell & Powell for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1897 the appellant, Rosalie Rhodes, was the owner of real estate in the county of Henderson subject to taxation, and the tax assessed thereon for State and county purposes amounted to the sum of \$280.55. She did not pay any part thereof. The appellee, Negley, who was the then sheriff, paid the same for her to the State and county. He made this payment in December, 1897. Some time after the payment by him he attached some money in the bank belonging to the appellant, and in this way collected \$67, which he applied as a credit on his claim against her. Soon after he paid this money for appellant she, with her husband, Moses Rhodes, moved from the State of Kentucky, and have remained nonresidents ever since. On April 2, 1902, appellee brought this action against appellant and obtained an attachment upon the ground of her nonresidency, and that she was about to sell and dispose of her real estate. This attachment was levied upon some lots in the city of Henderson. In the petition appellee alleged that he paid this money for appellant at her instance and

request. Some time after the action was instituted appellant, by her attorney, entered her appearance and filed her answer, denying that appellee paid this tax at her instance or request, or that he paid it for her accommodation, and also pleaded the statute of limitations in bar of his right of recovery.

The proof conduced to show that appellee did pay the amount of money named for appellant at the instance and request of her agent, Moses Rhodes, and that he paid it in the month of December, 1897. The court gave appellee judgment for the amount he sued for and sustained the attachment. From this judgment appellant has appealed, and contends that the lower court erred in failing to sustain her plea of the statute of limitations, claiming that her liability for these taxes was created by statute, and was barred after the lapse of five years after the taxes became due; that the taxes for the year 1897 became due the 1st of March of that year, and as the action was not brought until April, 1902, the right to recover thereon was barred. This is not an action for the recovery of taxes. Her taxes were paid in December, 1897, at her instance and request. The appellee paid them, and he instituted this action on account for the money advanced by him for her, and his right of action thereon would have been barred until December, 1903. Having brought his action within that period, he was entitled to recover.

Wherefore, the judgment of the lower court is affirmed.

SPEER v. DUFF, JR., &c.

(Filed February 14, 1905—Not to be reported.)

Former appeal—Additional evidence—The additional evidence taken after the rendition of the former opinion in this case, together with the evidence in the former record, is sufficient to show that the land in controversy is covered and included in the Pickett and Marshall patent, establishing the contention of appellees. (Former opinion 23 Ky. Law Rep., 1323.)

E. E. Hogg for appellant.

J. J. C. Bach for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case, the opinion on the first appeal being in 23 Ky. Law Rep., 1323, and is referred to for the history of this litigation.

This court, in that opinion, said: "So far as the deed from Strong to Duff is concerned, it is sufficient to say that it nowhere appears from competent evidence that Strong had any title to the land he was attempting to convey. (This remark has reference to the conveyance to appellee's ancestor.) * * * Plaintiff claims under patents issued in 1873. The patent to Pickett and the Marshalls was issued long before 1873, and it is contended for appellees that the land in controversy is covered by the Pickett patent. But that contention is denied by the reply, and we do not think that there is competent evidence sufficient to sustain the averments of the answer in respect to this question."

This court in the former opinion, in response to petition for rehearing, after reversing the judgment, authorized the parties upon the return of the case to the lower court to amend their pleadings, and to take and retake proof if they so desired. Appellees took the depositions of three additional witnesses, by whom they proved that they were acquainted with the lines and corners of the Pickett and Marshall patent; that it covered and included all of the lands on the waters of Combs' branch, the land in controversy. Two of them, very old men, stated that they were shown the beginning corner of the Pickett and Marshall patent, two sugar trees and a hackberry, prior to the year 1850, and long before the patents under which appellant claims were issued. We are of the opinion that this additional evidence, together with the evidence in the former record, is sufficient to show that the land in controversy is covered and included by the Pickett and Marshall patent.

E. C. Strong, the vendor of appellee's ancestor, gave his deposition since the former reversal, and produced the patent from the Commonwealth of Virginia to Pickett and Marshall, and established the chain of title from them to himself, and professed to file the several conveyances showing this chain of title. These conveyances are not copied into this record, and there is no reason given why appellant failed to have them copied. The presumption is that they were filed as stated in the deposition.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. MOORE.

(Filed February 14, 1905—Not to be reported.)

Railroads—Damages—Killing of stock—Where an examination of the railroad track the morning after stock were killed by the train showed that they ran on the track for 300 yards, it can not be presumed in the absence of proof that the horses left the track and then returned to it, and in view of the fact that the horses were not seen until they were struck and that the train ran out of the fog before it reached the point where the horses began running on the track, there was sufficient evidence to go to the jury, as the law presumes the killing was due to the negligence of the railroad company. The fact that the engineer did not see the horses until after he had struck them, the jury was authorized to conclude that he was guilty of a want of care in not keeping a look out.

Benjamin D. Warfield and Fairleigh, Straus & Fairleigh for appellant.

Chas. Carroll for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Chief Justice Hobson.

On November 8, 1903, appellant's fast southbound train, which left Louisville about 10 p. m., struck and killed two horses belonging to appellee south of Hubers Station. It was a rainy, dark night. The train ran through several fog banks, emerging from one at Hubers Station. The engineer in charge of the train testified that he did not see the horses until they were thrown up into the air by the locomotive. The collision with the

horses broke the air tubes and set the brakes on the train, stopping it short distance south of where the collision occurred. While the engineer was repairing the damage he got wet from the rain. Although it was not raining when the collision occurred, this illustrates the character of the night. The fireman did not see the horses until after they were struck, as he was engaged in his work of putting coal into the engine. The train was running something like fifty miles an hour, and the testimony of the engineer showed that the collision was unavoidable. The fireman testified, and so did the engineer, that the collision took place about two hundred yards from Hubers Station. The fireman stated that the headlight would not light the track in a fog further than one hundred and twenty-five yards, while the engineer said that the headlight would permit him to see from one hundred and fifty to two hundred yards where there was no fog. The engineer also said that train could be stopped in from 2,800 to 3,000 feet.

The plaintiff proved by a witness who went on the ground the next morning that there was a cattle guard about forty yards north of where the horses were struck, and that he saw signs of the horses feet on the north side of this cattle guard where they had jumped the cattle guard, digging up the ballast with their hoofs. He followed these signs from that point to where they were knocked off, showing that they were running on the track. November 3, 1903, was Tuesday. On the following Sunday the plaintiff and his brother went upon the ground and followed the tracks from the cattle guard to the point where the horses were killed, the signs showing plainly on the rock ballast and the ties. The ties were indented by the shoes of the horses, pieces of the ties were knocked off and the ballast was dug out. They then followed the same signs north from the cattle guard a distance of 300 yards to the county road crossing. Beyond this point northward there were no signs, and there were no signs south of the point where the horses were struck. The witnesses testified that they could tell from the marks that the horses were running from the county road to the point where they were struck, a distance of 340 yards; and from the height of the embankment, as well as the tracks along the road, in the absence of some proof to this effect, it can not be presumed that the horses left the track and then returned to it.

In view of the fact that the horses were not seen until they were struck, and that the train ran out of the fog at Hubers Station, there was sufficient evidence to go to the jury, as the law presumes that the killing of stock is due to the negligence of the railroad company. From the fact that the engineer did not see the horses at all until after he had struck them the jury were warranted in concluding that he was guilty at least of want of care in keeping a lookout, as it would seem that the headlight permitted him to see at least 125 yards in front of the engine. The fireman testified that the headlight would throw a light about 350 or 400 yards under favorable circumstances. No effort was made to check the speed of the train, no whistle was blown or stock signal given. The train stopped about 200 or 300 yards south of where the stock was struck.

In cases of this character the plaintiff can rarely ever show when the stock were in fact seen; he must, in the main, rely upon circumstances to show negligence, and when he shows facts establishing some negligence on the

part of the railroad employes the statutory presumption of negligence is not overthrown, and it is a question for the jury whether the killing of the stock was due to the want of care.

Judgment affirmed.

SPETH v. BRANGMAN.

(Filed February 15, 1905—Not to be reported.)

1. Liens—Grazing stock for compensation—Construction of statutes—Sections 2500 and 2501, Kentucky Statutes, providing for the grazing of stock for compensation, provides that the lien shall not continue for a longer period than ten days after the removal of the stock from the premises with consent, and that in case of such removal the lien shall not be valid against a purchaser without notice. The statute thus recognizes the right of the keeper to retain possession of the property. Where a defendant did not detain stock without right, and they were taken from him under an order of delivery, they were properly ordered returned to him, to be held until his bill for grazing them was paid.

2. Same—Verdict—Where a verdict is not copied in the record this court can not determine whether it was in proper form or not.

Lane & Harrison for appellant.

Wolfolk & Klein for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Chief Justice Hobson.

P. G. Speth brought this suit, alleging that he was the owner and entitled to the possession of certain horses named in the petition which were wrongfully detained from him by appellee. Appellee filed an answer, in which he set up the fact that the plaintiff owed him \$107.20 for feeding and grazing the animals mentioned in the petition and four others, all of which were delivered to him by the plaintiff to be fed and grazed; that he had let the plaintiff have four of the animals upon the agreement that he would pay the bill, which he had failed to do, and Speth had then taken the other animals from him under the order of delivery in the action. He prayed judgment against the plaintiff for the amount of his bill; also that he be adjudged a lien upon the animals, and that they be returned to him. The plaintiff, by reply, denied the defendant's bill of \$107.20, and pleaded that he had failed to feed the stock properly and had neglected them, suffering them to become extremely poor. The defendant, by rejoinder, controverted the allegations of the reply; the case was submitted to a jury without objection to the pleadings or the issues made so far as appears. They found in favor of the defendant on the issues, and thereupon the court entered a judgment against plaintiff for the \$107.20, and adjudged a return to him of the horses which had been taken from him under the order of delivery. From this judgment the plaintiff appeals. The case is here on the pleadings and the judgment without a bill of exceptions or the verdict of the jury, except so far as it is referred to in the judgment.

The case turns on the proper construction of sections 2500-2502, Kentucky Statutes, which are as follows:

"Section 2500. All owners and keepers of livery stables, and persons feeding or grazing cattle for compensation, shall have a lien upon the cattle placed in such stable or put out to be fed or grazed by the owner or owners thereof for their reasonable charges for keeping, caring for, feeding and grazing the same; and this lien shall attach whether the cattle are merely temporarily lodged, fed, grazed and cared for, or are placed at such stables or other place or pasture for regular board; but it shall be subject to the limitations and restrictions as provided in case of a landlord's lien for rent.

"Section 2501. When such lien exists in favor of any person he may, before a justice of the peace, or a judge of the quarterly court of the county where the cattle were fed or grazed, by himself or agent, make affidavit to the amount due him and in arrear for keeping and caring for such cattle, and describing as near as may be the cattle so kept by him; and thereupon such officer shall issue a warrant, directed to the sheriff or any constable or town marshal of said county, authorizing him to levy upon and seize the said cattle for the amount due, with interests and costs; but if said cattle have been removed from the custody of the livery stable keeper, or person feeding or grazing them, with his consent, the lien herein provided for shall not continue longer than ten days from and after such removal; nor shall such lien, in any case of such removal, be valid against any bona fide purchaser without notice at any time within ten days after such removal. A warrant, as herein provided, may be issued to another county than that in which the cattle were fed or grazed; the lien may also be enforced by action as in cases of other liens.

"Section 2502. The proceedings under a warrant shall, in all respects, be the same as in cases of distress warrant, and none of the cattle so fed or grazed shall be exempt from seizure or sale."

The statute gives the person keeping the stock a lien thereon, but it provides that the lien shall not continue longer than ten days after their removal from his premises with his consent, and that in case of such removal the lien shall not be valid against a bona fide purchaser without notice within ten days after such removal. The lien may be enforced by a distress warrant or by action as in cases of other liens. The statute thus recognizes very clearly the right of the keeper to retain possession of the property. If the stock is removed from his possession without his consent, and he acquiesces in its removal, his consent to the removal will be implied and he will lose his lien after ten days, or as against a bona fide purchaser without notice within that time. The defendant, therefore, did not detain the stock without right, as alleged in the petition, and they having been taken from him under the order of delivery the court properly ordered them to be returned to him and to be held by him until his bill was paid, as he had a lien by the statute upon the stock for the payment of his bill.

The verdict is not copied in the transcript, and, therefore, we can not determine whether it was in proper form or not. Appellant has only brought up the pleadings and the judgment. The judgment entered by the court was warranted by the pleadings. While it is true that the judgment might have been in the alternative for the return of the horses, or their value,

under the statute, this was not prejudicial to the plaintiff. The defendant was entitled to the possession of the property, and if the property was not forthcoming, then the court might have ordered so much of its value paid to him as would satisfy his bill; but when the property was forthcoming the plaintiff can not complain that the court ordered the property returned to the defendant which he had improperly taken from him under the order of delivery.

Judgment affirmed.

COMMONWEALTH, FOR USE, &c. v. RATCLIFF.

(Filed February 15, 1905.)

Sheriff—Taxes—Collecting excess—Judgment—Ca-Sa—A judgment against a sheriff for the collection of taxes in excess of the constitutional limit, is not such a judgment as will authorize an order awarding a *capias ad satisfaciendum* for its collection or enforcement.

Winfield Buckler for appellants.

Morgan & Hughes and Holmes & Ross for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Nunn.

At the May, 1902, term of the Nicholas Circuit Court the citizens and taxpayers of that county, who sued in the name of the Commonwealth, recovered a judgment against the appellee, the then sheriff of that county, for about \$3,000, with interest and costs. This recovery was on account of the sheriff having collected taxes for county purposes to that extent above the constitutional limit, that it is to say, that much more than the Constitution permitted to be collected for any one year. The fiscal court of that county made the assessment and directed the sheriff to collect, but to the extent of the amount of recovery stated the assessment was void. It would seem that that judgment had never been paid by the appellee.

This proceeding is upon a notice by appellant, and a motion made by it in court, at the February, 1904, term, asking the court to append to the judgment of 1902 an order awarding a *capias ad satisfaciendum* under section 1661, Kentucky Statutes. The court refused the motion of appellant and dismissed this proceeding, and the appellant has appealed. The appellant is proceeding upon the idea that the failure to append this to the judgment at the time it was rendered was a clerical misprision. This is a mistake. Even conceding that this writ should have been awarded or noted at the foot of the judgment of 1902, the failure to do so was an error of law and not clerical in its character, and appellant's remedy was by an appeal from this judgment. The failure of a court to render a judgment in conformity with the law is not a clerical misprision. (8 Bush, 164.)

By the section of the statutes referred to it is provided that a *capias ad satisfaciendum* may issue, except against females, upon all judgments for a trespass *vi et armis*, for seduction, or for slander, written or verbal, or for malicious prosecution. The appellant contends that the action of the sheriff

in the collection of the taxes referred to was a trespass vi et armis. We are of the opinion that this is error. Such a trespass is an unlawful act committed with force and violence on the person, property or the relative rights of another—injuries accompanied by force. The action of the sheriff in collecting these taxes was not a trespass by force and violence in the meaning and sense as used in the statute. To commit a trespass vi et armis the trespass must have been committed with at least a knowledge that a wrong was being done, and it must be accompanied with some force and violence. These elements of wrong do not appear in this record.

Wherefore, the judgment of the lower court is affirmed.

HAMILTON'S EX'OR v. HAMILTON, &c.

• (Filed February 15, 1905—Not to be reported.)

1. Note—Assignment—Pledge—Surety—Failure of pledgee to collect—Insolvency of payor—Liability—Where one assigns and delivers a note to his surety to be applied to the payment of a note owing by the pledgor on which the pledgee is surety, the pledgee is thereby charged with the duty of collecting the note in a reasonable time and applying the proceeds as directed. and if at the time of the delivery of the note the payors were solvent and thereafter became insolvent, the pledgee is liable to the pledgor for the amount of the note.

2. Estoppel—Res judicata—Pleas of res judicata and estoppel considered by the court under the facts in the record, and held to have been properly overruled by the court.

Breckinridge & Shelby for appellant.

J. R. Morton for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle.

A. L. Hamilton died in Fayette county, and his father, George Hamilton, later in Bath county. Each left a will which was duly admitted to probate in the county court of the county of his residence. John M. Elliott was named in each will as executor, and duly qualified as the executor of each.

The Hamiltons, father and son, were men of considerable wealth and enterprise, and in conducting large business transactions they became frequent borrowers of money. Some time after the death of A. L. Hamilton the executor brought suit in the Fayette Circuit Court for the settlement of his estate. The widow and children of the testator were made defendants, the former in her own right and as statutory guardian for the children, all of whom were infants. Amongst the claims presented against the estate was one in favor of the estate of George Hamilton. Upon the ground that John M. Elliott was the executor of both estates, the widow of A. L. Hamilton was, by an order of the court, permitted to make defense for her husband's estate as against this claim.

It appears from the record that the indebtedness of A. L. Hamilton to George Hamilton grew out of the following transactions. The former was owing Crisman, Sawyer & Co., of Missouri, between \$6,000 and \$8,000, upon which George Hamilton was his surety. In order to raise the money with

which to pay this debt, or to repay his father what he had paid as his surety to Crisman, Sawyer & Co., A. L. Hamilton, as principal, and George Hamilton, as his surety, borrowed \$6,000 of the Farmers National Bank of Mt. Sterling. Upon the maturity of this note it was renewed, at which time it amounted to \$6,256. Afterwards the Hamiltons, A. L. and George, were sued by the bank upon notes aggregating \$33,000, upon which judgments went against them. Later these judgments were paid by George Hamilton except \$10,000, which he at the time replevied, and also finally paid. The \$6,250 was one of the notes upon which the bank brought suit. It does not appear from the record how much, if any, of the \$33,000, beside the note of \$6,250, A. L. Hamilton was liable for as principal or surety, but at any rate it was all paid by George Hamilton, including the \$6,250 debt, and this sum of \$6,250, with its accrued interest, constitutes the claim asserted in behalf of the estate of George Hamilton against that of A. L. Hamilton. There are, however, certain admitted credits shown by the record which reduce the claim to the alleged balance of \$6,678 60 sued for.

In the answer filed by appellee to the petition as amended it was averred that the estate of A. L. Hamilton, in addition to the credits allowed by the executor, should receive a further credit of \$3,100 as of June 14, 1885, the amount of a note executed to A. L. Hamilton by Palmer & Bowman in September, 1884, and which it was charged A. L. Hamilton assigned June 14, 1885, to George Hamilton, in payment pro tanto of the note of \$6,000 held by the Farmers National Bank of Mt. Sterling against A. L. Hamilton and George Hamilton for money borrowed to pay on the debt of A. L. Hamilton to Crisman, Sawyer & Co., or to repay to George Hamilton what he had paid them for A. L. Hamilton; that the note of \$3,100 was accepted by George Hamilton with that understanding and agreement, and Palmer & Bowman were then, and for some time thereafter, solvent and good for the note, and that notwithstanding the agreement under which George Hamilton was assigned and accepted the note, he failed to give A. L. Hamilton credit therefor.

The reply, in substance, pleaded a want of knowledge or information on the part of the executor of George Hamilton sufficient to form a belief as to the alleged assignment of the \$3,100 note to George Hamilton by A. L. Hamilton; denied that the estate of the latter was entitled to credit therefor upon the claim asserted by the executor of the former, and averred that George Hamilton used due diligence in attempting to collect the note of Palmer & Bowman, and in fact pursued them to insolvency without being able to make the debt. Appellees by rejoinder controverted the averments of the reply as to the alleged diligence of George Hamilton in attempting to collect the Palmer & Bowman note. The cause was referred to the master commissioner to take proof and report as to the claims filed against A. L. Hamilton's estate, and after receiving and considering the proof offered by both parties, he made his report, from which it appears that he came to the conclusion that the estate of A. L. Hamilton was entitled to credit upon the claim asserted by the executor of George Hamilton for the note of \$3,100 on Palmer & Bowman, assigned George Hamilton by A. L. Hamilton, as of June 14, 1885, the date of the assignment, and that after allowing credit

therefor and approving the additional credits admitted by the executor of George Hamilton, there was left due his estate from that of A. L. Hamilton's the sum of \$315.95.

Exceptions were filed to the report by appellant as executor of George Hamilton, but they were overruled by the chancellor, and judgment entered in accordance with the report. It is insisted for appellant that the chancellor and his commissioner erred in allowing appellee's credit by the amount of the Palmer & Bowman note. This contention should not be sustained unless the conclusions of the commissioner and judgment of the chancellor are against the weight of the evidence, or contrary to law. It

seems to be admitted that A. L. Hamilton and J. C. Hamilton were in 1884 the joint owners of a herd of shorthorn cattle, and that in September of that year they sold a "Duchess" cow to Palmer & Bowman for \$6,200, for which the latter executed to A. L. Hamilton a note of \$3,100, and to J. C. Hamilton a note for a like sum, and it is also admitted that the \$3,100 note received by A. L. Hamilton of Palmer & Bowman was by him assigned and delivered to George Hamilton about the time he became the surety of A. L. Hamilton upon the \$6,000 note executed to the Farmers National Bank. The proof shows beyond question that the \$3,100 note remained in the possession of George Hamilton from the time of its delivery to him until the death of A. L. Hamilton, and in fact down to the time of his own death, which occurred five years after that of A. L. Hamilton, and it is not claimed or intimated by any witness who testified in the case that he or A. L. Hamilton were ever heard to say that the latter had or owned any interest in the note after its assignment and delivery to George Hamilton. It is furthermore admitted by appellant, because averred in the reply filed by him, that suit was brought upon the note against Palmer & Bowman by George Hamilton, and that he prosecuted the action with due diligence, in his own name. Manifestly he either became the owner of the note by its assignment and delivery to him, or he held it as collateral and in pledge to indemnify himself, to the extent that it was supposed to furnish such indemnity, against loss by reason for his suretyship for A. L. Hamilton upon the bank note. There is much proof aside from the circumstances to which reference has been made conducing to prove that he became the owner of the note by the assignment and delivery thereof.

The witness, Tenny, testified that he was present when the Palmer & Bowman note was assigned by A. L. Hamilton to George Hamilton, and that the son said to his father that he could take it in satisfaction of that much of what he might have to pay, or had paid to Crisman, Sawyer & Co.

Everett Van Meter testified to a conversation he had with George Hamilton in Chicago in 1891, when associated with him and appellant Elliott in a cattle transaction, in which conversation George Hamilton told him the history of the Palmer & Bowman note, and that it had been assigned him by A. L. Hamilton, and he had accepted it in part payment of the money the latter owed him.

The only testimony found in the record that tends to contradict the proof of ownership is the following entry appearing in the ledger of A. L. Hamilton:

"I this day give to A. L. Hamilton, as shown by his books due me, \$5,000

as an advancement to him. The above account runs back for a number of years. The Farmers National Bank of Mt. Sterling judgment against George Hamilton, and I believe also against A. L. H. for \$6,000, and not yet paid, and the note of Bowman & Palmer for about \$8,100, date September, 1884, are neither embraced in the above account. A. L. H. owes the Farmers National Bank judgment, and the Bowman & Palmer note is his. This 19th day of January, 1889.

“GEORGE HAMILTON.”

It is contended by counsel for appellant that the foregoing entry, made only nine months before the death of A. L. Hamilton, shows that it was understood between George and A. L. Hamilton that the title to the Palmer & Bowman note, notwithstanding its assignment and delivery to George Hamilton, remained in A. L. Hamilton. It is shown by the evidence that the entry or statement in question, including the signature of George Hamilton, is in the handwriting of Mrs. Ellen Hamilton, wife of George and mother of A. L. Hamilton. As no witness has testified that it was made with the knowledge of A. L. Hamilton, or George Hamilton, or by authority of the latter, its admissibility as evidence may well be questioned, but conceding for present purposes that it should be entitled to some weight as it appears in A. L. Hamilton's ledger, and was written by his mother, presumably by direction of her husband, it only proves that the Palmer & Bowman note was assigned to and received by George Hamilton to be collected and applied in payment pro tanto of the bank debt, or as collateral security and to furnish him indemnity against loss to the extent of its face value as surety of A. L. Hamilton on the bank debt. This is further shown by his treating the Palmer & Bowman note as his own, and by his bringing suit upon it in his own name. In fact after the date of the entry in question, and at the time of his death, he was prosecuting in his own name in Virginia an action against Palmer & Bowman upon the judgment he obtained in this State against them for the amount of the note. It is likewise true that he was entitled to the proceeds of the Palmer & Bowman note, for it is admitted that he paid the whole of the bank debt.

Assuming, therefore, that George Hamilton held the Palmer & Bowman note as collateral security, or in pledge for the purpose stated, it was his duty as pledgee to take care of it, to realize its value and to apply it to the bank debt. As pledgee and legal title holder of the note by virtue of its assignment and delivery to him, he was the only person having authority to collect the note or sue upon it, and in the absence of an agreement to the contrary, which has not been shown, it is to be inferred that he, as holder of the note, was charged with the duty and in law required to take the usual and ordinary steps to realize on it, that is to sue, if not paid at the proper time.

In Colebrook on Collateral Securities, section 117, it is said, in discussing the duties of the pledgee: “He must collect and apply the securities, at their maturity, to the payment of the debt, in the case of promissory notes and bills of exchange, though sale may be made when the collateral securities are long time negotiable bonds.”

In Shindler v. Hayden's Adm'r, 8 Ky. Law Rep., 859, it is said: “It is now well settled law in this State that the assignee of a note or bond taken

as collateral to secure another debt must exercise ordinary diligence in collecting the collateral, and if he fails to do so, he will be responsible to his assignor for the damage sustained by reason of his default." (Nolan v. Clark, 10 B. Mon., 241; Banta v. Curry, 3 Bush, 678; Hays & Watkins v. Wheatley & Co., 7 Ky. Law Rep., 663.)

It satisfactorily appears from the evidence that George Hamilton did not use ordinary diligence in trying to collect the Palmer & Bowman note. Upon the contrary, notwithstanding their entire solvency when he received the note and for some time after its maturity, he held it until December 12, 1888, more than three years after its maturity, before instituting suit upon it in the Montgomery Court of Common Pleas, yet in that time J. C. Hamilton, by suit, collected of the same obligors the note of like amount they gave him. The only explanation found in the record of the long delay upon the part of George Hamilton in bringing suit on the note is furnished by the deposition of his son, W. W. Hamilton, who testified therein that in several conversations with his father after the assignment to him of the Palmer & Bowman note he said he considered the note perfectly good; that Palmer was a nice man, and he thought worth half a million dollars. This confidence in Palmer, and his supposed great wealth, doubtless had the effect to produce in the mind of George Hamilton such a feeling of security as to the ability of Palmer & Bowman to pay the debt that it unfortunately caused him to delay to an unwarranted degree its collection, but the widow and children of A. L. Hamilton should not be made the victims of his misplaced confidence.

It is reasonably certain from the evidence, therefore, that George Hamilton, by the exercise of ordinary care, could have collected the note, and that he did not do so was due to his laches. So whether he be regarded as the owner or pledgee of the Palmer & Bowman note under the assignment from A. L. Hamilton, his estate was liable for the amount thereof, therefore, the credit for that sum allowed the estate of A. L. Hamilton by the report of the commissioner and judgment of the chancellor was proper unless the pleas of estoppel and res judicata interposed by the amended petition were a bar. It was averred in the amended petition, in substance, that by a former judgment of the Fayette Circuit Court, rendered in the case of Emma Hamilton, &c. v. John M. Elliott, Trustee under the will of A. L. Hamilton, the contest over the claim asserted in this action by appellant as executor of George Hamilton against the estate of A. L. Hamilton was settled by agreement and adjudicated in favor of the validity of the claim, and that appellee, Emma V. Hamilton, was a party to the agreement in her own right as widow of A. L. Hamilton and also as statutory guardian of her infant children.

The facts constituting the alleged estoppel contained in the amended petition were specifically denied by the answer of the appellee, Emma V. Hamilton, widow and statutory guardian. The only competent proof offered in support of the pleas of estoppel and res judicata is furnished by the record of the former action. The action was brought by Emma V. Hamilton in her own right and as statutory guardian of her children to procure the removal of John M. Elliott as trustee under the will of her husband, and to surcharge certain settlements made by him in the Fayette County

Court. George Hamilton and his wife, Ellen Hamilton, were made parties to the action. Thereafter George Hamilton filed answer, denying the statements of the petition, to the effect that his claim against the estate of A. L. Hamilton was unjust or unfounded. George Hamilton died March 4, 1895, but no order of revivor was ever taken against his executor, J. M. Elliott, nor was the executor ever made a party to the action. The written agreement between the parties referred to was made October 16, 1895. The only parties to the agreement were Emma Hamilton, in her own right and as guardian of her children, and John M. Elliott, individually and as trustee under the will of A. L. Hamilton. In effect the agreement provided, first, that John M. Elliott should resign as trustee of A. L. Hamilton's estate; that the Security Trust and Safety Vault Co., of Lexington, should be appointed trustee in his stead, and that he should be allowed \$100 compensation for the year 1895; second, that the contest over the claims of George Hamilton and J. M. Elliott should be abandoned, and the exceptions thereto withdrawn, and that no action should be taken by J. M. Elliott, as executor of A. L. Hamilton, to enforce the claim of George Hamilton's estate against that of A. L. Hamilton until the result of a claim in favor of the estate of A. L. Hamilton against certain parties in Virginia should be ascertained. This agreement was signed by Emma V. Hamilton, in her own right and as guardian of her children, and by J. M. Elliott, individually and as trustee.

The agreement, together with the resignation of John M. Elliott as trustee, was filed in the case of Emma V. Hamilton v. J. M. Elliott, Trustee, in the Fayette Circuit Court, and at the same time an order was entered accepting the resignation of Elliott as trustee, and appointing the trust company as trustee under the will of A. L. Hamilton. The order further directed a reference of the case to the commissioner to make final settlement with Elliott of his accounts as trustee under the will of A. L. Hamilton. It does not appear that the provisions of the agreement as to the claim of George Hamilton's estate against the estate of A. L. Hamilton was made a part of, or referred to, in the judgment of the court. There was in fact no express recognition of its validity in the written agreement, and one of the grounds assigned in the petition in the suit against J. M. Elliott, trustee, for his removal as such was that he had improperly allowed the claim of George Hamilton. As the judgment is silent as to the claim of George Hamilton, and yet shows the removal of Elliott as trustee and the appointment of his successor, the inference to be drawn from these facts would be that the judgment sustained the contention of the plaintiff in that action that Elliott as trustee had improperly allowed the claim of George Hamilton. The judgment, therefore, does not support the plea of *res judicata*.

Is the estoppel pleaded by appellant sustained by the written agreement? An examination of the agreement and of the record in the former action will show that the question as to the ownership of the Palmer & Bowman note was not in issue in that case, the reason of which is patent. The action instituted by George Hamilton in Virginia against Palmer & Bowman upon the judgment obtained upon the note in Kentucky was pending at the time the agreement was made, and it was doubtless then believed by the parties that the claim could probably be collected, in which event the

money would have been appropriated by the executor of the estate of George Hamilton in part satisfaction of his claim against the estate of A. L. Hamilton, which arose out of what he had paid as surety for A. L. Hamilton, and if such had been the result this controversy would not have arisen. The real object of the agreement, we are satisfied, was to hold in abeyance the claim asserted for the estate of George Hamilton until it could be ascertained whether the Palmer & Bowman note could be collected; if so, and A. L. Hamilton's estate received credit for it, it would have been immaterial whether the Palmer & Bowman note became the property of George Hamilton by the assignment, or he took it as collateral security to indemnify him against loss as surety for A. L. Hamilton. But when it was ascertained that the Palmer & Bowman debt was lost, the question as to how it was held by George Hamilton arose for the first time, the contention of appellees being that whether he took it as owner or pledgee, the estate of A. L. Hamilton should not be the loser. J. M. Elliott was not a party to the agreement as executor of the will of George Hamilton. If the agreement had provided that the estate of A. L. Hamilton should have credit upon the claim of George Hamilton's estate by the amount of the Palmer & Bowman note, would the estate of the latter, or his executor, been bound thereby? Undoubtedly not. If the agreement was not binding upon appellant as executor of the will of George Hamilton with respect to a matter in which the widow and children of A. L. Hamilton were interested, how could it operate as an estoppel against them or the estate of A. L. Hamilton?

We are of opinion that the pleas of estoppel and res judicata were properly overruled by the chancellor, and as his conclusions in all respects seem to be supported by the weight of the evidence, the judgment is affirmed.

Judge O'Rear not sitting.

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COURT OF APPEALS OF KENTUCKY.

ILLINOIS CENTRAL R. R. CO. v. KEEBLER.

(Filed February 15, 1905—Not to be reported.)

1. Master and servant—Unsafe place to work—Damages—Verdict—Where a servant of a railroad company was put to work in a building where the floor had been removed, leaving nothing but the "sleepers" on which to stand and do the work, and in doing which he was compelled to turn a heavy boiler plate without assistance, and in doing so he slipped off the sleeper and was ruptured, a verdict for \$1,250 damages will not be disturbed.

2. Obvious danger—Knowledge of servant—Question for jury—The question whether the danger in doing the work was so obvious to the servant that none but a reckless person would have undertaken it, having been submitted to the jury under proper instructions, their finding in favor of the plaintiff is conclusive.

3. Release of claim—Consideration—Fraud in procuring—Where a servant of a railroad company was injured in being required to work in a dangerous place, and after his recovery was induced to sign a release of his claim for damages in consideration of \$1 and a promise of continued employment by the company, and was discharged the next day, the fact as to whether the release was obtained by fraud and without consideration was a question for the jury under proper instructions of the court.

Wheeler, Hughes & Berry, J. M. Dickinson and Pirtle & Trabue for appellant.

Hendrick & Miller for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the McCracken Circuit Court for \$1,250. The substance of the facts as they appear in the record are as follows: Appellee was engaged as a machinists' helper in the shops of the appellant at.

Paducah, Ky. In the month of March, 1908, the foreman in charge of the shops directed him to leave the place where he was working as a helper and go to a machine in another part of the shop, known as a drilling machine, used in boring holes in boiler plates. When appellee went to this machine he found that the floor in front of and partly around it had been removed, leaving nothing but the sleepers exposed, which were about twelve inches in width by four inches across, and about two feet apart, upon which he was required to stand to perform his work. He went to the foreman and explained the situation, and was directed by him to go to work and work up some light material; that he would send him assistance in drilling a couple of boiler plates, each weighing about 400 pounds. Appellant performed this light work and two assistants were sent him, who remained until he had completed one and had the other on the machine and a "wooden horse," when these assistants were sent to another portion of the shop by the former. Appellee, without assistance, drilled the holes along one side of this boiler plate. It then became necessary to turn the plate around to drill holes in the other side, and he went to the foreman and told him that he needed assistance for this purpose. The foreman told him to go ahead and perform the labor; that he was in a hurry to have that work completed, and that the assistants were busy in another part of the shop at that time.

Appellee testified that he then believed he was able to turn this plate, by exercising care, and he undertook to do so under the direction of the foreman, and while attempting it, with one end of the plate upon his shoulder, one of his feet slipped off of a sleeper, he fell astride the wooden horse, the boiler plate slipped down upon and severely injured him by producing permanent hernia. He was sent to appellant's hospital and remained there until the 20th of April, when, believing he was able to resume his labor, he returned to the shops. Before being permitted to work he was sent to one of the officials in charge of the shops and required to sign a writing, the terms of which released the appellant of all liability for this injury, and as well as all others he may have received while in its employment. The recited consideration was one dollar, and the further consideration, proven without contradiction, that he was to have continuous employment in the service of appellant. It was also proven, without contradiction, that appellant required its employes to sign such a release after receiving injuries before they were allowed to resume work for it. This release was signed on the 20th of April, but it bears date the 4th of April. On the next morning after appellee signed this writing he was discharged by the foreman of the shops for the alleged reason that it had been reported to him that appellee had been bringing beer upon the premises and drinking it there. This appellee denied at the time. He testified, and was not contradicted, that he had never drunk any beer or other liquors in the shops or on the premises, and had never brought any there except upon one occasion, which was some time before the signing of this release, and then he was given some money by the machinist in the shop under whom he was working, who told him to go and bring a bottle of beer, which he did; that he did not drink any of it himself.

Appellant asks a reversal of this judgment because, as it claims, appellee's testimony showed that his injuries were the result of his own negligence;

that the danger to appellee, incident to the performance of the labor at that place, was obvious, and in undertaking the performance of it he assumed the risk; also that this written release signed by the appellee was a bar to his right of recovery. It is well settled that if by reason of defects in the machinery, appliances or place the employer is aware of the danger incident to the work to be performed under the circumstances, and notwithstanding this he directs the employe to perform the labor, the employer takes the risk, although the employe knew of the danger, unless the danger is so obvious and the probable injury so imminent that a reasonably prudent person would not have undertaken it under the circumstances. (Lasch v. Stratton, 101 Ky., 672; Wake & Co. v. Price, 23 Ky. Law Rep., 696; I. C. R. R. Co. v. Langan, 25 Ky. Law Rep., 500.)

The question as to whether or not the danger in performing this work was so obvious and the probable injury so imminent that none but a reckless person would have undertaken it under the circumstances was submitted to the jury under proper instructions, and the jury found in favor of appellee. The jury, under instructions not prejudicial to appellant, found that the release referred to was obtained by fraud and without any consideration, and we are of the opinion that the evidence sustains their verdict, as the reason for his discharge, if there was any, existed prior to the time his signature was obtained, and it is evident appellant intended to discharge him at the time he signed this release. Under the circumstances of this case the one dollar paid him in consideration of a substantial injury was in fact no consideration. The real consideration which induced appellee to sign it was the expectation of continuous employment, and that failed.

Wherefore, the judgment of the lower court is affirmed, with damages.

SQUIRES, &c. v. O'MALLEY.

(Filed February 17, 1905—Not to be reported.)

1. Land—Written contract—Creating equitable trust—S., who was a widower without children, but had reared a foster daughter who married O., induced O. to give up his trade and move to S.'s farm under a written contract stipulating that O. was to cultivate and control the farm, pay the taxes, and have all the proceeds thereof, with the right to sell it, and have all the proceeds of the sale in excess of \$4,000, which S. reserved to himself. Held—That under the contract S. held the legal title to the land in trust for O. after paying himself \$4,000 out of it.

2. Sale of land—Reinvestment of proceeds—Parol agreement—After making some improvements O. sold the farm for \$5,500, with the consent of S., who made the deed, and invested the proceeds in a Kansas farm, which he afterwards sold and invested the proceeds in another Kentucky farm, in both of which farms the legal title was taken to S. Held—That this did not destroy or annul the original equitable trust between the parties, the oral agreement for the two last trades being nothing more than a recognition of the trust created by the original written contract. The trust followed the property, and may be enforced as long as the subject of the trust can be traced and identified.

3. Abandonment of farm—Devise by S.—Recognition of trust—The fact that O. before the death of S. procured a divorce from his wife, by her fault, and left the farm and went back to his former trade, was not an abandon-

ment of his equitable trust in the property, and the further fact that on the death of S. he by his will devised the divorced wife of O. \$4,000, and made no other devise except \$200 for tombstones, was a recognition of his obligation to O. under the original contract.

4. Sale of last farm by S. before his death—S. contracted to sell the last farm to C. for \$7,000, on which C. paid \$411 to S. In an action by O. to recover the proceeds of this sale in excess of \$4,000, Held—That he was entitled to recover the excess of the purchase money over \$4,000, less \$411 paid to S.

A. E. Cole & Son, Owens & Burroughs and Hazelrigg & Chenault for appellants.

W. D. Cochran and E. L. Worthington for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Settle.

W. H. Squires died in Nicholas county, Kentucky, in January, 1900, at about seventy years of age. He was a widower, and childless, but had reared, without adopting her, one Mary Lulie Sims, who went by the name of Mary Lulie Squires. She continued to live with her benefactor after the death of his wife and until her own marriage with the appellee, Patrick O'Malley.

W. H. Squires left a will by which, after providing for the payment of his debts and funeral expenses and the erection of a monument for himself and wife, to cost not exceeding \$200, he gave \$4,000 to Mary Lulie O'Malley. The will made no disposition of any other property of the testator, and it is contended by appellee that he had no other property. The marriage of appellee and Mary Lulie Squires occurred in October, 1887, at which time W. H. Squires owned a farm of 100 acres in Nicholas county, about two miles south of Carlisle, worth about \$4,000, on which he lived. The appellee at the time of his marriage lived in Carlisle, where he was conducting a profitable business as a blacksmith, and his wife, after the marriage, as a matter of course, took up her residence with him in Carlisle, which left W. H. Squires unprovided with a housekeeper, and alone on his farm. He soon began to importune the appellee, Patrick O'Malley, and his wife to live with him upon his farm, which the former at least seemed reluctant to do, but Squires assured him that if he would live with him on the farm and take charge of it he would give him all he could make on it; that the farm was worth \$4,000, and appellee could also have all over \$4,000 he could make out of it by improving, trading or selling it. Appellee finally accepted the offer of Squires, and upon the terms indicated abandoned his blacksmith shop and business, and removed his family to the farm and residence of Squires, but before doing so he and Squires entered into the following written agreement:

"Articles of agreement made and entered into this 22d day of February, 1888, between W. H. Squires of the first part, and Patrick O'Malley of the second part: That the party of the first part agrees to give the party of the second part full control of his farm, which contains about 100 acres, this farm located about two miles south of Carlisle, in Nicholas county, Kentucky, and valued at about \$4,000. The party of the first part further agrees that whatever improvements that the party of the second part puts on said land shall be his. The party of the first part further agrees that if the

party of the second part wants to trade or sell said land to a better advantage, he is at liberty to do so, the party of the first part reserving in any trade that may be made the amount of land or money above mentioned. In case either party becomes dissatisfied the party of the first part agrees to turn over all the property except \$4,000, or its equivalent, to the party of the second part. The party of the second part, or his estate, is responsible for taxes, or any other necessary debt made by him, and it is further agreed by both parties that neither of them is to go any one's security unless agreed to by both parties. The party of the first part reserves his horse, bridle and saddle. The party of the second part is at liberty to cultivate said land to the best advantage that he may deem proper.

"W. H. SQUIRES,

"P. O'MALLEY."

After going upon the farm of Squires appellee took charge of it, his wife keeping the house and Squires living with them as one of the family. Portions of the farm were rented by appellee, and the rents collected by him; he paid all taxes on the land, erected a barn, crib and probably other buildings thereon, and otherwise improved the farm, thereby considerably enhancing its value. Under the right given him by the written contract he, in 1892, sold the farm for \$5,500; the sale was approved by Squires, who duly executed a deed conveying it to the purchaser. Appellee and Squires took \$4,650 of the money realized for the Nicholas county farm, and re-invested it in a farm in Kansas, the title to which was taken to W. H. Squires, to be held by him, as claimed by appellee, under the same agreement as was the Nicholas county farm. Appellee, his wife and children, and W. H. Squires, went to Kansas to reside, and the Kansas farm was controlled and managed by appellee just as he had managed the Nicholas county farm.

In October, 1895, the Kansas farm was exchanged by appellee for a farm in Mason county, Kentucky, of 265 acres, and appellee, his family and W. H. Squires then returned to Kentucky, and to the Mason county farm, the title to which was taken, as in the case of the Kansas farm, in the name of W. H. Squires, but, as claimed by appellee, under the same agreement and understanding between Squires and himself that their respective rights therein should be the same as in the other farms. The entire trade, with reference to the Mason county farm, as in the case of the sale of the Nicholas county farm and the purchase of that in Kansas, was conducted by appellee alone, W. H. Squires having nothing to do with it except to execute the deed conveying the Kansas land, and to give his note for the difference between the value of the Kansas land and the price agreed to be paid for the Mason county farm, which was \$1,400. After the purchase of the Mason county farm appellee assumed and exercised absolute control of it, as he had of the Nicholas county and Kansas farms, and W. H. Squires continued to live with him as a member of his family. In other words, the same relations between them continued until domestic trouble arose between appellee and his wife some time in the year 1899, for which she was wholly to blame, and by reason of which a separation occurred, and he left their home and the farm and went to Oklahoma, but soon returned, and took up his residence in Carlisle, his former home, where he resumed his old trade as a blacksmith. Later he and his wife were divorced by judgment of the

Nicholas Circuit Court, which judgment gave him the sole custody of their five children.

Notwithstanding the domestic infelicitities of appellee and his wife, and the consequent divorce proceedings, no disturbance seems to have resulted to the agreeable relations that had long existed between him and her foster-parent, W. H. Squires. They remained friends until the death of Squires, which occurred very soon after the separation of appellee and his wife.

This action was instituted by appellee soon after the death of W. H. Squires to enforce his rights under the contract of February 22, 1888, and to recover his interest in the Mason county land by the sale of the whole and the payment to him of the proceeds in excess of the \$4,000 reserved to W. H. Squires under the contract between them, and which, under the provisions of his will, should be applied in discharge of the legacy to Mary L. O'Malley. The executor of W. H. Squires' will, his heirs at law and Mary L. O'Malley were made parties defendant to the action, all of whom, except Mary L. O'Malley, made defense to appellee's claim. By amended petition the court was advised that one Josiah Coons had some sort of claim to the land under an alleged purchase from W. H. Squires, and he was also made a party. The answer of Coons disclosed the fact that he had shortly before the death of W. H. Squires purchased of him the land at the price of \$7,000; for \$1,500 of this sum he gave his note, to be paid March 1, 1900, and when paid Squires was to make him a deed to the land, upon the execution and delivery of which Coons was to execute his note for \$5,500, the remainder of the consideration, payable five years after date, with 6 per cent. interest from date, payable annually, the payment of the note to be secured by a lien upon the land retained in the deed. A title bond signed by W. H. Squires containing the terms of the sale as set forth in the answer was delivered to Coons at the time of his purchase of the land, and this bond is filed with and made a part of the answer. The answer also averred a part performance of the contract, in that \$411 of the \$1,500 note was paid by him prior to the death of Squires, and before the maturity of the note, and that the death of the latter had prevented a further performance of the contract, but that he was able and ready to pay the balance of the \$1,500 note at once, and would, upon the execution of a deed by the proper parties conveying him the land, execute the note for the remaining \$5,500 of the consideration as of the date and upon the terms stipulated by the title bond.

By the judgment rendered in the court below appellee's claim was sustained, but a sale of the land refused on account of the executory contract under which it was purchased of W. H. Squires by Coons. The judgment, however, recites that: "Inasmuch as said Coons made said contract in good faith, and is claiming a right to said land under it, the court is of opinion that he is entitled to have said land conveyed him, provided he complies with the terms of said contract on or before April 1, 1908, and that the purchase money for said land should be paid as follows: Four thousand of it, less the \$411 paid to said Squires in his lifetime, to his executor, Turley M. Squires, and the balance to plaintiff."

The judgment then specifically enforced the contract made between Josiah Coons and W. H. Squires, by ordering Coons, on or before the first day of the next term of the court, when the deed should be made to him by the commissioner, to pay the master commissioner \$1,088.50 (being \$1,500 and in-

terest, less \$411.50 that the title bond from W. H. Squires provided should be paid March 1, 1900), and to execute his promissory note for the sum of \$5,500, with 6 per cent. interest from March 1, 1900, payable annually. This note to be secured by lien retained in the deed from the commissioner. The judgment further directs the master commissioner to collect the \$5,500 note when due, and to apply the entire proceeds of the land received of Coons as above stated. The executor and heirs at law of W. H. Squires excepted to so much of the judgment as allowed appellee any part of the proceeds of the land, and appellee excepted to so much of the judgment as enforced the contract between W. H. Squires and Coons. An appeal was prayed by all the parties excepting to the judgment, but appellee does not now appear to be dissatisfied with the judgment.

The question that first presents itself is, what effect should be given the written contract of February 22, 1888, between appellee and W. H. Squires? It undoubtedly gave appellee the exclusive possession and control of the Nicholas county farm, the right to cultivate it as he chose, and to appropriate to his own use the profits resulting from such control and cultivation. It gave him the right to rent it and retain the rents; to put whatever improvements upon the land he thought proper, and made him the absolute owner of such improvements. It also made him responsible for all taxes that might be assessed against the land, and gave him the right to trade or sell it when, or to whom, he pleased, and at whatever price he chose, except that he could not sell it for less than \$4,000 in money, or trade or exchange it for other land of less value than \$40,000, as W. H. Squires was to have that sum in money or land in the event of appellee's disposing of it.

If at any time during his occupancy of the Nicholas county land appellee or W. H. Squires had become dissatisfied with the arrangement existing between them, the contract would have compelled W. H. Squires to "turn over" to appellee all property on or belonging to the farm, and to pay him the value of the farm in excess of \$4,000, or its equivalent. Manifestly the contract gave to appellee an equitable claim to the land, and took away from Squires all his rights therein except the naked legal title, and a claim thereon for \$4,000. Or, to put it in other words, after the contract was made W. H. Squires held the legal title in trust for appellee after paying himself \$4,000 out of it.

It is contended by counsel for appellants that the written contract applies alone to the Nicholas county farm, and that the contract by which appellee was to have the same right to the Kansas and Mason county farms was in parol, and, therefore, invalid under the statute of frauds; and though Squires held the legal title to the first farm in trust for appellee to the extent provided in the written contract, that the parol trust as to the last two farms was a resulting trust, which, under the Kentucky Statutes, can not be enforced. Trusts by operation of law, more generally known as constructive trusts, have been established by parol agreement in numerous cases in Kentucky. (*Sweet v. Stevens*, 28 Ky. Law Rep., 407; *Williams v. Williams*, 8 Bush, 241; *Caldwell v. Caldwell*, 7 Bush, 515; *Pendleton v. Patrick*, 22 Ky. Law Rep., 878; *Green v. Ball*, 4 Bush, 591.)

We find the law on this subject well stated in *Crutcher v. Muir*, 90 Ky., 144: "There is a marked distinction between a legal title to real estate acquired under circumstances that make a trust upon the holder in favor of a

person other than the immediate grantor and that conveyed by an absolute deed from the vendor to purchaser. An action for equitable relief may be brought and maintained in the first-mentioned case without either charging a person upon a contract for the sale of real estate, or contradicting or varying the terms of a deed under which the legal title is held, though the result may be to change a conveyance, absolute on its face, into a mortgage or deed of trust, or divest the holder of a title altogether. Consequently an agreement upon which claim for relief is in such case founded may, though not in writing, exist, and be enforced, without violation of the statute referred to, and be established by parol, notwithstanding the general rule of evidence mentioned."

A limitation was placed upon this doctrine in *Sherley v. Sherley*, 91 Ky., 512, which is that a court of equity will not enforce a parol voluntary trust, that is, a trust created by parol agreement, without valuable consideration.

In the case at bar the agreement by which the trust was created was not voluntary, but based upon a valuable consideration, viz., the moving of appellee to the Nicholas county, Kansas and Mason county farms, the taking care of and paying the taxes on them, and furnishing W. H. Squires with a home and home comforts. But, independently of this question, we think the trust sought to be enforced in this case is not one created by parol agreement. It is an express trust, and was given being by the original written agreement. That agreement was not a contract for the sale of land that could be embraced by our statute, which provides that no action can be brought "upon any contract for the sale of real estate" unless the contract be in writing; it was rather a trust in land, or an equitable right in land, which was created by the written agreement. By the agreement appellee was given the right to sell the farm or trade it. When sold or traded by him Squires was bound to convey the legal title which he held to the purchaser, but was entitled to receive in land or money \$4,000 in any trade that should be made. So if the farm was exchanged for another, or its proceeds invested in another under the contract, Squires was to have \$4,000 in that other farm, and appellee the balance in that other farm. In other words, by the terms of the contract, fairly construed, it was the evident intention of the parties that in case the Nicholas county farm was sold and the money re-invested in another farm, then the rights of the parties should be the same as if one farm was traded for the other, with or without boot. So the trust as to the Kansas and Mason county farms should be treated as the trust created by the written agreement, and the oral agreements subsequently made amounted to no more than a recognition of the trust created by the writing.

If one should convey to a trustee land to be held in trust for his son, with power to the son to sell it and cause the trustee to convey it, and re-invest the proceeds, or permit him to do so, as often as he thought proper, and the land thus conveyed should be sold by the son, conveyed by the trustee, and the proceeds invested in other land, and that in turn exchanged for yet another tract, the legal title to each trust successively all the time remaining in the trustee without any other written evidence of the trust than what was expressed in the first deed, the one from the father, what is it that gives the son an equitable right in the property in which the trust fund

was last invested? Manifestly it is the same instrument that created the trust in the first place. The trust simply follows the property, and may be enforced as long as the subject of the trust can be traced and identified.

In this case the proof is conclusive of the fact that W. H. Squires never claimed to have an interest in the Kansas and Mason county farm, in excess of the \$4,000, and that he to the last recognized appellee as entitled to an interest in the several farms to the extent of their value in excess of \$4,000. The recognition of appellee's right and interest is also manifested by the will of W. H. Squires, for though it was known to him that the Mason county farm was worth \$3,000 in excess of his interest, he by his will only disposed of his own interest, the \$4,000, by bequeathing it to appellee's erring wife. We, therefore, conclude that there was no error in the judgment of the lower court. We think the action was properly brought in the Mason Circuit Court, as it sought to recover an interest in real estate claimed by appellee. The venue of the action is fixed by section 62, Civil Code.

Judgment affirmed.

GRIFFIN'S ADM'R v. EQUITABLE ASSURANCE SOCIETY, &c.

(Filed February 15, 1905.)

1. Life insurance—Policy to creditors—Fraud on company—Payment by company—Liability to administrator of insured—Where policies of insurance were taken out on the life of the insured by persons claiming to be his creditors and who paid the premiums, and on the death of the insured the policies were paid by the company to the beneficiaries named therein under the belief that they were in fact creditors of the insured, the company is not liable to the administrator of the insured for the sums so paid, although the parties to whom the money was paid were not in fact creditors of, and had no insurable interest in, the life of the insured.

2. Gambling scheme—Where the beneficiaries named in a life insurance policy were not in fact creditors of the insured and procured the policies by falsely representing themselves to be such creditors, the transaction was a speculation upon the hazard of a human life, and a gambling scheme, and the policies are void as against public policy, and no cause of action can be maintained on them by the administrator of the insured.

8. Consent of insured—Void policy—Payment of premium in good faith—Where an insurance policy is taken out upon the life of another without his consent or knowledge it is void, but in such case, where one in good faith paid the premium on such a policy, he would be entitled to recover the premiums so paid.

W. D. O'Neal, Jr., and H. C. Sullivan for appellant.

Humphrey, Hines & Humphrey for appellees.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Settle.

The appellee, Equitable Life Assurance Society, issued two policies of life insurance upon the life of Morris Griffin, one for \$9,500, of date May 19, 1893, payable to the firm of Howe & Johnson, the premium on which was \$266, payable each year during the continuance of the contract. The other policy was for \$7,000, of date June 24, 1893, payable to J. Gano Johnson, in consideration of an annual premium of \$196.

It is claimed by appellee that in applying for the policies Griffin repre

sented that the beneficiaries were his creditors, and the latter in the proofs furnished appellee of Griffin's death swore that they were creditors of his, and that by reason thereof had respectively a valid interest to the amount issued in the life of the deceased. It also appears that the beneficiaries, Howe & Johnson, and Johnson, respectively, paid all premiums on the policies as long as Griffin lived. His death occurred July 10, 1900, and proofs thereof having been promptly furnished, appellee, on August 15, 1900, paid to the beneficiaries respectively the amounts of the two policies, less certain deductions resulting by corrections of the decedent's age to correspond with the date of birth shown in the proofs of death.

Suits were brought in the Lawrence Circuit Court on December 4, 1900, by the appellant, John Hays, as administrator of the estate of Morris Griffin, against appellee and Howe & Johnson for the proceeds of the \$9,500 policy, and against appellee and J. Gano Johnson for the proceeds of the \$7,000 policy. Summons as to Howe & Johnson and J. Gano Johnson were quashed by the lower court upon their motion and the actions dismissed as to them. The cases were subsequently consolidated, and after the taking of proof by deposition were submitted. By the judgment rendered the petitions were dismissed at the cost of the appellant. We will not undertake to state the several issues presented by the voluminous pleadings. It is only necessary to say that the pleadings presented the claim upon appellant's part, controverted by appellee, that Griffin applied for the insurance payable to himself, and paid, or caused the premiums to be paid, but that appellee fraudulently and secretly issued the policies payable to Howe & Johnson and J. Gano Johnson; that neither Howe nor Johnson was a creditor of Griffin, and neither had an insurable interest in his life, as the contracts of insurance were purely speculative upon the part of Howe & Johnson and J. G. Johnson; and further, that the designation in one policy of Howe & Johnson, and in the other of J. G. Johnson, as beneficiaries, was invalid, for which reason the proceeds of the policies were entitled to be received by Griffin's administrator.

The legal issue as to whether Howe & Johnson were creditors was tried by a jury, and decided by them in the negative. All other issues were tried by the court. We think the following facts were established by the evidence: First, that Howe & Johnson in the one policy and J. Gano Johnson in the other were named as beneficiaries; second, that all the premiums on the policies during the continuance of the insurance contracts were paid by the beneficiaries respectively; third, that neither at the time of the issue of the policies nor when they were paid did appellee know that Howe & Johnson or J. Gano Johnson were not creditors of Griffin, if such was the case; fourth, that appellee did not know at the time of paying the policies, or at any time previous thereto, that any person or persons other than the beneficiaries had any claim upon or interest in the proceeds of the policies. Upon the facts as thus presented we think the judgment rendered by the lower court was proper. We can find no reason to hold that appellant is entitled to recover of appellee the proceeds of the policies in question. If, as seems to be admitted by counsel for both appellant and appellee, the persons named as beneficiaries in these policies were not in fact creditors of Griffin, yet they and he fraudulently procured the policies by falsely repre-

senti g them to be creditors, the transaction as to each policy was clearly a speculation upon the hazard of human life, and consequently a gambling scheme, pure and simple, which rendered the policies void because against public policy; and if void, no cause of action against appellee exists in favor of Griffin's administrator for the recovery of their proceeds. (*Basye v. Adams*, 81 Ky., 368; *Warnock v. Davis*, 104 U. S., 779; *Keystone Mut. Benefit Association v. Norris*, 115 Pa., 446.)

Upon the other hand, if the policies were taken upon the life of Griffin without his knowledge or consent they were also void, but any one who in good faith paid premiums upon them would be entitled to recover the premiums so paid. (*Metropolitan Life Ins. Co. v. Monohan*, 19 Ky. Law Rep., 992; *Metropolitan Life Ins. Co. v. Black*, 22 Ky. Law Rep., 580; *Metropolitan Life Ins. Co. v. Smith*, 22 Ky. Law Rep., 868.)

The appellant's first contention that Griffin applied for the insurance payable to himself, and paid, or caused to be paid, the premiums, but that by fraudulent collusion between appellees, Howe & Johnson, and Johnson the policies were, without Griffin's knowledge or consent, made payable to them respectively, is wholly unsupported by proof. Equally untenable, we think, is appellant's further contention that though Griffin consented that the policies be made payable to Howe & Johnson and Johnson respectively, the fact that they were not creditors of Griffin, as represented, rendered the policies void as to them, but valid as against appellee in favor of Griffin's administrator, to whom they must be paid, notwithstanding the settlement made by appellees with the beneficiaries, without any notice on its part of their want of interest, or of any claim on the part of Griffin's administrator. The authorities cited by appellant's counsel in support of the last proposition do in the main hold that the designation of a beneficiary "outside the prescribed class" does not render the policy void, but merely renders that designation invalid. It will be found, however, that these were all cases of benevolent aid societies, the charters of which provided that only the families of the members could be the beneficiaries of the insurance, therefore, the opinions hold that where one was named as beneficiary in a certificate or policy issued on the life of a member of the society to whom it would be ultra vires for the society to pay the insurance, because not a member of the class authorized by the charter to be beneficiaries, the insurance should nevertheless be paid to the persons designated by the charter.

Other cases cited by counsel for appellant, such as *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S., 460; *Mayer v. Manhattan Life Ins. Co.*, 87 Texas, 775, and *Warnock v. Davis*, 104 U. S., 781, seem to hold that where policies are issued to beneficiaries who have no insurable interest, and the circumstances are not such as to make the policies absolutely void as wagering policies, then the beneficiaries are to be treated as assignees or appointees, for the purposes of receiving the money for whoever may be lawfully entitled to enjoy it. The doctrine applied in these cases can not obtain here. It is disclosed by the record that the applications made and signed by Griffin for the policies in question can not be considered as evidence, because not attached to or accompanying the policies. (*Kentucky Statutes*, section 679.) There was, therefore, no evidence to show upon whose application the policies were issued. In this view of the matter it would seem that the

policies are to be regarded as mere wagering policies, and if so they were void, and appellee could not have been made to pay their proceeds to the beneficiaries named therein, nor can there be any recovery of such proceeds by Griffin's administrator. But if the evidence had shown that the transactions were not purely speculative, or the circumstances were not such as to make the policies absolutely void as wagering policies, as, according to the evidence, the appellee in good faith settled the insurance with the persons named in the policies as beneficiaries, who would be treated by a court of equity as having received the same as assignees or appointees for those entitled thereto, and this settlement was made without knowledge on its part that they were not creditors of the insured, and without notice of the claim of the latter's administrator, we know of no principle of law or equity that would compel it at the suit of the administrator to pay the second time the amount of the policies. If the administrator has a cause of action against any one for the proceeds of the policies it is against the beneficiaries named in them, who received such proceeds, and not appellee. But we are not now called upon to say whether or not such cause of action exists against the beneficiaries.

Wherefore, the judgment is affirmed.

Whole court sitting except Judge O'Rear.

GREENE v. LOUISVILLE RY. CO.

(Filed February 16, 1905.)

Street railway—Use of street by wagons—Injury to drivers—Relative duties—The driver of a wagon in a public street has the right to use any part of it, although occupied by the track of a street railway, and if while driving on the street car track he is struck by the car without negligence on the part of those in charge of the car, when his presence on the track could not be discovered by them in the exercise of ordinary care in time to avert the injury, he can not recover. But he is not a trespasser on the track, and has a right to anticipate that a proper lookout would be kept by those in charge of the cars, and that ordinary care would be exercised by them to avoid running into him.

B. H. Young and M. W. Ripy for appellant.

Fairleigh, Straus & Fairleigh for appellee.

Appeal from Jefferson Circuit Court, Law and Equity Division.

Opinion of the court by Chief Justice Hobson.

Appellant, Gus Greene, was driving his wagon eastward at the intersection of Twenty-third and Portland avenues, in the city of Louisville, when a street car propelled by electricity came up behind him and ran into his wagon, throwing him to the ground, turning his wagon over, and injuring him, his horse and his wagon. He was driving at the time on the track of the street railway, laid in the street, because that was the smoothest part of the highway, traveling at an ordinary trot, the wheels of the wagon being in the car tracks. He had a man on the hind end of his wagon to keep the boys from stealing the apples with which the wagon was loaded, and appellant had asked him if he saw a car coming to let him know. The

first that appellant knew that a car was coming was when the man in the rear told him so. Appellant then turned his horse and tried to get out of the way, but before he could do so the car ran into him. As shown by the proof for appellant, the car was running very rapidly and gave no signal of its approach. An electric street light was burning at the intersection of Twenty-third and Portland avenues, and the wagon was only ten or fifteen feet north of the crossing when struck. The motorman testified that he was not running fast, and did not see the wagon until he was within thirty feet of it, and after that he could not stop before he ran into it. He also testified that there was a dark place there from the shade of the trees. Appellant's proof was that there was a good light. The jury found for the defendant under the instructions of the court and the plaintiff appeals. The court gave the jury these instructions:

"1st. The court instructs the jury that if the plaintiff was injured in the manner complained of in the petition, and that the accident and consequent injury, if any there was, was caused by the failure of the defendant, or its employes, to exercise reasonable and ordinary care in the operation of its car, then the law is for the plaintiff, and the jury should so find. However, the court further instructs the jury that the plaintiff was bound to exercise that degree of care and caution for his own safety that a person of ordinary prudence would exercise under the same and similar circumstances, and if the jury believe that the plaintiff did not exercise such a degree of care and caution, and the accident was occasioned thereby, then the law is for the defendant and the jury should so find, unless the jury should further find that the defendant did or could have discovered the peril of the plaintiff in time to have avoided the injury to him by the exercise of reasonable diligence.

"2d. The court instructs the jury that the defendant company has the superior, but not the exclusive, right to the use of that portion of the street occupied by its tracks, and that when the plaintiff undertook to use that portion of the street it was his duty to use reasonable diligence to keep out of the way of the defendant's cars using the same track.

"3d. If the jury believe from the evidence that after the motorman in charge of the car should, by the exercise of ordinary care, have discovered or did see plaintiff's vehicle upon the track, such motorman exercised ordinary diligence and brought into operation all the means at his command to prevent a collision with the plaintiff's vehicle, then the law is for the defendant, and the jury should so find.

"4th. Ordinary care, as used in these instructions, means that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances."

Appellant complains especially of the second instruction given by the court and of the refusal of the court to give the following instruction, which he asked: "The court instructs the jury that it was the duty of the motorman in charge of the defendant's car to keep a lookout for persons on the track, and if by the exercise of ordinary care the agents and servants of defendant in charge of the car could have discovered the presence of plaintiff in time to have stopped the car, or did see the plaintiff in time to have stopped the car, then the law is for the plaintiff, and the jury should so find."

It is incumbent on all travelers on the highway to exercise ordinary care for the safety of others using the highway. The operators of street cars are bound by this rule no less than other persons on the highway. The only difference between a street car and other vehicle is that it can not turn aside as other vehicles, but must stay on the track, and it is entitled to the use of the track without obstruction from other vehicles; but it can no more run down another vehicle by negligence than any other traveler on the highway may do so, although the vehicle may be upon its track. In operating in public streets rapidly moving cars, propelled by electricity, it is incumbent on those having charge of them in the crowded highway to exercise care commensurate with the circumstances for the protection of others, and to this end they must keep a lookout ahead of the car. The failure of the court to so instruct the jury was prejudicial to appellant under the facts of the case. (Shearman & Redfield on Negligence, section 485; Thompson on Negligence, section 1388; Robinson v. Louisville Railway Co., 112 Fed. Rep., 484; Louisville Railway Co. v. Wood, 2 Ky. Law Rep., 387; Central Passenger Railway Co. v. Chatterton, 14 Ky. Law Rep., 663; Owensboro Railway Co. v. Hill, 21 Ky. Law Rep., 1638.)

If appellant was obstructing with his wagon the railway track he might be punished for this under the city ordinance; but he was lawfully upon the highway and had the right to use one part of it no less than another, although occupied by the track of the street railway. If while on the street car track he was struck by the car without negligence on the part of those in charge of the car when his presence on the track could not be discovered by them in the exercise of ordinary care in time to avert the injury, he can not recover. But he was not a trespasser on the track, and he had the right to anticipate that a proper lookout would be kept by those in charge of the cars, and that ordinary care would be exercised by them as in the case of other vehicles to avoid running into him.

In 27 Am. & Eng. Ency. of Law, 70, the rule is thus stated: "While it is the duty of vehicles moving along street railway tracks to leave the tracks on the approach of cars, so as not to obstruct their passage, still those in charge of the cars must use reasonable diligence to prevent collisions, and the company is liable for injuries resulting from their failure to do so. Thus where a vehicle is seen moving on the tracks ahead of a car the motorman, gripman or driver should bring his car under control if possible, so as to avoid a collision if the driver of the vehicle fails to leave the track, but he is not required to bring the car to a stop unless the vehicle is sufficiently near to be reasonably considered in a position of danger. It has been held that where a street car approaching from the rear runs down a wagon driving along the track, this is of itself sufficient evidence of negligence on the part of the street railway company, in the absence of special circumstances excusing such act, to carry the question to the jury. Where a street car is approaching from the rear a vehicle moving along the track, the person operating the car has not the right to proceed without regard to the presence of the vehicle, in anticipation that the vehicle will leave the track in time to give free passage to the car."

Instruction 2 was misleading, and should not have been given. In lieu of instruction 2 given by the court, and in lieu of instruction 2 asked by the

plaintiff, the court should have told the jury that the plaintiff was lawfully upon the street and had the right to use any part of it; that the defendant was entitled to the use of its tracks for the free passage of its cars; that it was the duty of those in charge of the defendant's car to keep a lookout for persons and vehicles upon the track and to exercise ordinary care to discover and avoid injuring them; and that it was the duty of the plaintiff in using the street to exercise ordinary care for his own safety and the safety of others. As the court used in instruction 1 the words "reasonable diligence" and "reasonable care," he should, in instruction 4, have told the jury that reasonable diligence or reasonable care is ordinary care.

Instruction 3, given by the court, should be omitted. In so far as it was the converse of the last clause of instruction 1 it is unnecessary. There was evidence tending to show want of due precaution in other respects on the part of the operators of the car, and the instruction was an improper limitation on the first clause of instruction 1.

Judgment reversed and cause remanded for further proceedings consistent herewith.

SCOVILLE v. BAUGH, &c.

(Filed February 16, 1905—Not to be reported.)

1. Counties—Fiscal affairs—County judge—Employment of attorney—Authority—The fiscal affairs of a county are under the control of the fiscal court, and the county judge has no authority to make any contract for the county unless specially authorized to do so by statute, and there is no statute authorizing him to employ counsel for the county or to contract with attorneys for their fees.

2. Sheriffs—Railroad tax—Collection—Attorney's fee—Payment—Order of county judge—An order of the county judge directing the sheriff to pay an attorney 25 per cent. of the sum collected by the sheriff from the railroad as franchise tax was void, and the sheriff was properly refused a credit for said payment in his settlement with the county commissioner.

Jas. Sparks for appellant.

Walker Moren and George G. Brock for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant Scoville is the sheriff of Laurel county, and as such collected from the L. & N. R. R. Co. its franchise taxes due the county for the years 1896-1901, amounting in all to \$2,485.47, under an order of the Laurel County Court directing him to collect the money. The county court also made an order employing James Sparks to assist as an attorney in the collecting of the taxes, and agreeing to pay him for his fee 25 per cent. of the amount recovered. The railroad company paid the sheriff the taxes upon demand, and the county judge then made an order for the sheriff to pay Sparks \$621.43, or one-fourth of the amount collected, which Scoville did. At its following October term the Laurel Fiscal Court appointed a commissioner to settle with the sheriff, who refused to give him credit in the settlement for the amount which he had paid Sparks under the order of the county

court. The county court confirmed the settlement and an appeal was taken by appellant to the Laurel Circuit Court, who affirmed the judgment of the county court, and from this judgment the sheriff prosecutes the appeal before us.

The fiscal affairs of the county are by law under the control of the fiscal court. The county judge has not jurisdiction or authority, either in chambers or when sitting as the county court, to make any contract for the county, unless specially authorized to do so by statute. There is no statute authorizing him to employ counsel for the county or to contract with attorneys on behalf of the county for their fees. The authority to make such contracts is in the fiscal court and not in the county judge. The order of the county court employing Sparks and contracting with him as to his fee was, therefore, void. The order directing the sheriff to pay Sparks \$621.43 out of the money of the county in his hands was also void as the county judge was without authority to make an appropriation of the county's funds. These orders being void, were nullities, and were no justification to the sheriff for the payment of the money to Sparks. His legal standing is just the same as it would have been if he had paid the money out without an order of any kind. Sparks not having been legally employed by the county, had no claim against it for services, and so far as appears had performed no services as the railroad company paid the money to the sheriff on demand. It is also insisted that as this money was for taxes of previous years the sheriff's sureties are not responsible for it, as they only undertook for the collection of the taxes of that year. What basis there may be for this contention we need not determine as they are not parties to the record. Appellant has received the money of the county and must account for it.

Judgment affirmed.

HESS, &c. v. TRUMBO, &c.

(Filed February 16, 1905—Not to be reported.)

Corporation — Insolvency — Stockholders—Action by creditors—In an action by creditors of a defunct "investment company" against the stockholders to enforce payment of the balance due on their stock, alleging the insolvency of the corporation and for the appointment of a receiver, a failure to allege any indebtedness on the part of the corporation to the plaintiffs, or a failure to pay any supposed indebtedness due from the corporation to plaintiffs, and no proof that the stock was purchased with notice of its infirmity or in bad faith to defraud creditors, the petition of the plaintiffs was properly dismissed by the chancellor.

Lane & Harrison and Caruth, Chatterson & Blitz for appellants.

O'Neal & O'Neal for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

This action was instituted by the appellants in the Jefferson Circuit court, Chancery Branch, against the Louisville Savings Bond Co., W. B. Trumbo and others, the latter alleged to be indebted to the corporation.

The proceeding is under section 547 of the Kentucky Statutes to enforce,

the payment by the stockholders of the unpaid balance on their shares in the corporation. Upon the trial the chancellor dismissed the petition because of its failure to state a cause of action, in that it was not alleged that appellees, at the time they purchased the stock from the owners in the open market, knew it had not been fully paid up; and from this judgment this appeal is prosecuted. The defendant corporation appears to have been what is commonly called an "investment company," of which the petition, after stating it to have been incorporated under the laws of Kentucky, contains this allegation: "Plaintiffs say that the defendant corporation has heretofore been engaged in the business of what is known as an investment company, selling its certificate of investment upon weekly payments and contracting to create and reserve a reserve fund of 25 per cent. of all monthly payments and a redemption of 50 per cent. of all payments as shown by said contract, to wit: 'All monthly payments, when received at the home office of the company, are credited to the various funds as follows: Fifty per cent. to the redemption fund for the purpose of paying coupons; 25 per cent. to the reserve fund, with all fines, lapses, transfers and interest the moneys in the reserve fund, are invested for the protection of all outstanding bonds and held so long as a coupon represented by such deposit is unpaid, a liability against such above mentioned fund; and 25 per cent. to the expense fund for the paying of the expenses of the company.' "

It is then alleged that the plaintiff had been induced to purchase certain certificates of the company, giving the numbers thereof, upon which they had paid certain sums in monthly payments of 25 cents, amounting in the case of Charles A. Hess to \$80, as to August A. Fusts \$28, and as to Lizzie Kronenberger \$36; that the defendant company had sold a great number of these investment bonds or certificates to various other people, the names and residence of whom were unknown to the plaintiffs, and who were too numerous to bring before the court; that the defendant corporation had wasted all its assets, and violated its contract, in that it had failed to accumulate or keep invested a reserve fund for the protection of the outstanding liabilities of the company and the outstanding bonds and coupons, and that it had ceased to do business, and was hopelessly insolvent; that its co-defendants were indebted to the corporation in various sums and amounts, which were unknown to the plaintiffs, or either of them, wherefore, they prayed for the appointment of a receiver to take charge of the affairs of the defunct corporation; that its affairs be wound up and settled, and the plaintiffs be permitted to sue for and on behalf of all the other creditors.

There is a total failure to allege any indebtedness on the part of the corporation to the plaintiffs. It is stated that they were induced to purchase certain certificates of the company, upon which they had made certain weekly payments, aggregating certain sums, but there is nothing to show that the appellants still owned the bonds or certificates in question, and we are left in the dark as to the terms of the contract contained in them, if there was a contract. There is no allegation of a promise to pay, or a failure to pay, any supposable indebtedness due from the corporation to the appellants. On page 24 of the transcript we find the following entry by the clerk: "Amended petition and exhibits of John H. Weller (the receiver appointed by the court), filed on the 11th day of January, 1902, is missing from the

papers, and can not be copied herein." The opinion of the chancellor is as follows: "While this case is argued by counsel for plaintiff as though it was submitted in chief against all the defendants, there is no sheriff's return upon the summons against the individual defendants except the defendant, Mary Speth, and only she and Trumbo have answered. The ruling upon this submission will, therefore, be confined to these two defendants. This action is brought under section 547, Kentucky Statutes, to collect from stockholders the unpaid portion of the purchase price of the stock. In Trumbo's case the stock was originally subscribed for and issued to Sherman and Garrison, and was by them transferred to Trumbo, while in Mrs. Speth's case the stock was originally subscribed for and issued to McCabe, and was by him transferred to Mrs. Speth. Little or nothing was paid to the company for the stock by the original subscribers. Are these stockholders, who did not buy from the company, liable to the company's creditors for the unpaid purchase money of their stock? The stock upon its face purports to be paid-up stock. The statute makes 'stockholders' liable to creditors for the full amount of the unpaid part of the stock subscribed for by them. (Section 547.) It is claimed by defendant that the statute contemplates the original owner of the stock, and not a subsequent transferee, because none but the first owner can subscribe for stock. It would seem, however, that a broader meaning should be given the statute in order to accomplish the purpose of the legislature in protecting creditors of corporations. Thompson on Corporations, section 2929, citing *Walker v. Lewis*, 49 Tex., 123, as authority, says that the stockholder is liable for whatever remains unpaid on his shares at their par value, according to the tenor or effect of the contract of subscription entered into by him or his assignee. The evident purpose of the statute is to have in the treasury of the corporation a full equivalent for the outstanding stock. When that has been once done the statute has been satisfied, regardless of what may have subsequently happened in the transfer of the stock, or what, if anything, was paid for such subsequent transfer. But in order to hold a subsequent bona fide transferee of stock liable for the unpaid purchase price of the original holder it should be alleged that he took it with notice that it had not been paid for. (*Cleveland Rolling Mill Co. v. Texas & R. Co.*, 27 Fed., 250; Thompson on Corporations, section 2934, and cases cited.) The stock in this case purports to be fully paid up, and there is no charge in the petition against these defendants that they knew it had not been paid for when they bought it, or that they had notice of any kind on that point. They acted in good faith and bought the stock in the open market, and in order to bring them within the provisions of the statute supra it should be alleged and proved either that they took the stock with notice of its infirmity with regard to its relation to the corporation, or that they took in bad faith for the purpose of defrauding the creditors. As nothing of this kind appears in the petition (or amended petition), it will have to be dismissed as to Trumbo and Mrs. Speth, with judgment for their costs."

The statements in the opinion of the court, that the appellees, Trumbo and Speth, were stockholders in the defunct corporation, and the law applicable to them as stockholders, are evidently based upon allegations contained in the lost amended petition of the receiver, and we must conclusively

presume, in the absence of this material part of the record, that it upholds the judgment of the trial court.

The original petition failing to state a cause of action, as we have pointed out, and the amended petition and exhibits filed with it not being in the record, and for the additional reasons given in the opinion of the chancellor, which we approve, the judgment is affirmed.

SKIDMORE v. SMITH, &c.

(Filed February 16, 1905—Not to be reported.)

1. Land—Title—Evidence—Pleading—In a controversy involving the title to unoccupied and uninclosed land an allegation of ownership which is denied will not authorize a recovery in the absence of the title papers being filed or other evidence showing title.

2. Common grantor—Deed—Title bond—Prescription—Burden of proof—Where two parties claim title to a tract of land under the same grantor, one by deed and the other by title bond, neither of which is filed or proven, and neither the pleading nor the evidence tend to establish a title by prescription in either of the parties, it is incumbent on the plaintiff to exhibit a superior paper title in order to a recovery.

J. Smith Hays and N. B. Hays for appellant.

Clay & Hardin for appellees.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Barker.

This is a controversy as to the title of a boundary of land on Gray's branch of Martin's Fork in Harlan county, Kentucky. All of the land on Gray's branch prior to 1878 belonged to Hezekiah Hall, Sr. An agreed statement of facts in the record stipulates that Hall, the common, remote grantor of the parties litigant, had a perfect title in fee simple deducible from the Commonwealth of Kentucky.

Conceiving that the appellee was wrongfully asserting a claim to a part of his land, and trespassing thereon by cutting timber, the appellant instituted this action in the Harlan Circuit Court, setting out a boundary of which he alleged he was the owner and in possession, and such other facts as were necessary to constitute a cause of action, and praying an injunction restraining the appellee from trespassing upon his property, and clouding his title by wrongful claims of ownership thereto. The answer controverted appellant's title to so much of the boundary of land described in the petition as constituted a part of the boundary set out in the answer, and of which it was therein alleged the defendant (appellee) was the owner and in actual possession. Evidently believing there was no conflict between the two boundaries as pleaded, the appellant, by reply, denied that any of the land contained in the boundary described in the answer constituted a part of the boundary described in the petition; whereupon the appellee amended his answer, and alleged, specifically, that he claimed the westernmost fork of Gray's branch as his western line, and that he owned all the land between this westernmost fork and "Barnrock Ridge." The appellant joined issue

with the appellee as to his ownership of this latter boundary, and the title to this is the matter in controversy.

In the second paragraph of the reply to the amended answer the appellant (plaintiff) set out specifically his title to the land between "Barnrock Ridge" and the westernmost fork of Gray's branch, alleging that in the summer of 1878 Hezekiah Hall, Sr. (now dead), who was then the owner and in actual possession of all the land on Gray's branch, including that now owned by both the parties litigant, sold that in controversy to one William F. Farmer, and delivered to him a bond for title therefor, and put him in actual possession of it; that Farmer sold the land to William Mc. Hall, who in turn conveyed it to Jerome Skidmore, who transferred it to the appellant, J. F. Skidmore. Appellant then proceeded to allege appellee's title to the land, which is stated as follows: "The plaintiff further states that he believes and alleges as true that defendant claims title to the land in controversy under a deed executed by said Hezekiah Hall, Sr., to Noble Smith on the 10th day of September, 1878. Now plaintiff states that the above-described title bond was executed, and the possession of the land in dispute was given, by said Hall to William F. Farmer under said title bond before the execution of the deed to said Noble Smith by said Hall; that it was not the intention of said Hezekiah Hall to convey to said Noble Smith, under said deed, any of the land west of Barnrock Ridge, and said Smith had due notice of the previous sale by said Hall under said title bond to said William F. Farmer."

The appellee accepted as true the allegation of appellant as to his (appellee's) title, but controverted the sale by Hezekiah Hall, Sr., to Farmer, the execution and delivery of the bond for title, and his (appellee's) notice of the existence of the title bond alleged. This allegation by the appellant of appellee's title, together with the stipulation of facts before referred to as to the title of Hezekiah Hall, Sr., and a reference by Hezekiah Hall to the fact that he had deeded land to the appellee's grantor, Noble Smith, constitutes all of the evidence in the record of the appellee's ownership of the land in controversy. Neither of the two deeds forming his chain of title from Hezekiah Hall, Sr., was placed in evidence. The trial court evidently was of opinion that the allegation in the amended reply, as to the title of appellee, was sufficiently broad and comprehensive to warrant the latter in dispensing with other evidence of his title to the land in dispute than the admission referred to. This, we think, was error. While it is true the allegation of a pleading must be construed most strongly against the pleader, and, therefore, every intendment legitimately deducible from the allegation in question should be taken as true in considering the title of appellee, still we think that the allegation, as it stands, does not constitute an admission that the deed from Hezekiah Hall, Sr., to Noble Smith contains the land in dispute within the boundary conveyed; and if this be sound, there is no evidence whatever in the record showing a conveyance of it from Hezekiah Hall, Sr., to the appellee, or his grantor, Noble Smith.

There is a total failure on the part of the appellant to establish the execution and delivery of the bond for title from Hezekiah Hall, Sr., to Farmer prior to September 10, 1878, or that either the appellee or his grantor, Noble Smith, had notice of the existence of such a bond. On page

98 of the transcript William F. Farmer, who was giving his deposition in appellant's behalf, was asked these questions, and made the following answers thereto:

"Q. State when, or about when, you bought said boundary of land from said Hall, and took said title bond for same. State also whether or not you lived within the said boundary at any time, and if you did, when and how long."

"A. The best I remember in 1878; I lived on it in the same year, but only a short time."

"Q. What time in the year 1878 did you buy said land and live on same?"

"A. I do not know the exact time, but in the warm part of the year."

"Q. Was it before or after September of that year?"

"A. Don't remember."

"Q. State why you remember it was in the warm part of the year."

"A. Because when I bought it and went to look at it the timber was green."

Bearing in mind that the deed from Hezekiah Hall, Sr., to Noble Smith was dated September 10, 1878, it is perfectly apparent that Farmer fails to show that his bond for title, which appears to have been lost, or at least was not placed in evidence, was executed prior to the date of Noble Smith's deed. His statement that the weather was warm, and that the trees were green, does not militate against the position that his purchase was after September 10. Some of the warmest weather of this climate occurs in the latter part of the month of September, and the leaves do not, as a rule, lose their verdure until after that date. But in the absence of the title deeds of appellee this bond for title, together with the deed of William Mc. Hall from his father in 1881, and the subsequent conveyances to appellant, establish at least a prima facie title in him to the land in controversy.

The self-serving declarations of Hezekiah Hall, Sr., as to what he conveyed, made after the deed to Smith, are incompetent as against his grantee, or the vendees of the latter. Neither the pleadings nor the evidence tend to establish a title by prescription in either the appellant or appellee; in fact they show that the land is wild, unfenced, unoccupied, mountain timber land, and it was, therefore, incumbent upon the appellant (plaintiff) to exhibit a superior paper title, which we think he has done in the absence of appellee's muniments of title showing a conveyance to his grantor of the boundary in dispute September 10, 1878, and the conveyance to himself afterwards. When the case returns to the lower court justice requires that both parties be permitted to introduce additional evidence, if they desire.

For these reasons the judgment is reversed for proceedings consistent with the opinion herein.

UNION CENTRAL LIFE INSURANCE CO. v. SPINKS.

(Filed February 15, 1905—Not to be reported.)

Life insurance—Where a life insurance policy provides that any indebtedness of the assured to the company will be deducted from the face of the policy, a note owing to the company by the assured should be credited on the sum payable by the company.

L. J. Crawford and Hazelrigg, Chenault & Hazelrigg for appellant.

Robt. Ramsey, Maxwell & Ramsey and W. W. Helm for appellee.

Appeal from Campbell Circuit Court.

Judge O'Rear delivered the following extended opinion:

The policy provides that any indebtedness of the assured to the company will be deducted from the face of the policy if the latter becomes a claim against the company. The note for \$396.80, and interest from December 15, 1897, spoken of in the opinion, ought to have been credited on the sum payable to appellee under the terms of the policy. For the error in failure to do so the judgment must be reversed and cause remanded to enter judgment in the verdict subject to the credit herein indicated.

The opinion in other respects is adhered to.

THARP v. NOLAN.

(Filed February 17, 1905.)

1. Slander—Charge of being bribed—Indictable offense—Special damages—The following words, viz.: "I bribed him in a railroad case; I know he was bribed and can do it again; he sold out in the railroad case and received a bribe," when spoken of one who, at the time the bribe was alleged to have been accepted, was not an officer, do not import a crime for which the accused may be indicted, and are not actionable unless special damages are shown.

2. Private citizen—Officer—There is no statute punishing the bribery of a private citizen, and in order to constitute an officer guilty of taking a bribe it must occur while he is such officer, and a reference to a matter that occurred whilst he was a candidate, and before he was elected to the office, was no charge of bribery.

3. Alleged words must be proven—Not their import—The rule in slander is that the plaintiff must prove the words as alleged by him, and not other words of like import, and for this reason the defendant is not allowed to plead that he used other words, and attempt to justify them.

Nesbitt & Watson, O. H. Pollard and R. L. Greene for appellant.

L. A. West, Riddell & Riddle for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee sued appellant for slander, charging that he said about him on or about July 10, 1899, and on divers other days, the following words: "I bribed him in the railroad case; I know he was bribed and can do it again; he sold out in the railroad case and received a bribe."

He alleged that the defendant thereby meant that he had committed the crime of receiving a bribe and being bribed as a citizen and justice of the peace, which office he then held, to vote on a matter to be decided by the plaintiff as such officer in regard to withdrawing a suit by the county of Estill against the Richmond, Nicholasville, Irvine & Beattyville R. R. Co. as to the delivery of the bonds of the county to the company, which matter was then to be decided by the plaintiff and associate justices of the peace of

the county as to the withdrawal or dismissal of that suit. The defendant filed answer traversing the allegations of the petition on April 1, 1901. A change of venue was then granted to Powell county, and the case was finally tried in Powell at the June term, 1902. On the trial the defendant offered to file an amended answer, in which he reiterated his denial that he had spoken of the plaintiff the words set out in the petition, but alleged that he had spoken of him these words, and that they were true: "I furnished the money to elect him justice of the peace for Estill county in consideration of his agreeing to vote for the dismissal of a suit then pending in the Estill Common Pleas Court in favor of said county against the Richmond, Nicholasville, Irvine & Beattyville Railroad Co., and after his election he did vote to dismiss said suit."

The court refused to allow the amended answer to be filed, and the case went to trial under the denials of the original answer. The jury returned a verdict for the plaintiff in the sum of \$500, and the defendant appeals. The proof showed that Estill county had made a subscription to the Richmond, Nicholasville, Irvine & Beattyville Railroad Co., and that the county had instituted a suit in the Estill Circuit Court to restrain a delivery of the bonds, and that at this stage of the proceeding an effort was made by the railroad company to get the fiscal court to order the suit dismissed. An election of magistrates was held, at which the plaintiff was elected, and after his election he, with others, voted for the dismissal of the suit, and it was dismissed. The proof for the plaintiff on the trial tended to show that after this suit had been dismissed the defendant said of the plaintiff that he had bought him in the railroad case, and if necessary he could buy him again, but the evidence taken as a whole, which was introduced on the behalf of both parties, tended to show that the defendant stated at the time that he furnished the money to elect the plaintiff to the office of justice of the peace; that for this the plaintiff agreed, when elected, to vote to dismiss the suit, and that he did vote to dismiss it. On this evidence the defendant testifying that he had furnished the money as indicated, and had said of the plaintiff in substance the words alleged in his amended answer, and only those words, the court instructed the jury as follows:

"1st. If the jury believe from the evidence that the defendant, A. J. Tharp, on or about the 10th day of July, 1898, spoke of and concerning the plaintiff, O. K. Nolan, the words: 'I bribed him in the railroad case; I know he was bribed and I can do so again; he sold out in the railroad case and received a bribe;' or those words in substance, they should find for the plaintiff and fix his damages at such a sum as the jury may believe from the evidence will fairly and reasonably compensate the plaintiff for the disgrace, shame, humiliation, mortification or anguish of mind suffered by the plaintiff. If they believe he suffered such by reason of the speaking of said words, or substantially said words, if they believe from the evidence that the defendant spoke them, and the jury may also allow such punitive damages as they may deem proper under all the circumstances introduced in evidence, not exceeding in all \$5,000.

"2d. Unless the jury believe from the evidence that the defendant spoke of and concerning the plaintiff the words mentioned in the first instruction, or substantially those words, they should find for the defendant."

To be actionable, unless special damages are shown, the words spoken must import that the person accused is guilty of a felony or other crime of such turpitude as to render him liable upon indictment to punishment. (*McNamara v. Shannon*, 8 Bush, 558.) Thus to charge that one is an insurgent or an embezzler, before the statute was passed punishing embezzlement, or to charge that a person is a rogue, has been held not actionable. There is no statute punishing the bribery of a citizen. The only statute which seems applicable in section 1866, Kentucky Statutes, which is as follows: "If a member of the general assembly, or if any executive or ministerial officer, shall take, or agree to take, any bribe to do, or to omit to do, any act in his official capacity, he shall forfeit his office, and be fined in a sum not less than \$200 nor more than \$1,000, and, moreover, be disqualified from holding any office of trust or profit, and from the right of suffrage for ten years."

The taking, or agreeing to take, a bribe constitutes the offense under this statute, for if the officer, after getting the bribe, should fail to keep his contract he would be none the less guilty than he would be if he had performed it. To be guilty, therefore, under the section the taking of the bribe or the agreement to take it must occur while the person is an officer. The statute does not punish the acts or agreements of private citizens. If the defendant furnished money to elect the plaintiff justice of the peace for Estill county in consideration of his agreeing to vote for the dismissal of the suit then pending against the railroad company, and he afterwards voted against the dismissal of the suit, it would hardly be maintained that he was guilty of receiving a bribe as a public officer on account of his agreement made before his election when after his election and as an officer he had done nothing wrong. If the transaction was within the statute, as we have said, his guilt or innocence in no manner depended upon his standing to his agreement. The proof on the trial showed, or at least was sufficient to warrant the jury in finding, that the defendant explained at the time he used the words complained of by the plaintiff just what he referred to, and if he did so and his words were so understood by those who heard them, what he said was not actionable. The court should have presented this view of the case to the jury, for if, taking all that the plaintiff said at the time, it was apparent that he only referred to a matter that took place before the plaintiff's election as justice of the peace, there was no charge of bribery.

The only testimony introduced on behalf of the plaintiff as to the words used by the defendant was that the defendant said that he bought the plaintiff in the railroad case, and, if necessary, he could buy him again. The rule in slander is that the plaintiff must prove his words, as alleged by him, and not other words of like import. For this reason the defendant is not allowed to plead that he used other words, and justify them. The court properly refused to allow the amended answer to be filed; but the words proved on the trial were not the words alleged in the petition, nor substantially so, within the rule excluding words of like import. The rule is thus stated in *Townsend on Slander*, section 865: "The plaintiff need not prove all the words laid, but he must prove enough of them to sustain the action. It is sufficient if the gravamen of the charge as laid is proved, and unless the additional words qualify the meaning of those proved so as to render

the words proved not actionable, the proof is sufficient. It is necessary for the plaintiff to prove some of the words precisely as charged, but not all of them, if those proved are in themselves slanderous; but he will not be permitted to prove the substance of them in lieu of the precise words."

Again, in section 869, it is said: "Where the words set forth, in their ordinary sense, import a charge of crime, if they are proved to have been so spoken in connection with other words as to rebut the idea of criminality, there is a fatal variance."

In section 871 a number of variances are collected which have been held fatal, none of them stronger than the case before us. (Taylor v. Moran, 4 Met., 188; Sproul v. Reed, 1 Ky. Law Rep., 407; Catlett v. Brumley, 10 Ky. Law Rep., 322; 18 Ency. Pl. & Pr., 63.)

Judgment reversed and cause remanded for a new trial.

ILLINOIS CENTRAL R. R. CO. v. WINSLOW.

(Filed February 21, 1905.)

1. Railroads—Passenger—Insult by employe—Peremptory instruction—Where the evidence shows that a brakeman abused a passenger in a caboose on a freight train, and threatened to "knock a lung out of him," the court properly refused to give a peremptory instruction to the jury to find for the defendant.

2. Res gestæ—Incompetent evidence—Subsequent statements of brakeman—On the trial of an action by a passenger against a railroad company for damages for abusive, insulting and threatening language used towards him while a passenger on the train, it was incompetent to admit evidence of statements made by the brakeman of the occurrence some days after it happened, as such statements were no part of the res gestæ and were prejudicial to the defendant.

Robbins & Thomas, J. M. Dickinson, Pirtle & Trabue and O. L. Price for appellant.

W. J. Webb and B. Gardner for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Settle.

Appellee by verdict of a jury and judgment of the court below recovered of appellant \$200 in damages.

It appears from the statements of the petition that appellee, while a passenger in a caboose of one of appellant's freight trains, traveling from Wingo to Mayfield, Ky., upon a first-class ticket which he had purchased before taking the train, was insulted and threatened with violence by appellant's brakeman, who was charged with the duty of seeing to the comfort and safety of appellee and other passengers on the train; that the alleged insulting, offensive and threatening language of the brakeman was addressed to appellee because he had accidentally expectorated upon the stove of the caboose; that all that was said and done by the brakeman was in the hearing and presence of other passengers in the caboose, and appellee was, by reason of the wrongful acts and misconduct of the brakeman, subjected to great humiliation of feeling and mental suffering, as well as bodily fear.

The answer contained a traverse of the material statements of the petition, and pleaded the alleged misconduct of appellee in expectorating upon the stove, which it was averred he persisted in doing after being requested by the brakeman to desist; that such use of the stove by appellee made a bad odor and was offensive to the other passengers, and when politely requested by the brakeman, as it was his duty to do, to stop expectorating upon the stove, appellee became angry and created the only disturbance that occurred in the car. Two grounds for a reversal are presented by appellant's counsel, viz.: The admission by the lower court of incompetent evidence in the trial, and the refusal of that court to give the jury a peremptory instruction to find for the appellant when appellee's testimony was concluded. A careful examination of the bill of evidence convinces us that the court did right in refusing the peremptory instruction, as the evidence introduced by appellee was sufficient, standing alone, to authorize a verdict for some amount in his behalf. Upon the other hand, that of appellant strongly tended to show that the altercation that occurred between appellee and the brakeman was caused mainly by the misconduct of appellee.

In other words, the testimony of appellee himself was to the effect that he expectorated upon the stove one time by accident; that upon being reproved by the brakeman, Hamlet, therefor, he told him it was accidental, but instead of accepting his excuse, the latter said to him, in an insulting and domineering manner: "What did you want to spit on that stove for? Was it to hear it fry? You better go home and spit on your grandmanma's bed, and see what she would do;" that Hamlet continued to talk to appellee in an angry and insulting manner, and appellee said to him: "I understand what you mean, and I think you have said enough about it." Whereupon Hamlet turned to the conductor, who had just entered the caboose, and asked him if appellee was a passenger, and upon being told that he was, he said, again turning to appellee: "If you wasn't, damn you, I would knock your lungs out." Upon being told by appellee: "No, he wouldn't, either," he said: "Yes, I would," and started towards appellee, who, according to his further statements, said no more, as he was afraid Hamlet would strike him.

Two of the passengers, a man and a woman, corroborated appellee in large measure, though they did not hear all that was said by either appellee or the brakeman. Their testimony, however, went to show that the brakeman's language was rough and his conduct aggressive, and both heard him say if appellee were not a passenger he would slap a lung out of him.

For the appellant three witnesses were introduced, Hamlet, the brakeman, Parker, the conductor, and Saxon. Hamlet's testimony was, in substance, as follows: "It was a very cold evening and we were coming this way on 192, the local freight, coming north, and this gentleman was sitting there spitting on the stove, and I asked him to stop it. There were some old ladies in the car, and one in particular was coughing right smart, and it seemed to me it was offensive to her. It was offensive to me, and I use tobacco myself, and I remarked to him, if you was to spit on your mother's stove she would take a stick of stove wood and blam you up by the side of the head with it, and he seemed to get highly insulted, and he says, you have said enough; don't speak to me any more, and spoke very loud, and I

asked the conductor if he was a passenger, and he says yes, and I says it is a very good thing he is, I would slap a lung out of him."

The conductor corroborated Hamlet in full, but Saxon's statements were more corroborative of appellee's testimony than of Hamlet's. It is evident from Hamlet's testimony that he was angry and his manner aggressive on the occasion in question, and if the jury placed full credit in the testimony of appellee and his witnesses, they no doubt came to the conclusion that Hamlet was insulting, and his manner threatening, not to say violent. At any rate it was the province of the jury to determine whether his conduct was such as to justify a verdict for damages against appellant, whose servant he was, with reference to the duty of a common carrier towards its passengers.

"The doctrine is now well established that the law implies a contract for the protection of the party carried from the insults and wanton interference of strangers, fellow passengers, and the carrier and his servants, and for every violation of the implied contract, by force or negligence, the carrier is liable in an action of contract or tort." (Addison on Torts, volume 1, page 88, note, and authorities there cited.)

In discussing this doctrine in *Winnegar's Adm'r v. Central Passenger Railway Co.*, 85 Ky., 547, this court said: "It is not material whether the violation consists in putting the passenger off at a point before his destination is reached, or by insulting him, or in assaulting him; they are all plain violations of duty for which a recovery may be had."

Again, in the same case, the court further said: "The law makes the carrier responsible for the acts of the person in charge of the car, and who for the time has the voluntary custody of the passenger, with the implied obligation that he will exercise the highest degree of diligence to transport him safely. In *Godard v. The Grand Trunk Railway*, 57 Maine, 202, it was held that the carrier was obliged to protect his passengers from violence or insult from whatever source it arises. He must use all such reasonable precautions as are necessary for that purpose." (*L. & N. R. R. Co. v. Ballard*, 85 Ky., 811; *L. & N. R. R. Co. v. Ballard*, 88 Ky., 159; *L. & N. R. R. Co. v. Donaldson*, 19 Ky. Law Rep., 1834; *Memphis & Cincinnati Packet Co. v. Nahel*, 16 Ky. Law Rep., 743; *Dawson v. L. & N. R. R. Co.*, 6 Ky. Law Rep., 668; *Strull v. L. & N. R. R. Co.*, 25 Ky. Law Rep., 678.)

We deem it unnecessary to comment upon the instructions given by the trial judge as no complaint is made of them by counsel for appellant. It is only insisted that a peremptory instruction should have been given. It is enough to say that the instructions were as favorable to appellant as it could have been asked. It is, however, complained that the substantial rights of appellant were prejudiced by the admission of the testimony of Elvis Lamb. This witness was introduced in chief for appellee for the purpose of proving by him a conversation with appellant's brakeman, Hamlet, a few days after the altercation between the latter and appellee out of which this action arose. It appears that Lamb arrested Hamlet under a warrant charging him with some offense connected with his treatment of appellee on appellant's train, and that Hamlet was fined in a police court for the offense charged, and it was on the day and at the time of the trial that the conversation in question took place. Lamb was permitted by the court to

testify as to that conversation, and he said Hamlet told him in substance if it was going to cost him anything he wished he had slapped a lung out of appellee, and that he started to slap a lung out of him, and was sorry he didn't do it.

This testimony was clearly incompetent. In Greenleaf on Evidence, volume 1, section 113, we find this statement of the law: "The party's own admissions, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act and part of the *res gestæ* that it is admissible at all, and, therefore, it is not necessary to call the agent himself to prove it; but whenever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it; and it follows that where his right to act in the particular matter in question has ceased the principal can no longer be affected by his declarations, they being mere hearsay." (Taylor on Evidence, volume 1, section 588.)

In C. & O. R. R. Co. v. Reeves' Adm'r, 11 Ky. Law Rep., 14, the above rule of evidence was considered, and in discussing it the court said: "The testimony of the witness as to the conversation with Hinch, the conductor, in which he is said to have admitted his neglect, was incompetent. * * * In this case the conversation occurred after the accident happened and after the conductor had left the station, when he was expressing his regret caused by the occurrence, and attaching blame to himself for the injury to the unfortunate man. If this conversation with the witness is to be regarded as a part of the *res gestæ*, then the agent, by his declarations, can bind his principal after as well as at the time the accident happened, or the transaction takes place." (L. & N. R. R. Co. v. Ellis' Adm'r, 17 Ky. Law Rep., 259; L. & N. R. R. Co. v. Webb, 99 Ky., 332; Parker's Adm'r v. Cumberland Tel. and Tel. Co., 25 Ky. Law Rep., 1391.)

It is insisted that the proof of the statements of the brakeman, Hamlet, were not prejudicial in view of his admissions made on the trial of this case of what he said to appellee. All that he then admitted saying to appellee was, if he were not a passenger he would slap a lung out of him, but in his conversation with Lamb the statement calculated to prove hurtful to appellant was that he started to slap a lung out of appellee, and was sorry he had not done so. The statement was a corroboration of appellee's testimony that he started towards him as if to strike him. We can well imagine that it must have had great weight in causing the jury to find for appellee. At any rate, it was not part of the *res gestæ*, and, therefore, incompetent, and the court should have excluded it. Appellee, upon the cross examination of Hamlet, might have laid the foundation for contradicting him by obtaining his denial of the statements attributed to him by Lamb, in which event Lamb could have been introduced in rebuttal to prove the statements, but even then it would have been the duty of the court to tell the jury that the statements as testified to by Lamb might be considered by them, not as substantive evidence, but only for the purpose of contradicting and discrediting Hamlet.

Because of the error of the court in admitting proof of the conversation

between Hamlet and Lamb the judgment is reversed and cause remanded for a new trial and other proceeding consistent with the opinion.

Whole court sitting.

GREER v. COMMONWEALTH.

(Filed February 21, 1905—Not to be reported.)

1. Malicious shooting—Self-defense—Instruction—Qualification—Brought on difficulty—In a prosecution against one charged with maliciously shooting another with a pistol with intent to kill, it is error in the court in giving an instruction on self-defense to qualify it by adding thereto: "Unless you believe from the evidence that the defendant brought on the difficulty," without explaining to the jury how or by what means the difficulty was brought on by the defendant.

2. Shooting in sudden affray—An instruction under Kentucky Statutes, section 1242, for shooting in a sudden affray, etc., should follow the language of the statute.

3. Separation of witnesses—Under section 601 of the Civil Code the trial court may, in its discretion, allow one of the witnesses for the Commonwealth to remain in the court room to aid the attorney for the Commonwealth during the trial.

R. L. Greene and M. H. Rhorer for appellant.

N. B. Hays and L. Mix for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Hobson.

Sarah Greer was indicted under section 1166, Kentucky Statutes, on the charge that she willfully and maliciously shot at Emma Calloway with a pistol with intent to kill her, and wounded Elizabeth McWilliams. The proof by the Commonwealth was to the effect that while Mrs. Calloway and Mrs. McWilliams, who were sisters, were walking along the street, in Middlesboro, and just as they got even with the side door of the house in which Sarah Greer was, she came to the door and made some remarks, and threw her pistol at Mrs. Calloway as if she were going to shoot her; that Mrs. McWilliams ran toward the pistol to prevent the defendant from shooting her sister and as she did this was shot in the arm; that Mrs. Calloway then grabbed the defendant and a struggle ensued between them over the pistol outside of the door.

On the other hand, the proof for the defendant was that she was sitting in the house talking to two other women, and was sitting farthest from the door when Mrs. McWilliams and Mrs. Calloway appeared at the door, and Mrs. McWilliams said: "Is Sarah Greer here?" That she answered yes, and Mrs. Calloway then rushed towards her, with a pistol pointed at her, saying: "What did you part me and my husband for;" that she jumped up and grabbed the pistol and Mrs. McWilliams grabbed her, and that in the scuffle the pistol went off and struck Mrs. McWilliams in the arm. The two women who were in the house with Sarah Greer, and one or two other witnesses, give testimony confirming her version of the transaction, while the other version of it, which was given by Mrs. Calloway and Mrs. McWilliams was confirmed by other witnesses on behalf of the Commonwealth.

The proof showed that the difficulty occurred in April, and that in the preceding August, while Mrs. Calloway, then unmarried and sixteen years old, was on a train, Sarah Greer came up and said she wanted to see the girl who was going with Lapps Calloway, and she would put her lights out. A man who was sitting by the girl made her go away. Calloway and his wife were married the following February, and in March he left her, and the intimacy between him and Sarah Greer seems to have continued. There was also proof that Sarah Greer, on the day of the shooting, had insulted Mrs. Calloway, and had followed her from place to place along the street.

On this evidence the court instructed the jury that if the defendant maliciously shot at Emma Calloway with intent to kill her, and wounded Elizabeth McWilliams, they should find her guilty, as charged in the indictment, and fix her punishment at confinement in the penitentiary at not less than one nor more than five years; or if the shooting was done in sudden heat of passion and sudden affray, they should fix her punishment at a fine and imprisonment in the county jail, as provided in section 1242, Kentucky Statutes. He also gave the usual self-defense instruction, but with this qualification: "Unless you believe from the evidence that the defendant brought on the difficulty, then the law of self-defense does not apply, unless the defendant in good faith abandoned the difficulty."

Under this qualification the jury might have thought that if the defendant brought on the difficulty by estranging the husband and wife, or by insulting Mrs. Calloway that day, or by following Mrs. Calloway as she had done, then the right of self-defense did not exist. This qualification of the self defense instruction has been often condemned by this court. (*Allen v. Commonwealth*, 9 Ky. Law Rep., 784; *Wilcoxon v. Commonwealth*, 15 Ky. Law Rep., 261.) There was no evidence that appellant abandoned the difficulty before the shooting. The court should have made this part of the instruction read thus: "Unless you believe from the evidence that the defendant brought on the difficulty by presenting a pistol at Emma Calloway, or aiming to shoot her with it, then the right of self-defense does not exist."

The second instruction given by the court does not follow the language of section 1242, Kentucky Statutes. The language of the statute is: "If any person shall in a sudden affray, or in sudden heat and passion, without previous malice and not in self-defense, shoot, etc."

The instruction should follow the language of the statute. None of the instructions given by the court presented to the jury the version of the transaction as proven by the defendant and all her witnesses. In addition to the instructions given the court should have told the jury that if Emma Calloway made an attack on the defendant with a pistol, and she in her necessary self-defense caught the pistol in her hand, and in the struggle between her and the defendant over the pistol it was accidentally discharged, wounding Mrs. McWilliams in the arm, they should find the defendant not guilty. It has been held by this court that section 601 of the Civil Code, as to the separation of witnesses, applies to criminal cases, but that the court is permitted in its discretion to allow one witness to remain in the court room for the purpose of aiding the Commonwealth attorney. (*Baker v. Commonwealth*, 20 Ky. Law Rep., 1778; *Gilbert v. Common-*

wealth, 28 Ky. Law Rep., 1094.) The ruling of the court on this subject will not be ground for reversal here unless the discretion is palpably abused. The record is very obscurely made out on this subject, but as the question may occur on another trial we will say that the Commonwealth attorney should be allowed to keep in the court room, if he so desires, either Mrs. Calloway or Mrs. McWilliams. We do not see that there was any error in the admission or rejection of evidence.

Judgment reversed and cause remanded for a new trial.

WILLIE v. EAST TENNESSEE COAL CO.

(Filed February 21, 1905—Not to be reported.)

Master and servant—Mining coal—Injury to servant—Knowledge of danger—Pleadings—Proof—In an action by a servant against the master for damages for injury sustained in mining coal, where it appears that the servant had full control of the room of the mine in which he was injured, working there alone at his own will, setting up props to support the roof when and where he pleased, and failed to allege or prove any duty on the master to inspect or keep the roof of the mine in safe condition, or that he did not know it was dangerous, he can not recover for an injury by some slate falling on him while so engaged at work.

Tye & Denham for appellant.

Sharpe & Siler for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by the appellant to recover damages for a severe injury received while performing labor in the mines of appellant. He merely alleged in his petition that he was digging coal for appellant at so much per ton; that he was "necking" a room in the mine when a large piece of slate from the roof of this neck fell upon and injured him; that his injuries were the result of the negligence of the appellee. He failed to allege that he did not know of the dangerous and unsafe condition of the roof of his neck. He also failed to allege that it was the duty of the appellee to inspect and keep this roof in safe condition, by props or otherwise. It is not shown by the petition whose duty it was to look after and keep in repair and safe condition this neck or room.

From the evidence, as it appears in the record, it is clear that it was the duty of the appellant to perform this duty. He was mining coal by the ton, commenced and ceased working at his own will, was working in the room alone, set up the props to support the roof when and where he pleased; and it is shown that he put up a prop under this piece of slate, which fell and injured him, and also that it was removed, but it is not shown who took the prop down. The proof does show that he knew it was down for some time before he received his injury. From all the facts proven it clearly appears that appellant had full and complete charge of that room or neck, and that the appellee did not fail to perform any duty that it owed to him while he was performing labor in this place.

In cases where death ensues by reason of the negligence of an employer, it is not necessary to allege in the petition that the deceased did not know of the danger incident to his employment; but in cases where a servant is suing his employer to recover for injuries sustained by reason of the negligence of the employer, it is incumbent upon the party injured to aver and show that he was not aware of the danger. (Lexington and Carter County Mining Co. v. Stephens, Adm'r, 104 Ky., 504; Williams v. L. & N. R. Co., 111 Ky., 824.)

We are of the opinion that the allegations of the petition did not support a cause of action in favor of appellant. If the petition had been sufficient, we are of the opinion that the appellant's proof failed to support a cause of action and the lower court did right in giving a peremptory instruction. (Ashland Coal and Iron Ry Co. v. Wallace, 101 Ky., 626 and 644, and the authorities therein cited.)

Wherefore, the judgment is affirmed.

LEXINGTON RAILWAY CO. v. O'BRIEN.

(Filed February 21, 1905—Not to be reported.)

1. Street railway—Ejection of passenger—Amended petition—Limitation—In an action by a passenger against a street railway company for damages for being assaulted and thrown from the car by its conductor after tendering his fare, an amended petition filed after the expiration of twelve months from the time of the alleged assault, explaining plaintiff's mistake in presenting an improper ticket for his fare, is not a new cause of action and not barred by the one-year statute of limitation.

2. Ejection of passenger—Unnecessary force—Liability—A street car conductor has a right to eject a passenger from the car for a failure to pay his fare, but he has no right to use more force than is reasonably necessary to do so, and if he uses more force than is reasonably necessary to do so the company is liable for the damages to the passenger resulting from such excessive force.

3. Instructions—Punitive damages—An instruction to the jury that if they believe from the evidence that the conductor in ejecting the passenger "was inspired to use excessive force, if he did so, by actual malice or ill will towards the plaintiff, the jury may, in their discretion, allow punitive damages," was more favorable to the defendant than it was entitled to. The court should have added after the word "plaintiff" the words "or wantonly or recklessly threw him from the car."

R. C. Stoll and Morton, Webb & Wilson for appellant.

Allen & Duncan for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Nunn.

Appellant prosecutes this appeal from a judgment of the Fayette Circuit Court rendered against it for \$2,000 in favor of appellee for personal injuries sustained by him as the result of being thrown from one of appellant's street cars by the conductor thereof.

The appellee received his injuries on the 6th of November, 1899. He alleged, in substance, in his petition that he had paid his fare and was a

passenger on the car, and that appellant's agents and servants in charge thereof unlawfully, willfully, maliciously and wantonly assaulted the appellee and pushed and threw him from the car to the street below; that by reason of this wrongful act he fell upon the street and received severe injuries. (Describing them.) The appellant filed an answer traversing the allegations of the petition, and in the second paragraph thereof alleged that appellee got on the car and the conductor asked him for his fare, when he produced a blue transfer ticket, of the form issued by the appellant company for its own convenience and that of its passengers, to be used within a definite time as shown by the punch mark on the margin of it, and to be used only by persons getting on appellant's cars at its transfer station, located on Main street, at the intersection of Cheapside. The ticket had printed upon it the following stipulations and agreements, which were accepted and assented to by all persons receiving the ticket, viz.: "Not good on route or after time punched; nor unless presented by the person to whom issued on first car passing transfer station for desired route, and will not be honored unless holder boards car at transfer station." That appellee was informed that this ticket was not good because he did not get on at the transfer station. He refused to pay his fare, and appellant's conductor ejected him from the car, using no more force than was necessary in doing so. Appellee traversed these allegations by a reply.

In the month of November, 1901, more than twelve months after he had received his injuries, he filed an amended petition as follows: "The plaintiff, John O'Brien, says that on the 8th day of November, 1899, that he boarded an East Main street car by mistake, thinking it was a Dewees street car; that he paid his fare, and when reaching Dewees street found his mistake; that the conductor on the Main street car gave him a transfer slip, properly punched, and directed him to transfer to the Dewees street car; that the plaintiff believing that he had the right to use this transfer slip in payment of his fare on the Dewees street car, boarded same and presented the slip to the conductor, who refused to accept it, and demanded an additional fare; that upon plaintiff's declining to pay same the conductor undertook to, and did, eject plaintiff from the car, and in doing so used far more force than was necessary, and pushed the plaintiff violently off of the car upon the ground, by reason of which he received the injuries complained of in his original petition."

Appellant traversed these allegations, and by a separate answer to the amended petition pleaded the statutes of limitations of one year as a bar. The appellant contends that by this amended petition appellee abandoned his original cause of action and set up a different and distinct cause of action other than that alleged in the original petition. The court sustained a demurrer to appellant's answer pleading the statute of limitations, and this is the first alleged error complained of.

We are of the opinion that the court did not err in this. The appellee's cause of action was for the injuries received by him at the hands of appellant's servants in charge of the car. The object of the amendment was for the purpose of correcting a mistake made in the original petition with reference to facts leading up to the time when he received his injuries. (Smith v. Bogenschultz, 14 Ky. Law Rep., 805.)

There were three trials of the case in the lower court. On the first one the jury failed to agree. On the second appellee recovered a verdict for \$5,000, which was set aside on motion of appellant. The last trial resulted as above stated. It appears from the evidence that the appellee, in good faith, believed that this transfer ticket entitled him to ride upon this car. When he presented it the conductor, without examining it, tore it to pieces and threw it upon the floor of the car, and demanded of appellee his fare. Appellee claimed that he had a right to ride upon this transfer ticket and undertook to explain to him what the conductor who gave him the transfer ticket had said. The conductor told him that the ticket was not good, and that he would have to pay his fare or he would put him off. Appellee told him that he could not put him off. The conductor stopped the car, grabbed appellee by the lapel of his coat, jerked him around so that his back was toward the steps of the car, and suddenly gave him a shove in the breast, which threw him off, and he fell on the macadam street, and was severely and seriously injured. There is no conflict in the evidence as to the extent of appellee's injuries, but appellant claims that his crippled condition is partly due to an injury he sustained about the year 1883, and complains because the court failed to give an instruction upon this hypothesis, and cites the case of *L. & N. R. R. Co. v. Kingman*, 18 Ky. Law Rep., 82. In that case the verdict was for \$12,000, and the court had instructed the jury, in effect, to disregard the evidence as to Kingman's physical condition caused by the injury received four years prior to the negligence complained of.

The court in the case at bar, in its instructions, confined the jury to giving appellee compensation for any injury done to him by any excessive force used by defendant's agent in ejecting appellee from appellant's car, if in fact such excessive force was used. The court, in giving its instructions, acted upon the idea that appellee's right of recovery, if any he had, was based solely upon the excessive force used by appellant's conductor in ejecting him from the car, and said, in effect, that if he used more force than reasonably appeared to him to be necessary to accomplish that purpose, then they should find for the appellee; otherwise, they should find for the appellant. Appellant does not complain of the court's action in this, but does complain of the instruction authorizing punitive damages. The court in submitting the question of punitive damages used this language: "And if the jury further believe from the evidence that said agent was inspired to use such excessive force, if he did so, by actual malice or ill will towards the plaintiff, the jury may, in their discretion, allow punitive damages, etc."

This instruction was more favorable to appellant than it was entitled to.

The court should have added after the word "plaintiff" the words "or wantonly or recklessly threw him from the car."

Without referring to the evidence on this subject in detail, we are of the opinion it authorized the court to submit this question to the jury.

Perceiving no error prejudicial to the substantial rights of the appellant the judgment is affirmed.

WARTH v. BALDWIN.

(Filed February 21, 1905—Not to be reported.)

1. **Passway—Adverse use—Presumption—Rebuttal**—While the continuous and uninterrupted use of a passway for fifteen years creates a presumption that the use was a matter of right, and adverse, such presumption may be overcome by proof that the use was permissive.

2. **Permissive use—Evidence**—Where the owner of land over which a passway runs erected gates and kept them in repair for his own use, and as a favor to his neighbors allowed them to use the gates and the passway, such use was permissive merely.

Lafferty & King for appellant.

W. S. Hardin for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Nunn.

For many years, and up to twenty or twenty-five years ago, there was an old dirt road or passway leading from Leeslick to Cynthiana, which ran between the farm now owned by appellant and appellee. At this time a turnpike was built between these two places, leaving the farm of appellant between the pike and this old dirt road. Soon after the building of the pike one end of this dirt road was closed and the other end of it was closed two or three years ago, leaving the only passway from appellee's farm to the pike through the center of the farm of appellant, which passway had been used for thirty or forty years. Persons using this passway through the farm of appellant had to go through gates on entering and leaving the farm, there being no lane or open way through it. Shortly before the institution of this action appellant removed these gates and closed the passway, and appellee, by this action, seeks to compel appellant to open same.

Appellee did not allege or prove any formal grant or dedication of this right of way, consequently her claim is by prescription alone. She proved a continuous and uninterrupted use of this way by herself and vendors, immediate and remote, for more than thirty years, but she did not prove by a single witness that this use of the passway was claimed and exercised as a matter of right or adverse to the owner of the land through which the way passed. She did not prove a single act or circumstance to indicate that the use thereof was as a matter of right.

This court has repeatedly decided that a continuous and uninterrupted use of a passway for more than fifteen years creates a presumption that such use was a matter of right and adverse, but in this case such a presumption has been overcome by the proof that the use was permissive. Appellant shows that he has owned this farm for only a year or so, but he shows that the prior owners of this land always regarded the use of this passway as merely permissive. They erected the gates and kept them in repair for their own use and as a favor to their neighbors, and received no aid whatever in making the gates, repairing them or in keeping the passway fit for travel. (Magruder v. Potter, 25 Ky. Law Rep., 1336; Clay v. Kenney, 24 Ky. Law Rep., 2084; Abel v. Payne, 23 Ky. Law Rep., 243; Patterson, &c. v. Griffith, 23 Ky. Law Rep., 834, Conyers v. Scott, 14 Ky. Law Rep., 784.) In this last case the court said: "To create the presumption of the grant of the

right of way the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant, or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it, without regard to the wishes of the owner of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege revokable at the pleasure of the owner of the soil."

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

FISHER v. WESTERN UNION TELEGRAPH CO.

(Filed February 21, 1905.)

Telegram—Error in transmission—Liability of company—Where, in an action against a telegraph company, the petition alleges that the plaintiff addressed a telegram to a lumber dealer, offering to sell him lumber at \$35 per 1,000 feet, and by negligence of the company the telegram transmitted read \$25 instead of \$35, and that the lumber was delivered to the purchaser before the mistake was discovered, whereby the plaintiff lost \$494.10, the difference in the price of the bill of lumber at \$25 instead of \$35 per 1,000 feet, for which difference the plaintiffs ask judgment against the company. The petition states a cause of action for which the company is liable.

J. B. Bennett for appellant.

Richards & Ronald and George H. Fearons for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by the appellant in the Greenup Circuit Court. A general demurrer to the petition was sustained; he declined to plead further, and a judgment was rendered dismissing the petition, from which he appeals.

The petition discloses the following facts: That appellant was engaged in the manufacture and sale of lumber in Webbville, Lawrence county, Kentucky, and that on the 11th of January, 1901, he delivered to the agent of the appellee the following message:

"Webbville, Ky., January 11, 1901.

"N. Fisher, Vermillion, Ohio:

"Will furnish bill at thirty-five net to me Cleveland.

"H. N. FISHER."

Meaning that appellant would sell and deliver 19,410 feet of lumber at Cleveland, O., at the price of \$35 per 1,000 feet net. It was alleged that this message was delivered to the sendee, N. Fisher, by the appellee, reading exactly as the above, except the word "twenty" was used instead of "thirty."

On January 12, 1901, N. Fisher wired the appellant as follows:

"Vermillion, O., January 12, 1901.

"H. N. Fisher, Webbville, Ky.:

"Get out Bradley bill as soon as possible. Will write.

"N. FISHER."

It was alleged that the expression "Bradley bill," used in this message, referred to the lumber quoted in the message sent by the appellant to N. Fisher, and that in pursuance of this message appellant at once shipped and delivered at Cleveland, O., to one Bradley, the number of feet referred to above; that he delivered this lumber to Bradley upon the faith of his message, and that he was to receive therefor the price of \$35 per 1,000 feet; that when he presented his bill to N. Fisher for payment he refused to pay more than \$25 per 1,000, and presented to this appellant the telegram reading \$25 per thousand; that this bill of lumber having theretofore been delivered by him to Bradley, upon the order of N. Fisher, he could not, and did not, collect from N. Fisher more than \$25 per 1,000 feet.

Construing the petition as a whole, it charged that appellant did not discover, and had no knowledge of the error committed by the appellee in the transmission and delivery of his telegram first herein copied, until after the delivery of the lumber to Bradley, at Cleveland, O. It was also alleged that by reason of the failure of the appellee to keep and perform its agreement and undertaking to properly and correctly transmit and deliver the telegram first herein named to N. Fisher, as it undertook to do, the appellant had been damaged in the sum of \$494.10, and he asked judgment against appellee for that sum.

The appellee insists that the action of the lower court in sustaining the demurrer was correct, and cites as the only authority sustaining this position the case of Postal Telegraph Cable Co. v. Schaefer, &c., 110 Ky., 907. In that case the mistake was discovered while the potatoes were in transit and before any delivery had been made to the consignees, and it was the duty of Schaefer to stop the potatoes in transit and to prevent their delivery to the consignees, if he could have done so by the exercise of ordinary care and diligence, and thereby have prevented as much loss as possible. In that case the court said, in substance, where a telegraph company negligently delivered a different message from that it was authorized to deliver, so that the sender was represented as offering goods at a lower price than that at which he had in fact offered them, and the supposed offer was accepted in ignorance of the mistake, there was no contract, and the sender was not bound to deliver the goods at the lower price. But in the case at bar there was a delivery of the goods before the mistake was discovered, and the delivery was to a third party, Bradley & Co., lumber dealers, in the city of Cleveland, O., with whom appellant had no contract or dealings. Whether or not appellant had any cause of action against N. Fisher, the sendee of the message, we do not decide, as that matter is not now before us. But even if he did have, he has refrained from incurring extraordinary expense in litigating the matter in a foreign State, and is seeking to recover from the party primarily liable by reason of its alleged negligence. We are, therefore, of the opinion that the lower court erred in sustaining a demurrer to appellant's petition.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

THE KENTUCKY CITIZENS BUILDING AND LOAN ASSOCIATION'S ASS'EE, &c. v. DAUGHERTY, &c.

(Filed February 21, 1905—Not to be reported.)

1. Building and loan associations—Insolvency—Assignment for creditors—Borrowing members—Where a building and loan association is insolvent and in the hands of an assignee for the benefit of creditors, a borrowing member will not be allowed to apply to his debt the amount paid by him to the association as dues on his stock, but as to these he stands as any other stockholder, and must take such dividends as are coming to the stockholders on the settlement of the affairs of the corporation.

2. Old companies—Consolidation—Effect—Where two old companies were consolidated and a new one formed which simply succeeded to their rights, took all their assets and liabilities, the renewal of a note to the new company in no way changed the situation of the parties or affected any of their rights, and the case must be determined as though the new corporation had continued to hold the note executed to the old association.

3. Accepting new stock—Election to continue as stockholder—The fact that appellee accepted the new stock and was credited thereon for the dues he had paid on the old stock, was an election to continue as a stockholder, and an acquiescence in the dues he had paid to the old company being applied as payments on the stock issued to him in the new. He was thus entitled to all the profits which might accrue to him as a stockholder in the new concern, and took the risk of whether there would be such profits.

James C. Poston, Burnett & Burnett and C. B. Blakey for appellants.

L. A. Faurest for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Hobson.

On November 26, 1892, G. W. Daugherty subscribed for ten shares of stock in the Kentucky Building and Loan Association, a corporation created under the laws of this State, and paid it \$10 admission fee, \$6 as dues on stock for the month of December, and \$6 as dues on stock for the month of January. On the 1st of February, 1893, he borrowed of the association \$300, and as part security therefor pledged eight shares of his stock, it being agreed that when these eight shares were paid up they should be cancelled and the loan treated as paid. From that time until July 30, 1894, he paid the association monthly \$8 for interest and premium on the loan, and \$6 for dues on the stock. On July 30, 1894, he borrowed from the association the further sum of \$200, and as part security therefor pledged his remaining two shares of stock under a like agreement that when the stock should be fully paid up it was to be cancelled and the loan treated as paid. From that time until February 1, 1897, he paid the association monthly \$10 for interest and premium on the loan and \$6 for dues on the stock. About February 1, 1897, the association, while it was a going concern, and another building and loan association, organized under the laws of this State, consolidated and formed the Kentucky Citizens Building and Loan Association. The Kentucky Building and Loan Association prior to February 1, 1897, assigned and transferred to the new company all of its assets, including the note for a \$1,000 held by it, and a mortgage which had been executed to

secure it. The Kentucky Building and Loan Association then ceased to have a corporate existence.

The new company credited Daugherty with \$100 on the principal of his debt and took a new note from him for \$900. The stock which he held in the old company was cancelled and the new company issued to him nine shares of its stock, and credited him thereon for the dues paid by him on the stock theretofore issued to him by the old company. From that time he paid to the new company monthly \$9 for premium and interest on the loan, and \$5.40 for dues on the stock for some months.

On July 2, 1897, the new association made an assignment for the benefit of its creditors, and subsequently this suit was brought by the assignee against Daugherty on his note for \$900, and to enforce the mortgage securing it. Daugherty pleaded usury, insisting that all of his payments to the old company, whether made on the stock or on the debt, should be applied to the debt, and that the \$900 note was to a large extent without consideration.

The court below sustained this view, and the plaintiff appeals.

It is unquestioned that the new association is insolvent. The rule is that where a building and loan association is insolvent and in the hands of an assignee for the benefit of its creditors, a borrowing member will not be allowed to apply to his debt the amount paid by him to the association as dues on his stock, but as to these he stands as any other stockholder, and must take such dividends as are coming to the stockholders on the settlement of the affairs of the corporation. Where the association is solvent a different rule applies. There the whole transaction is regarded simply as a borrowing of money, and all sums paid will be treated as paid upon the debt. It is conceded for appellee that he is not entitled to credit on his debt for the dues paid on the stock of the new company, and the question to be determined is whether the same rule should be applied to the dues paid on the stock of the old company. Where an assignee purchases a note in consequence of assurances from the obligor that it is good and will be paid, he will not be allowed to set up against the assignee defenses which would otherwise have been good against the assignor. (Smith v. Stone, 17 B. Mon., 171; McBrayer v. Collins, 18 B. Mon., 838.) The same rule is applied where after the assignment the obligor by a valid contract for indulgence, as by executing a new note to the assignee payable in the future, lulls the assignee into security, and thus causes him to lose his recourse. (Stone v. McConnell, 1 Duvall, 55; Beal v. Bethel, 8 Ky. Law Rep., 897; Burks v. Cheek, 11 Ky. Law Rep., 953.) The rule rests upon the ground of estoppel. It applies to usury as well as to other defenses; but it will not be applied where the assignee has lost nothing, and is in no worse situation by the renewal of the note. In the case at bar the two old companies were consolidated and a new one formed which simply succeeded to their rights, took all their assets, debts and liabilities and stood in their shoes. The renewal of the note to the new corporation in no way changed the situation of the parties or affected any of their rights, and the case must be determined as though the new corporation had continued to hold the note executed by Daugherty to the old association.

If the new association had continued to hold the old note and Daugherty had continued to hold his stock in the old corporation under an agreement.

of the parties that it should be treated as stock in the new corporation and have the same right, it could not be maintained that he is now entitled to credit on his debt for the dues on this stock. But the issuing of the new stock was merely for convenience. It was only a form of accomplishing what would have been done under the agreement suggested. When the two companies consolidated and formed a third, their stockholders were the stockholders in the new corporation. The issuing to them of new certificates of stock in the new company was only to give them due evidence of their rights. Daugherty was credited on this new stock for the dues which he had paid upon the old stock, and he accepted the stock thus credited. He was not entitled to credit on the stock for his dues and also to credit on the note for the same money. He might then, if he had so elected, given notice of withdrawal, and as the concern was then going, he would in this event have been entitled to credit on his debt for all that he had paid; but he did not elect to do this. He accepted the new stock and was credited thereon for the dues he had paid on the old stock. He thus elected to continue as a stockholder and acquiesced in the dues which he had paid to the old company being applied as payments on the stock issued to him in the new. He was thus entitled to all the profits which might accrue to him as a stockholder in the new concern, and took the risk of whether there would be such profits. When the company failed, his legal situation is in no effect different from what it would have been if no new stock had been issued to him, and he had still held his old stock as representing his interest in the new concern. His stock was reduced from ten shares to nine because his debt was reduced, and this saved him paying dues on one share of stock. He was not prejudiced by the reduction of his stock as he was credited on the nine shares for what he had paid on the ten old shares of stock. To make a distinction between the dues he paid the new company and those he paid to the old company on his stock under such circumstances, would be to disregard the substance and look only at the mere form of the transaction. The case falls squarely within the reasons for the rule refusing to allow a borrowing stockholder credit on his debt for the dues paid on his stock where he has given no notice of withdrawal before the failure of the association. The rule rests on the idea that if this were allowed the stockholders would not be placed upon an equality, and the borrowing stockholders might receive the greater part of the assets of the company, leaving little or nothing for the nonborrowing stockholders, and in some cases not enough to pay the creditors.

Where a stockholder has severed his connection with the company before its insolvency he stands as any other debtor; he is no longer a stockholder, and, therefore, a different rule is applied to him. But in the case before us Daugherty remained a stockholder and was entitled to share in all the profits which might have come to the stockholders, and every reason which would apply to other borrowing stockholders in the association applies to him.

We concur in the conclusion of the circuit court that Daugherty paid \$160, which was not credited to him. But it is equally clear that this money was paid for ten months' dues at \$6 a month and interest and premium on the loan at \$10 a month. He is entitled to credit on his debt for the ten pay-

ments of \$10 a month for interest on the loan, making \$100 as of date February 1, 1897. The circuit court properly added the cost of insurance paid by appellee to the amount of the debt.

Judgment reversed and cause remanded for a judgment as herein indicated.

HAGER, AUDITOR, &c. v. LOUISVILLE TITLE CO.

(Filed February 14, 1905—Not to be reported.)

Taxation—Franchise taxation—The appellee not being embraced by section 4077, Kentucky Statutes, and being authorized by its charter to transact an entirely different character of business from the companies named in that section, it is not subject to assessment for a franchise tax. The fact that it is required to set aside a part of its capital stock by the provisions of section 734, Kentucky Statutes, as a guarantee fund for certain investments, does not result in a special privilege. It is intended as a benefit to those to whom it has given guarantees, and is, therefore, to that extent a burden upon it.

N. B. Hays and Loraine Mix for appellants.

John C. Strother for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Paynter.

This appeal involves the question whether the Louisville Title Co. is or is not subject to the assessment for a franchise tax under section 4077, Kentucky Statutes. It was organized under the act of March 19, 1894, of which section 725 to 743 are a part. Section 4077 authorizes the imposition of a franchise tax on numerous corporations, including banks, trust companies, guarantee and surety companies and other like companies, corporations or associations, and also on other corporations or associations having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service. If the appellee is not one of the companies embraced by section 4077, then it is not subject to assessment for a franchise tax.

This court in *Louisville Tobacco Warehouse Co. v. Coulter*, 106 Ky., 165, held that corporations generally are not subject to a franchise tax; that a corporate existence is not a special or exclusive privilege; that the corporations subject to a franchise tax are such as enjoy a special or exclusive privilege or a franchise not allowed by law to natural persons or that perform a public service. It was held in *Ætna Insurance Co. v. Coulter*, 25 Ky. Law Rep., 193, that insurance companies do not enjoy special or exclusive privileges or perform a public service, therefore, were not subject to the assessment for a franchise tax. The appellee is empowered to contract, sue and own property. And by section 728, Kentucky Statutes, it is given the power: "To examine titles to real estate and chattels real; to procure and furnish information in relation thereto; to make and guarantee the correctness of searches for all instruments, liens or charges affecting the same, and to guarantee or insure bonds and mortgages, and the owners of real estate and chattels real and others interested therein against loss by reason of defects of title and incumbrances thereon."

The appellee is unlike a bank, as it can not receive deposits, sell exchange, etc. Neither is it like a trust company. In fact it is authorized to transact an entirely different character of business from the companies mentioned in section 4077. It is not necessary to continue to point out wherein a title company differs from other companies enumerated in the section. Its business is to examine titles to real estate and chattels real, and procure and furnish information in relation thereto and guarantee the correctness of its information, and to do other things enumerated in section 728. Any individual might carry on the same character of business as a title company. It was held in the *Ætna Insurance Co.* case that to insure lives and guarantee the fidelity of persons is not a special or exclusive privilege.

It is insisted for the Commonwealth that under section 784, which requires appellee to set aside a part of its capital stock as a guarantee fund for investment only in certain designated securities, and that the funds so set apart shall be maintained and applied only for the security and payment of losses and expenses incurred by its guaranties, and shall not be subject to other liabilities of the corporation, is a special and exclusive privilege. It is not a privilege which the appellee enjoys, but it is intended as a benefit or protection of those to whom the appellee has given guarantees. If it were a privilege, they might or might not set apart the fund. Instead of it being a privilege, it is a burden imposed. The law requires insurance companies to deposit securities with the State treasurer for the benefit of the policy holders. This was not regarded as a privilege enjoyed by the insurance companies when the court had under consideration the question of the liability of insurance companies for a franchise tax.

If tobacco warehouse companies do not perform a public service (as it was so held in *Louisville Tobacco Warehouse Co. v. Coulter*), then certainly real estate insurance companies can not be said to perform a public service. For the foregoing reasons we conclude that the appellee is not subject to the assessment for a franchise tax.

The judgment is affirmed.

HAGER, AUDITOR, &c. v. KENTUCKY TITLE CO.

(Filed February 14, 1905.)

Corporations—Created prior to Constitution—Old charter—Restrictions—Franchise tax—Under Kentucky Statutes, section 744, providing that "existing corporations transacting the business provided for in this act may * * * continue in business as though incorporated under this act," a title insurance company created by special act of the legislature prior to the adoption of the present Constitution, although acting under its old charter, is restricted to the exercise of powers specified in Kentucky Statutes, section 728, adopted March 19, 1894, and is not subject to assessment for franchise tax.

N. B. Hays and Loraine Mix for appellants.

Thos. W. Bullitt for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Paynter.

The question involved in this case is the same as was involved in the case of *Hager, Auditor v. Louisville Title Co.*, ante, 845, this day decided. The reasoning and conclusion of the court in that case are applicable to this case, except there is another question which we will here consider. The appellee was created by special acts of the legislature passed before the adoption of the present Constitution. It was given powers and privileges which real estate title insurance companies do not have under the act of March 19, 1894 (sections 725 to 743, Kentucky Statutes). By section 573, Kentucky Statutes, provisions of charters given by the legislature "inconsistent with the provisions of this chapter (chapter 82, Kentucky Statutes), concerning similar corporations" and "all powers, privileges and immunities" conferred by such charters "which could not be obtained under the provisions of this chapter," stood repealed on September 25, 1897. This chapter seems to have contained no provision for the incorporation of title companies, and the legislature seems to have been of that opinion, because the act of March 19, 1894, makes special provision for the incorporation of such companies. It is provided in that act, section 744, that existing corporations "transacting the business provided for in this act may * * * continue in business as though incorporated under this act." It is clear from the statute that real estate title insurance companies, although acting under charters previously given, are restricted to the exercise of powers specified in section 728.

It is argued for the Commonwealth that because the Kentucky Title Co. did not accept the present Constitution until 1903, it gets no benefit from the present legislation, and, therefore, it is estopped to deny that it continues to exercise the special privileges by its legislative charter and amendments thereto. If the position of counsel for the Commonwealth is correct, then a corporation which enjoyed privileges under legislative charters could keep them in force by failing to accept the Constitution, although the legislature had repealed the acts granting them. The effect of this would be to give corporations irrevocable privileges. We are of the opinion that the appellee is not subject to assessment for a franchise tax.

The judgment is affirmed.

FORD, &c. v. AZBILL, &c.

(Filed February 16, 1905.)

1. Land—Judicial sale—Misdescription of property—In an action to enforce a purchase-money lien on a dwelling house and lot and two adjoining lots, the pleading described all three of the lots, and the judgment directed the sale of the dwelling house and the two vacant lots adjoining, but in giving the boundary the decree omitted the boundary of the dwelling house lot. The commissioner sold all three of the lots, but in his deed to the purchaser he gave the boundary of the vacant lots and omitted the boundary of the dwelling house lot. Held—That in an action by the former owner to recover the dwelling house that the purchaser at such sale was entitled to hold the entire property.

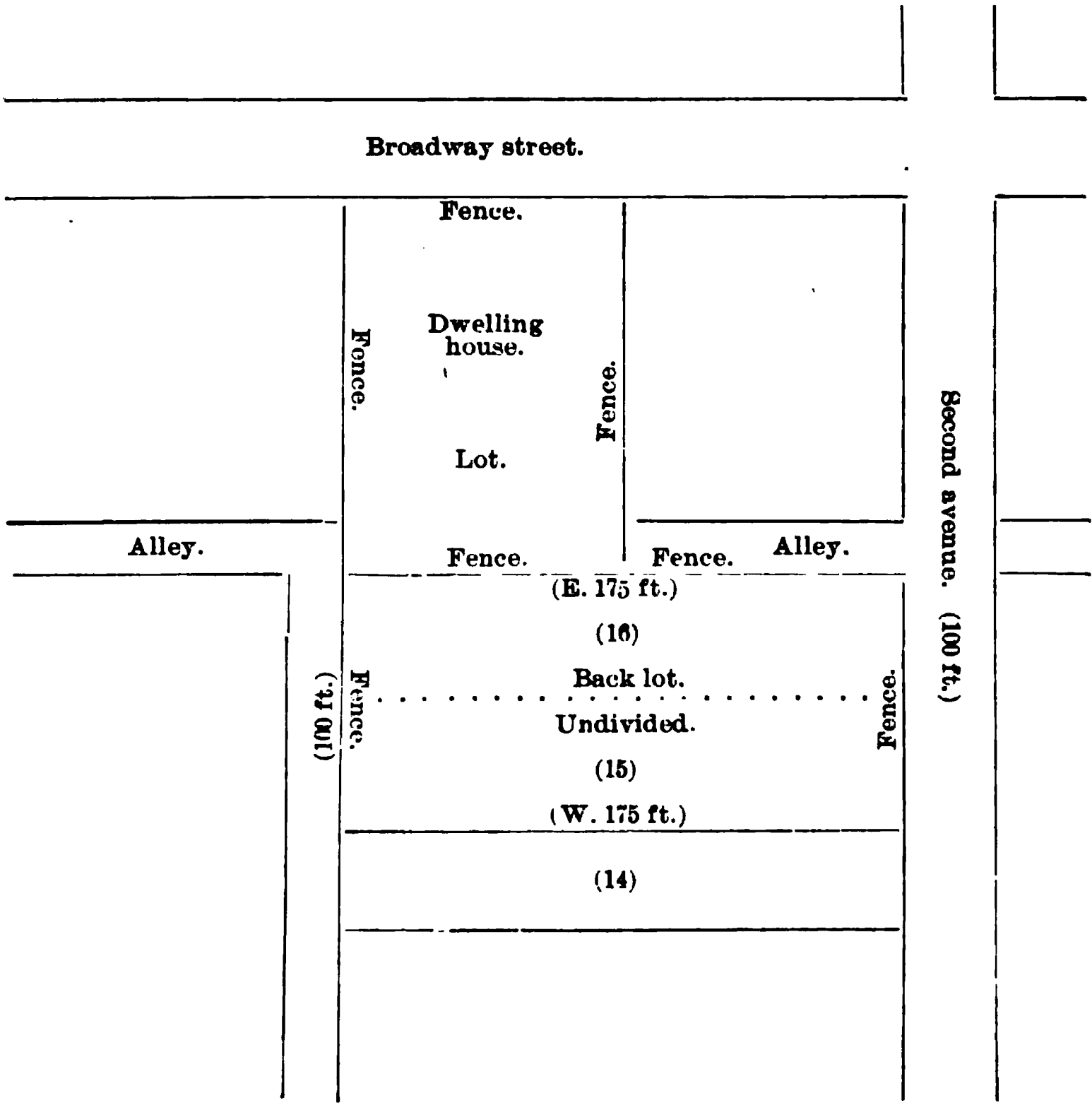
2. Ambiguous judgment—Reference to pleadings—Where the entry of a judgment is ambiguous or so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and other proceedings, and if with this light thrown upon the entry its obscurity is

dispelled and its intended significance made apparent, the judgment will be upheld and carried into effect as it was intended.

Pendleton & Bush for appellants.
B. R. Jouett and J. Smith Hays for appellees.
Appeal from Clark Circuit Court.
Opinion of the court by Judge Paynter.

The appellee, Mattie J. Azbill, purchased of Mrs. Alice M. Owen a house and lot situated in Massie's Addition of the city of Winchester, and two vacant lots adjoining the house and lot, but in the rear of it. The consideration was \$500 cash and two notes, each for \$1,150. One note was assigned to James Flannigan, who instituted an action thereon to enforce the purchase-money lien. The petition correctly describes the property sought to be sold, and the deed which Mrs. Owen had made to the appellee was filed and made part of the petition, also correctly describes the property. The court also adjudged that the property could not be divided without materially impairing its value. The following plot shows the situation of the property:

In the judgment enforcing the lien the property is described as follows:



"It is further adjudged that said debt is a lien on a certain dwelling house and two lots, situated in the city of Winchester, Ky., and in Massie's Addition to said city, which are bounded as follows: 'Beginning at a stake in the margin of Second avenue, corner of alley; thence in line of said alley E. 175 feet to an alley; thence 100 feet in line of alley to a stake, corner of lot No. 14 in said Massie's Addition; thence in line of said lot W. 175 feet to a stake in the margin of Second avenue (thence S. with avenue) 100 feet to the beginning.' Said lots are Nos. 15 and 16 in said Addition, and that the plaintiff has a right to enforce said lien on said house and two lots, the dwelling being located on one of said lots."

The property was sold by the commissioner of the court under that judgment. Flannigan became the purchaser. The sale was confirmed and a deed made in accordance with the description contained in the judgment. The appellee, under the purchase at the decretal sale, took possession of the house and lot and the two vacant lots and remained in possession of them about five years when this action was brought to recover the house and lot upon the claim that it was not sold at the decretal sale, but only the two vacant lots. The question here for our determination is whether the entire property was sold, or only the two vacant lots. The property brought \$1,800 at the sale. The vacant lots were worth about \$250 at that time. There was a lien upon all the property for the purchase money. There was no dwelling upon lots Nos. 15 and 16. The judgment recites that there is a lien upon the dwelling house and two lots; that the plaintiff has the right to enforce the lien on "said dwelling house" and two lots; that "said dwelling house and two lots" be sold. The commissioner was directed to advertise the dwelling house and lots. The report of the sale shows that the "dwelling house and two lots" were appraised at \$1,650. The order confirming the report of sale describes the property as a dwelling house and two lots, situated on East Broadway. It is further recited that Flannigan was the purchaser of the dwelling house and two lots. The parties to the action, including the appellee, supposed the entire property was sold, because the possession of it was taken under the judgment, and the appellee recognized that the entire property had been sold, because she never questioned it until the appellants discovered what they supposed was a defect in the description of the property, and sought to have the appellee correct it. The property sold was on East Broadway, and unless the lot upon which the dwelling was situated was sold the property could not bind on East Broadway. No dwelling house could have been sold unless the lot fronting on East Broadway was included in the sale. The appraisers could not have valued a dwelling house unless it was the one fronting on East Broadway. No dwelling house was ordered sold or sold under the judgment unless it was the one on the lot fronting on East Broadway. It is impossible to believe that the plaintiff would have paid \$1,800 for the vacant lots, worth only \$250, when a lien existed upon the entire property. The difficulty arises from the fact that the judgment after giving a general description of the property ordered sold, it then, in giving the metes and bounds, describes the vacant lots. Counsel for the appellee in the opening statement of their brief say: "This record presents a strange case. It might correctly be styled a

request that the Court of Appeals take from appellee her property, and give it to the appellant."

In this view we do not concur. The question is whether the court will allow the appellee to take from the appellant property which she actually purchased, and in which the appellee for many years acquiesced, and give it to the appellee, because of an error in the description of it. No one could examine this record without reaching the conclusion that the entire property was intended to be sold, and the appellee and the purchaser both understood that it was sold. The deed and petition correctly describe the property upon which the lien existed, and which was ordered sold. The fact that the court adjudged that the property upon which the lien existed could not be divided without materially impairing its value, shows that the court did not intend to order sold only part of it. To sustain the contention of the appellee we would have to hold that the court only intended to sell part of the property instead of the whole. To do this we would disregard the declaration of the court that the entire property was intended to be sold. To ascertain what the court meant we must take the whole judgment, not merely part of it. We must take that recitation in the judgment that the dwelling house is ordered sold; that the lot fronts on East Broadway. In that connection we must consider that the court adjudged that the whole property in lien should be sold. This court in *Hildebrand, &c. v. Bunnschu, &c.*, 19 Ky. Law Rep., 430, said: "It is true that the description of the land, as set out in the judgment sale and conveyance relied on by appellees, is in some respects essentially different from that in the deed to Andree, yet the deed to Andree was referred to in said suit and other known objects, hence it is manifest that the intention was to sell and convey the identical land sued for."

In section 3, volume 1, 2d edition, *Black on Judgments* says: "It remains to be stated that in case of ambiguity a judgment should be construed with reference to the pleadings, and when it admits of two constructions, that one will be adopted which is consonant with the judgment which should have been rendered on the facts and law of the case."

Again, in section 123, it is said: "The rule for construction of ambiguous judgments is clearly stated by the Supreme Court of Kansas in the following language: 'Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled, and its intended significance made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms.' This rule also applies to decrees in equity. The meaning and effect of a decree may, in case of doubt, be ascertained by reference to the bill and other proceedings, particularly when these are referred to in the decree itself. And for this purpose recourse may be had to duly attested stipulations between the parties. * * * A mistake apparent on the face of a judgment, amounting to an impossibility, will not destroy the judgment if enough remains, after it is corrected or eliminated, to disclose the actual judgment rendered."

We have reached the conclusion that the appellant is entitled to hold the entire property.

The judgment is reversed for proceedings consistent with this opinion.

SMITH v. PARK'S ADM'R.

(Filed February 22, 1905—Not to be reported.)

R. H. Tomlinson and R. L. Greene for appellant.

W. I. Williams and R. L. Davidson for appellee.

Appeal from Garrard Circuit Court.

Chief Justice Hobson delivered the following response to petition for rehearing:

Under the facts of this case it was a question for the jury to determine whether the services of appellant were gratuitous or not. The rule in this State is, if there is any evidence supporting the plaintiff's claim it must be submitted to the jury.

If the witness, Higginbotham, lives within twenty miles of the courthouse, his deposition can not be read on another trial unless he is physically unable to attend, or some other reason is shown which, under the Code, makes the deposition admissible in lieu of the oral testimony of the witness. Appellant can only recover so much of his claim as accrued within five years next before the institution of his action. The action was not brought within one year after the qualification of the personal representative, and, therefore, the provisions of section 2628, Kentucky Statutes, do not apply.

Petition overruled.

STEELE v. STEELE.

(Filed February 22, 1905—Not to be reported.)

B. H. Young and M. W. Ripy for appellant.

J. E. Conkling for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Chief Justice Hobson delivered the following response to petition for rehearing:

Under the evidence we see no reason to disturb the judgment of the chancellor on the question of alimony.

Petition overruled.

**CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO. v.
TAYLOR.**

(Filed February 22, 1905—Not to be reported.)

Railroads—Damages—Evidence—The pleadings support the judgment rendered in this action, and the only question presented is whether the court erred in refusing a peremptory instruction which was asked by appellant. Upon the facts it was manifest that the question was for the jury to determine whether proper care was exercised for the protection of the passengers, and the jury having found in favor of appellee, and it not appearing excessive, the verdict will not be disturbed.

John Galvin and C. H. Rodes for appellant.

Robert Harding for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant did not except to any ruling of the court in the admission or rejection of evidence or in the giving or refusing of instructions. The pleadings support the judgment, and the only questions that are presented by the record are whether the court erred in refusing to instruct the jury peremptorily to find for the defendant and whether the verdict of the jury is so palpably against the evidence as to indicate passion or prejudice on the part of the jury.

The facts of the case are that the appellee left Cincinnati about 8 p. m. for Junction City on appellant's fast train. Her husband came with her to the station, and being unable to find seats for her, the nurse and children in the day coach, took them back to the sleeper and left them there when the train started. She had with her two children, one five years and the other two years old, who soon went to sleep. When they were about ten miles out the sleeping car conductor came around. She gave him the railroad tickets and a \$5 bill, offering to pay for the section in which she was sitting to Junction City. He refused to take the money and said that she would have to get out and go into the day coach. She then offered to pay for the section clear through to Chattanooga. This he refused to accept, and still insisted that she should get out. She then made three trips to the day car in search of seats, but the seats were all taken and people were standing in the aisles. She returned to the sleeper and soon after this the railroad conductor came along. She explained to him the situation and he told her to stay right where she was; that he was running that train. He had not been gone long when the sleeping car conductor came back and again told her she must get out. She then went in search of the railroad conductor, whom she found in the stateroom of the sleeper. He took her and the children into the stateroom and told her to stay there. Not long after this the sleeping car conductor told her she must leave the stateroom, and ordered the porter to move them out. The porter took up the oldest child, the nurse took up the younger, and appellee followed. When they got to the door of the day coach it was locked. The porter put the child down on the platform and went back, as he said, to get a key, leaving appellee, the children and the nurse on the platform, the vestibule or side door being open. The train was pulling out from Georgetown and running about fifty miles an hour. Appellee caught hold of the door knob with one hand and caught hold of the child with the other. They stayed there waiting for the porter to return. When they reached Lexington three drunken men got on the platform where they were, who made signs that alarmed her very much; one of them had a big stick, and finally seized her by the arm. She stood there crying for a while, and in desperation, when the train had reached Nicholasville, hearing nothing from the porter or the other railroad men, she took the nurse and children into the smoking room of the sleeper. Soon after this the drunken men appeared at the door of the smoking room, again making signs which alarmed her, and set her to crying again. After a while she got hold of another porter and got the railroad conductor, who

then told her to stay in the smoking room, and he looked for the drunken men. She stayed in the smoking room until she got to Junction City.

We think it manifest on these facts that the question was for the jury whether the railroad people used proper care for the protection of the passengers. The jury found in favor of the plaintiff, and fixed the damages at \$900. While the evidence of the railroad people in some particulars contradicted the evidence of the plaintiff, we are not prepared to say that the jury were not warranted in believing her version of the transaction, and if they did, we can not say that the verdict for \$900 was so excessive as to warrant us in disturbing it on the ground that it indicates passion or prejudice.

Judgment affirmed.

COLBURN, &c. v. GIVIDEN.

(Filed February 22, 1905—Not to be reported.)

Conveyances—Descent—Construction of will—Where property was conveyed to Wilson and wife for life, with remainder to their child or children, but if no child or children be alive at their death, then to the heirs of Wilson, the children took a defeasible fee, conditioned upon their being alive at the death of the survivor of their parents; and if at that time no child of the marriage should be alive then the property is to descend to the collateral heirs of Wilson. Therefore, upon the death of Wilson, his widow and children could not convey the property.

Pryor, Sapinsky & Castleman for appellants.

Thos. A. Barker for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Barker.

The question for adjudication upon this record is the title of Mary T. Colburn and her children to a lot of ground in Louisville, Ky. The facts are agreed. William A. Kliessendorf and wife conveyed the land in question to Victor P. Wilson and his wife, Mary T. Wilson (now Mary T. Colburn), and the proper construction of this deed constitutes the question here involved.

The granting clause of the deed is as follows: "William A. Kliessendorf and wife, Mary E. Kliessendorf, do by these presents hereby grant, bargain, sell and convey unto the said parties of the second part for and during their mutual lives with the remainder in fee unto their child or children, if any there be alive at the time of the deaths of the said parties of the second part; and in case of no such child or children then being alive, unto the heirs at law of said Victor P. Wilson."

By the habendum clause it is provided: "To have and to hold the same unto the said parties of the second part for and during their natural lives, with the remainder in fee to their children, if any such be alive at the time of the deaths of the said parties of the second part, and in the event of no such children then being alive, unto the heirs at law of said Victor P. Wilson."

• Victor P. Wilson died intestate, domiciled in Jefferson county, Kentucky in April, 1898, leaving surviving him his widow, Mary T. Wilson, and three children, Allie May, Victor G. and Raymond Wilson. Raymond Wilson died intestate, unmarried, and without issue. The widow, Mary T. Wilson, has since intermarried with C. P. Colburn. Allie May and Victor G. Wilson, the children, are now of lawful age and unmarried. They and their mother entered into a written contract to sell the land in question to the appellee, Sadie Elizabeth Gividen, who, after examination of the title, declined to accept it; whereupon this action was instituted. Upon the trial of the case, the facts being agreed of record, the chancellor held that the vendors did not have a merchantable title to the property, and dismissed their petition. From this judgment the record comes up on appeal.

The conclusion of the chancellor is undoubtedly correct. The language of the deed leaves no room for construction as to the title of the grantees. Victor P. Wilson and his wife were given a life estate, "with remainder in fee unto their child or children, if any there be alive at the time of the deaths of the said second parties; and if there be no such child or children then alive, the property is to descend unto the heirs at law of Victor P. Wilson." The children took a defeasible fee in remainder conditioned upon their being alive at the death of the survivor of their parents, and if at that time there should be no child or children of the marriage alive, then the property is to descend to the collateral heirs of Victor P. Wilson. It can not be said now, considering the uncertainty of life, who will take the property at the death of Mrs. Colburn, the time fixed in the deed for the fee-simple estate to become indefeasible, and no judgment now rendered can bar the rights of those not now before the court who may be entitled at that time to the property. This being true, the appellee, Sadie Elizabeth Gividen, can not receive by the deed tendered her a title to the property in question which may not be hereafter defeated by the possible death of both of the children before that of Mrs. Colburn.

Judgment affirmed.

USHER v. TYLER, &c.

(Filed February 23, 1905—Not to be reported.)

Limitation of actions—The plea of the statute of limitations as to the first item in this action must prevail, the period provided for by statute having elapsed and no reason sufficient to stay it having been shown. In the matter of the set-off relied upon in an amended answer it is apparent from a careful reading of the record that the due bills referred to were mere memorandums of money loaned and were settled in adjusting the accounts between the parties, and, therefore, the chancellor's finding will not be disturbed.

Ed. Thomas for appellant.

Robbins & Thomas for appellees.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Barker.

This is an action by appellant, F. M. Usher, to recover of the appellee,

James P. Tyler, surviving partner of the late firm of H. D. Murphy & Co., the following sums alleged to be due him: Eleven hundred and thirty-three dollars and thirty-five cents, with interest from April 18, 1895; \$100, with interest from February 10, 1896; \$250, with interest from April 2, 1889, and \$250, with interest from February 21, 1890. The indebtedness as to the first sum is alleged to have arisen by reason of appellant's having been the surety of H. D. Murphy & Co. on their note to a Mrs. Ford for the sum of \$1,000 borrowed money, which, with accrued interest, amounting in all to \$1,133.35, appellant paid on the 18th day of April, 1895. The other three sums are evidenced by due bills bearing dates as above given.

The first item of the alleged indebtedness, \$1,133.35, may be disposed of as follows: Assuming it to be true (although denied by appellee) that appellant, as surety of H. D. Murphy & Co., paid the note in question for his principals on the 18th day of April, 1895, the plea of the five years' statute of limitations interposed by appellee must prevail, the action having been commenced on the 18th day of September, 1901, and no reason sufficient to stay the running of the statute being shown. In his testimony appellant admits that he was in error as to appellee's being indebted to him on both the notes for \$250 each, and withdrew his claim as to one of them. This leaves, of the cause of action originally set up, the two due bills, one for \$250 and the other for \$100, undisposed of.

By an amended answer, filed on the 18th day of May, 1903, the appellee pleaded a set-off for goods sold and delivered and money advanced to appellant by H. D. Murphy & Co., with a balance due and unpaid amounting to something over \$5,000. The validity of this set-off is placed in issue by an amended reply and counterclaim; and upon these questions of fact the parties and their witnesses deposed at great length. As this set off, and what is called the counterclaim thereto, involves the dealings between the firms of H. D. Murphy & Co. and Usher & Berry, and their mutual accounts against each other, covering a period of nearly ten years, amounting to over \$100,000, containing many hundreds of items, and all long since barred by the statute of limitations, we shall not enter into any further discussion of their merits than to say that we are convinced by a careful reading of the record that the two due bills left undisposed of were mere memorandums of money loaned, understood at the time to be settled in adjusting the mutual accounts of the respective parties, and that we are not willing to reverse the chancellor's conclusion, that they should be so settled and adjusted.

This conclusion renders it unnecessary to examine into or decide whether or not the \$250 note, evidencing money loaned for the purpose of prosecuting an action to recover what is called in the record the "Blythe estate," in which the parties to the transaction had only a speculative interest to a part of the proceeds of a favorable judgment, was or not champertous and void under chapter 15 of the Kentucky Statutes.

The judgment is affirmed.

ABRAMS v. COMMONWEALTH.

(Filed February 23, 1905—Not to be reported.)

K. Criminal law—Larceny—Breaking into and entering outhouse—Where the evidence upon the trial of appellant was to the effect that an outhouse

of Mrs. Hunt was broken into and three chickens were stolen therefrom; that in order to get into the outhouse the door had to be unfastened, and that it was securely fastened the night before the breaking into it, after it was seen that all the chickens were there; that the chickens were found the following morning in the hands of a merchant who had bought them from Heisler, who bought them from appellant, the jury was authorized to conclude that appellant was guilty.

2. Same—Instructions—An instruction which in substance told the jury that if they believed the house of Mrs. Hunt was feloniously broken into, and chickens taken therefrom by a person other than appellant, yet if they believed that at the time appellant was present aiding and abetting such other person in the commission of the crime, they should find him guilty, while inaptly worded was the law, and was authorized by the evidence.

8. Same—Competency of evidence—Upon the trial of appellant the Commonwealth proved by Felty that he had a conversation in the jail with appellant, in which the latter told him he got the chickens from Worthington, but did not know where the latter got them, and that witness after this asked Heisler where appellant told him he got them and Heisler said that he told him from Worthington. Held—That this was incompetent, but instead of being prejudicial to appellant was beneficial to him, as it tended to contradict Heisler who testified that appellant told him the chickens were his.

W. T. Cole for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Settle.

Appellant was indicted in the Greenup Circuit Court for unlawfully and feloniously breaking and entering into an outhouse, belonging to and used in connection with the dwelling house of Mrs. Belle Hunt, and stealing therefrom three chickens of value, the property of Mrs. Hunt. The trial resulted in appellant's conviction at the hands of the jury and the fixing of his punishment at confinement in the penitentiary for two years.

He now insists that he should have been granted a new trial by the lower court, and that the judgment of conviction should be reversed by this court upon the following grounds:

1st. That the trial court should have given a peremptory instruction directing his acquittal because there was no evidence upon which to base a conviction.

2d. That the court erred in instructing the jury.

8d. That incompetent evidence was admitted in behalf of the Commonwealth to his prejudice.

An examination of the bill of evidence contained in the record convinces us that the first contention is unsustained. The facts as proved by the Commonwealth were in brief that three of the chickens of Mrs. Hunt were stolen from her chicken house in a building adjoining her dwelling house, Saturday night, in April, 1904; that the person by whom they were stolen had to unfasten the door of the building in which they were confined to get them, which had been securely fastened by Mrs. Hunt the evening before, after seeing that all her chickens were there. On the following morning at an early hour she discovered the theft of the chickens, and though the door

of the building from which they were taken had been refastened by the thief, the gate through which he entered the lot from a back alley was left open by him, and the fastening broken. The mere raising of the latch of the door, and the opening of the door, and thereby effecting an entrance to the chicken house, was a sufficient breaking under the indictment, if done with the felonious intent and accompanied by the taking of the chickens as charged.

Mrs. Hunt, on the following day, found and identified the three stolen chickens in the possession of Peters, a merchant, who had bought them of one Heisler, to whom they were sold by appellant at 8 o'clock that morning (Sunday). In selling the chickens to Heisler appellant said they were his, and that he had brought them from his father's farm Saturday evening. He sent John Worthington to tell Heisler that he had the chickens for sale, and Heisler found him in his (Heisler's) shed with the chickens, ten in all; in this number were Mrs. Hunt's three chickens. Heisler paid appellant the money for the chickens at the rate of 30 cents apiece.

Appellant was in the town of Greenup Saturday afternoon and night, and at that time, as well as on Sunday, appeared to have been somewhat under the influence of whisky, but not so much so as to obstruct his locomotion or becloud his mind. His defense was that Worthington stole the chickens, and that he, without knowledge of that fact, assisted him in the sale to Heisler. He likewise made some effort to account for his whereabouts on Saturday night, and thereby establish an alibi. The evidence in his behalf did not, however, so situate him as to prove that he could not have had an opportunity to commit the crime with which he was charged, and as to Worthington's connection with it the evidence conduced to prove that he was *particeps criminis*, and his absence at the trial and bad reputation tended to confirm this theory. The jury no doubt came to the conclusion that he and appellant were equally guilty, and we see no reason to dissent from that view of the case.

Instruction No. 8, which is the one complained of by appellant's counsel, is inaptly worded, but we do not think the jury could have failed to understand it, or that it was in any sense prejudicial. It in substance told the jury, and such was its meaning, that though they might believe from the evidence, beyond a reasonable doubt, that the house of Mrs. Hunt was feloniously broken into and her chickens taken by a person other than appellant, if they further believed from the evidence, beyond a reasonable doubt, that appellant was at the time present, and that he aided, advised or abetted such other person in the commission of the crime, they should find him guilty. This was undoubtedly the law, and the giving of the instruction was authorized by the evidence in the case. The other instructions given by the court are not complained of, and they seem to be free from objection.

The alleged incompetent evidence complained of by appellant is found in the testimony of Nando Felty, by whom the Commonwealth proved that he had a conversation with appellant while in jail, in which the latter told him he got the chickens from John Worthington, but did not know where Worthington got them, and that the witness (Felty) afterwards asked Heisler where appellant told him he got the chickens, and Heisler said appellant told him he bought them of Worthington. This testimony was mere

hearsay and incompetent, but instead of being prejudicial to appellant, it was beneficial to him, as it tended to contradict Heisler's statement that appellant told him the chickens were his, and had been brought from his father's farm. We fail to see why the attorney for the Commonwealth should have introduced this statement of Felty, or understand why it should have been objected to by appellant. We are of the opinion that appellant received a fair trial, and that no error was committed by the lower court to his prejudice.

Wherefore, the judgment is affirmed.

VOKES v. EATON, &c.

(Filed February 23, 1905.)

1. Private corporations—Act authorizing—A statute authorizing the formation of private corporations for mining, manufacturing, mechanical, quarrying and other industrial pursuits, and "for any other lawful business," is sufficiently broad to include the incorporation of the National Bond and Security Co. for the purposes indicated by its title.

2. Placing bonds—Terms and conditions endorsed thereon—Unlawful business—Where an incorporated investment company, in placing its bonds on the market, printed on the back thereof the terms and conditions on which they are issued and upon which the "entire scheme" of the company is based, it can not be said to be doing an unlawful business because it was bottomed on a scheme that did not "finance out," but proved to be unprofitable.

Stricklett & Arnett for appellant.

Myers & Howard and Furber & Jackson for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Hobson.

The National Bond and Security Co., incorporated under the laws of South Dakota, was engaged in the business of selling certain installment bonds, with coupons attached, and appellant invested \$1,600 therein. The appellees were officers and stockholders of the corporation; that company on the 16th of April, 1901, was merged in the National Bond and Security Co., a corporation formed under the laws of the State of West Virginia, and this company shortly thereafter became insolvent and was placed in the hands of a receiver. Appellant then filed this suit against the appellees, charging that his money had been procured to be paid to the corporation by means of false and fraudulent representations which the defendants made as its officers, and which they knew, or ought to have known, were untrue; that the corporation was not legally organized, but was a mere dummy, and that the scheme upon which the bonds were based could not finance out; that this he did not know, and that the defendants knew this, or ought to have known it. The circuit court sustained a demurrer to the petition, and the plaintiff appeals.

The question of the validity of the incorporation of the company turns upon the statute under which it was formed, which is as follows: "Purposes of private corporations—Private corporations can be formed by the volun-

tary association of three or more persons upon complying with the provisions of this chapter, for the following purposes, namely: Mining, manufacturing, mechanical, quarrying, and other industrial pursuits, and for any other lawful business; the construction and operation of railroads, wagon roads, irrigation ditches; for seminaries, colleges, churches, libraries, benevolent, charitable and scientific associations; banks of deposit and discount (but not of issue) for loan, trust and guaranty associations: Provided, however, That no insurance company shall be incorporated under the provisions of this act, except by the voluntary association of seven or more persons."

It is insisted for appellant that the words "and for any other lawful business" must be construed as referring to such corporations as have been above named, and that the rule of *noscitur a sociis* should be applied. The difficulty of this is that after naming mining, manufacturing, mechanical and quarrying purposes, these words are added, "and other industrial pursuits." If only things like those which were named were meant this would have been covered by the words "and other industrial pursuits," and the words "and for any other lawful business" would have been unnecessary. Taking the statute as a whole, we are satisfied that the words were used in their broad and natural sense, otherwise corporations for a great many purposes for which corporations are formed in nearly all the States could not be formed under the statute, such as title companies, mercantile companies, holding companies, and the like. The statute was evidently intended to be broad in its operation from the fact that so many things are named, and the words "and for any other lawful business" are added to make it include things other than those named.

It is not claimed that the proper steps were not taken to form the corporation under the act. It is simply claimed that the act does not authorize the incorporation of such a company. This, we think, can not be maintained in view of the broad language of the act. But it is also insisted that the company was not incorporated for a lawful business, and that, therefore, it does not come within the act. This position is based upon the idea that the bonds issued by the company contain a scheme which was in and of itself illegal. The bonds are as follows:

**"THE NATIONAL BOND AND SECURITY CO.,
OF COVINGTON, KY., U. S. A.**

"By this certificate, does hereby promise to pay Chas. E. Vokes, or order, upon maturity or redemption of any of the ten coupons hereto attached, an amount equal to the total deposits made hereon, together with interest at the rate of six and two-thirds per cent. for the period of ten years from the date of the said maturity or redemption. The terms and conditions printed on the back hereof and in the application herefor are a part of this contract as fully as if recited herein. In testimony whereof, the said National Bond and Security Co. has, by its duly authorized officers, signed, sealed and delivered this contract, this the 28th day of January, in the year of 1901.

(Signed) "GEO. H. DAVISON, President.

(Signed) "IRVING J. ISBELL, Secretary."

The terms and conditions printed on the back of the bonds or contracts are as follows, to wit: "Terms and conditions—This contract is issued to

the holder hereof in consideration of a membership fee of \$10 and an installment of \$5, and thereafter a monthly installment of 50 cents on each unredeemed coupon until the redemption or maturity. The monthly dues of this contract are due and payable without notice on the first day of each month hereafter, and must be paid on or before the 10th of each month or a fine of 10 cents on each coupon will be assessed, and if not paid on or before the 25th of each month this contract shall become null and void and the holder thereof shall forfeit all payments hereon to the several funds.

"Redemption of coupons—Any coupon of this contract shall be surrendered to the company at any time when called for by the redemption, and the holder thereof shall receive for such surrender the guaranteed redemption value at the month in which the redemption shall occur.

"The monthly redemption shall occur after the close of business of the last day of each month, except where the last day falls on a legal holiday, in which case they shall occur on the day following, and shall be determined as follows:

"Seventy-five per cent. of the redemption fund shall be used each month to pay off one coupon on each contract in numerical order, commencing the first month with the first coupon on contract No. 1, and so on in like manner until the first fund is exhausted; commencing each succeeding month with the first coupon on the next contract, following the last one paid the previous month, continuing in like manner each month until the entire list has been passed through, and then reverting back to the lowest numbered coupon in force, and pay off the second coupon on each contract in force in like manner. Twenty-five per cent. of the redemption fund shall be used each month to pay off one coupon on each contract in numerical order, commencing each month with the lowest number contract in force.

"Cash surrender or withdrawal value—At any time after thirty-six monthly installments have been paid hereon, the holder hereof may file a withdrawal and receive an amount equal to the total amount previously contributed to the reserve fund plus the estimated earnings to the date of withdrawal, the estimated earnings to be paid from the general redemption fund for the month in which the withdrawal is made, the reserve contributions to be drawn from the reserve fund.

"Loan value—At any time after thirty-six monthly installments have been paid hereon, the holder hereof may, upon depositing this certificate as security, borrow from the reserve fund an amount equal to the cash surrender or withdrawal value hereof, at the month in which the loan was made.

"Paid-up value—At any time after thirty-six monthly installments have been paid hereon, the company will, at the request of the holder hereof, in writing, issue a paid-up certificate for the redemption value (in the month issued), due in ten years from the date thereof and payable out of the reserve fund.

"Extended payments—At any time after thirty-six monthly installments have been paid hereon, the company will voluntarily extend the payments due hereon for such a time as the contributions previously made to the reserve fund will pay, and when all the money in the reserve fund, as above stated, has been exhausted, the holder hereof shall pay in cash the installments then due, together with the amounts charged against this certificate

as extended payments of this contract shall become null and void, and the holder hereof shall forfeit all payments hereon.

"Death benefit—In the event of the death of the holder hereof the legal representatives may avail themselves of either of the following options:

"1st. Continue the installments until redemption or maturity.

"2d. Surrender the same within ten days after the death of the holder hereof, and (upon the satisfactory proof of the death being furnished to the company) receive the redemption value for the month in which the death occurred, same to be paid from the general redemption fund at the next redemption following the filing of satisfactory proof.

"Maturity—The coupons on this contract will mature at any time when the contributions in the reserve fund plus the reserve accumulation shall equal the total deposits hereon, with interest at the rate of six and two-thirds per cent. for a period of ten years: Provided, however, That 118 monthly installments have been paid hereon.

"Division and distribution of funds—Monthly installments when paid are apportioned each month to the several funds, as follows:

"Sixty per cent. to the redemption fund, and is used each month in retiring coupons.

"Twenty per cent. to the reserve fund, which must be deposited each month in such bank or trust company as may be decided on by the board of directors, and can not be drawn for any purpose, except to mature coupons, cash surrender extended payments and for granting loans to be supervised by a committee of three appointed by the board of directors.

"Twenty per cent. to the current expense fund, and shall be used for the expense of the company in conducting its business.

"All moneys received on account of fines, transfer fees and interest earnings on reserve loans shall be placed to the credit of the reserve fund.

"Transfers—This certificate will be transferred on the books of the company, when all the requirements are complied with, and a fee of \$1 is paid, and the form hereon has been properly filled out.

"FINANCIAL SCHEDULE.

"No. of months.	Cost of Coupon.	Estimated earnings.	Return value.	C. S. or loan value.	Extended payment.
"1	\$1 50	\$1 00	\$2 50		
"2	2 00	1 33	3 33		
"3	2 50	1 67	4 17		
"4	3 00	2 00	5 00		
"5	3 50	2 33	5 83		
"6	4 00	2 67	6 67."		

It is insisted for appellant that the ordinary investor would never understand the terms of the bond, and that by the scheme some must be enabled to obtain more than they had invested, while others receive less; that it was impossible that all the contract holders should receive the same return upon the money invested, and that the scheme, taken as a whole, was deceptive and gotten up for the purpose of getting the unwary into a trap.

Whether the scheme would finance out under ordinary conditions we need not consider. There was nothing of a lottery about it. The coupons were

chosen for redemption in their numerical order, beginning one month where they left off the month before. How much the fund would be swelled by lapses no one could tell. If there was a greater profit on the coupons which were redeemed than the company could reasonably make on the money in its hands, this profit went to the investors on their investment, each bond being taken in its numerical order each month. To say that this was an unlawful business because it was bottomed upon a scheme which would not finance out would not be to give the words of the statute their ordinary meaning. A majority of the schemes for which corporations are formed it is said do not finance out. The cases relied on for appellant are cases where a receiver was applied for or some similar remedy was sought, and the court in using the language relied on by appellant was simply determining that the appointment of the receiver was essential for the protection of the persons interested. Some of the cases were direct proceedings by the State to annul the charter of the corporation or revoke its charter. In such cases a very different question is presented from that in the case before us. The court may well appoint a receiver for a corporation when the further conduct of its business would only make its condition more disastrous, and in a proceeding by the State to revoke the charter of a corporation great effect could be given the fact that the tendency of the business was to deceive investors into making an investment which must necessarily disappoint them. But many insurance companies have failed because the scheme of premiums proved insufficient to pay the losses, and it was perfectly apparent in the end that this was the necessary consequence of the false principles on which the scheme was based. Thousands of co operative companies have gone under, and even yet the proper basis of co-operative insurance is imperfectly understood. A few years ago the boom fever spread all over the country and numbers of corporations were formed in which thousands of dollars were invested in chimerical schemes which soon failed. But in none of these cases, so far as we have known, were the stockholders or the officers of the company held liable to the investors upon such allegations as are before us. The plaintiff does not charge that the defendants misrepresented any fact to him. Their entire scheme was set out in the bonds which he bought and accepted. It is not charged that there was any misrepresentation as to the terms of the bonds, or that he was misled in any way as to the contract. It is only charged that the defendants represented that the scheme would finance out, when they ought to have known it would not do so. This was a mere matter of opinion on which the plaintiff could exercise his judgment as well as they. Puffing by sellers is universal, and every one buys knowing that he must exercise his own judgment on matters of opinion expressed by the seller.

Judgment affirmed.

SMITH, &c. v. SMITH, &c.

(Filed February 28, 1905.)

1. Wills—Devise to son and his children—T. J. Smith by his will, among other devises, made the following: "I also give to my wife 100 shares of bank stock in the Farmers National Bank of Richmond, Ky., at her death

this property goes to my son and his children. I also give to my wife during her life 140 acres of land upon the Irvine pike, and known as the Collins place, at her death to my son and his children." Held—That the word "children," as here used, must be construed as a word of purchase and not of limitation, and by the will the testator's wife was given the "bank stock" and "Collin's place" during her life, and at her death to the testator's son for his life, and at his death to his children.

2. Bank stock—Liquidation of bank—The fact that the bank in which the stock is held will soon go into liquidation, or have to be reorganized because of its charter, can not affect the rights of the remaindermen or other parties in interest. In case the bank should go into liquidation the chancellor may, upon the petition of the parties in interest, direct the reinvestment of the proceeds in other good securities, to be held for the benefit of the devisees as provided in the will.

C. H. Breck, T. J. Smith and W. S. Moberly for appellants.

R. E. Roberts for infant appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by the appellants, T. J. Smith, Fanny Smith, his mother, and Elise Bennett Smith, his wife, against the appellees, Jesse Cobb, Elise Smith and T. J. Smith, Jr., the two last being the infant children of T. J. Smith and Elise Bennett Smith, and represented by a guardian ad litem, upon whom summons was served for them. The object of the action is to obtain a construction of certain clauses of the will of T. J. Smith, Sr., deceased, who was the father of the appellant, T. J. Smith, and the husband of the appellant, Fanny Smith. The will in question was duly admitted to probate by the Madison County Court soon after the testator's death, which occurred in Madison county, where he was at the time domiciled. The will is as follows:

"I, Thomas J. Smith, of Richmond, Madison county, Ky., being of sound mind and disposing memory, do make and declare this to be my last will and testament.

"1st. I wish all my debts and funeral expenses promptly paid.

"2d. I give to my wife, Fanny Smith, during her life, the home place where I now reside, on Lancaster avenue, and all the household and kitchen furniture, with all its belongings, except what belongs to my son; also my father's and mother's portraits, which I give to my son. I give to my niece, Rosa May Moberly, my large silver ladle, an heirloom given me by my mother, and at the death of my wife this property to go to my son or his heirs. I also give to my wife the storehouse, situated on Main street, in Richmond, Ky., during her life, and at her death to go to my son and his heirs. I also give to my wife 100 shares of bank stock in the Farmers National Bank, of Richmond, Ky. At her death this property goes to my son and his children. I also give to my wife during her life 140 acres of land upon the Irvine pike, and known as the Collins place. At her death to my son and his children. I give in trust to Curtis F., W. S. and Thomas J. Moberly, for the benefit of my sister, Bettie, for her sole and separate use and benefit, free from the debts of her husband, 110 or 112 acres of land,

situated in Fayette county, Kentucky, at her death this property goes directly to her children or their heirs.

"I give in trust for the benefit of my son and his children to S. S. Parks, W. W. Watts and Thomas J. Moberly, my farm on the Barnes Mill pike, known as the Old Major Turner farm, containing about 840 acres of land. I also give to the same parties, in trust for the benefit of my son and his children, fifty-four acres of land recently bought by me from J. Stone Walker, on the Barnes Mill pike. I also give to the same parties, in trust for my son and his children, ninety acres of land on the Lancaster pike, known as the Best land.

"I also give my son absolutely eight acres of land in Kansas City, Mo., in East Bottom, in the old city limits, in Kansas City, Mo. I give to his wife, Elise Bennett Smith, my corner lot on the summit recently purchased by me from W. B. Smith.

"I give in trust to Thomas J. Smith, for the benefit of Thomas Jones, my body servant, the house and lot where he now lives, fronting on Catholic Church street fifty feet and running back to Stofer's line. I charge Thomas J. Smith's estate with 100 bushels of coal to be delivered each and every Christmas to the said Jones during his life. I also charge Thomas J. Smith's estate with all county, town and State taxes each year during said Jones' life. At the death of said Thomas Jones this house and lot is to go directly to the children that he now has and may have by his present wife, Mary.

"I give to Tabitha White \$50 in cash, to be paid in six months after my death.

"All the residue of my estate of every kind and character, real, personal or mixed, all choses in action, to my son, Thomas J. Smith, and I appoint him my sole executor, without bond, to act for me and in my stead, and sign all necessary papers and deeds the same as if I were living.

"I do not desire or want an inventory taken of my estate.

"I direct a monument (shaft) in the center of my father's lot, in the Richmond cemetery, to cost \$800, with the name of my father and mother only inscribed thereon.

"In winding up my estate I desire no public sale to be made of anything belonging thereto.

"Having the utmost confidence in my son's honesty and integrity, he knowing that my prosperity commenced with my father and mother, if he should die without legal heirs of his body, I desire him to give my sister's children all the property that he may be seized with at his death, but first to provide amply for his wife, in whom I am well pleased. I direct my executor at my death to pay my wife \$500 in cash.

"This January 28, 1899.

"THOMAS J. SMITH.

"Test—

"W. W. WATTS,

"J. STONE WALKER,

"H. C. JASPER."

It appears from the agreed facts found in the record that the 140 acres of land on the Irvine pike, called the Collins place, has, since the death of the

testator, been sold and conveyed by his son, T. J. Smith, and his widow, Fanny Smith, to the appellee, Jesse Cobb, and since sold by Cobb to one Theodore Wilson, who declined to accept the deed thereto tendered him by Cobb on the ground that the son and widow of T. J. Smith, Sr., were by the will devised only a life estate each, successively, in the land, with remainder in fee to the son's children. Consequently that the deed from them to Cobb only conveyed him the life estate of each in the land, and the deed tendered by Cobb to Wilson could convey only such title as Cobb had received from his grantors.

It is insisted for appellants that the will gives the "Collins place," to the testator's widow for life, with remainder in fee to their son, and that the bank stock also given the widow for life by the will at her death goes to the son absolutely. And this court is asked to say what interest, if any, the children of appellant, T. J. Smith, take in the "Collins place" and bank stock under their grandfather's will.

The chancellor from whose judgment this appeal was taken decided that the "Collins place" and the 100 shares of bank stock are given by the will to the widow of the testator for her life, and at her death to his son, the appellant, T. J. Smith, for his life, and at the latter's death to his children. The provisions of the will which we are asked to construe are as follows:

"I also give my wife 100 shares of bank stock in the Farmers National Bank of Richmond, Ky., at her death this property goes to my son and his children.

"2d. I also give to my wife during her life 140 acres of land on the Irvine pike, and known as the 'Collins place,' at her death to my son and his children."

The word "children," as here used, must, we think, be considered as a word of purchase and not of limitation, and must always be so regarded when so used in a devise, unless there is some qualifying word or phrase in juxtaposition thereto to show that it is intended as a word of limitation; or unless in some other part of the will there are words or phrases which explain that the testator used the word "children" in the latter sense.

In *Carr v. Estill*, 16 B. Mon., 245, a will devised to "Mary Baker Didlake and her children" a farm. At the time of making the will Mary Baker Didlake had no children, but one was thereafter born to her. It was held by the court that she took under the devise an estate for life, and the child the remainder. In *Mifford v. Dougherty*, 11 Ky. Law Rep., 157, it was held that a devise to a son and to his children, heirs of his body, gave the son a life estate, with remainder to his children. The court said the qualifying words "heirs of his body" did not make the word "children" a word of limitation.

In *Frank v. Uuz*, 91 Ky., 621, it is said: "It may be regarded as settled law in cases where the devise is by the husband directly to his wife and children that the wife takes a life estate only, unless there is something else in the will showing a contrary intention." (*Weaver v. Weaver*, 92 Ky., 491; *Koenig, &c. v. Kraft, &c.*, 87 Ky., 95; *Poland v. Chiam*, 23 Ky. Law Rep., 1072.)

In *Adams v. Adams*, 20 Ky. Law Rep., 655, the language of the devise was: "It is my will and desire that all the income of my estate, real, per-

sonal and mixed, I give and bequeath to my daughter, Martha Jane Adams, and her children in their exclusive right." The contention of the appellant was that the wife took jointly with her children in fee one-third each, but the court, Judge Hazelrigg writing, said: "We think the intention of the testator was to give the whole estate to his daughter for life, and at her death to her children. This seems to be the trend of the modern decisions on the use of the words here involved."

An examination of the authorities relied on by counsel for appellant will show that they do not conflict with those from which we have quoted. They are cases in which from the use of qualifying words, or from other parts of the will, it was made to appear that the word "children" was used exclusively in the sense of heirs, and consequently as a word of limitation. By the will in this case, except the \$500 in money directed to be immediately paid her by the executor, all that the testator devised to his wife was for life only. He, however, made a distinct difference in the devises to his son, that is, certain real estate was devised to him absolutely. Other similar property was by the will put in the hands of trustees for his and his children's benefit, but as to the property in which the testator's wife was given a life estate by the will and the son the remainder, in the matter of the residence property on Lancaster avenue, and the store house in Richmond, the devise was to the wife for life, with remainder to the son and his "heirs." In respect of the bank stock and 140 acres of land known as the "Collins place" the devise was to the wife for life, with remainder to the son and his "children."

It would perhaps do no violence to the intention of the testator to hold that the word "heirs" in the other clauses of the will was used in the sense of children. If so it would limit the son's interest in the storehouse and residence property to a life estate as in the case of the "Collins place" and bank stock. Though the chancellor seems to have thought otherwise, as he held that T. J. Smith, the testator's son, was given by the will the remainder in fee in the store house and home place. In other words, it was held that as to that property the children of T. J. Smith took no interest whatever under the will. It may be that the word "heirs" was used by the testator in that connection advisedly, and for the purpose of excluding his son's children from any interest in that property, but if so it but strengthens the conclusion that the word "children" was also used advisedly, and for the express purpose of investing them with just such interest in the Collins place and bank stock as was adjudged them by the chancellor in his construction of the will.

It follows from what has been said that the deed from T. J. and Fanny Smith to Jesse Cobb conveyed only the life estate of each of the grantors in the Collins place; and further, that the children of T. J. Smith have under their grandfather's will the same interest in remainder in the bank stock that they have in the Collins place. The fact that the bank in which the stock is held will soon go into liquidation, or have to be reorganized because of its charter, can not affect the rights of the remaindermen or other parties in interest. The same limitations and conditions may be placed upon a devise of personal estate as upon a devise of real estate. (*Miller v. Simpson*, 8 Ky. Law Rep., 518.) And if the bank in which the stock is held should

go into liquidation, the chancellor may, upon the petition of the parties in interest, direct the reinvestment of its proceeds in other bank stock, good securities or other property, to be held for the benefit of the devisees as provided by the will. As we are not asked in the briefs of counsel to construe those parts of the will which relate to the devises in regard to the storehouse in Richmond and the residence property on Lancaster avenue, we do not pass upon the same.

Judgment affirmed.

WARD, &c. v. PUTNAM, &c.

(Filed February 21, 1905.)

Wills—Signature of testatrix—Words following signature—Validity—Kentucky Statutes, section 4820, provides that no will shall be valid unless it is in writing, with the name of the testator subscribed thereto, and section 468 provides that when the law requires any writing to be signed, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing. Where a testatrix in making her will placed her signature at the close of the substantial provisions of the document, and the writing as signed is sufficient to effectuate the intention of the party signing it, the statute is substantially complied with although there may be words following the signature which are unessential to the validity of the will.

Robert C. Simmons for appellants.

Ernst, Cassatt & McDougall for appellees.

H. B. Mackoy for guardian ad litem.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Hobson.

Margaret E. Ward requested Robert C. Simmons, as her attorney, to prepare her will, which he did, and sent it to her. Afterwards, and before the will was signed, she requested him to write a codicil to it; this he did, and returned the paper to her. After her death the paper was offered for probate in the county court, and was admitted to probate in part. An appeal was taken from the judgment of the county court, and in the circuit court a judgment was rendered rejecting the entire paper on the ground that it was not subscribed by the testatrix, and this is the only question to be determined upon the appeal. The entire paper is in these words:

"I, Margaret E. Ward, of Covington, Ky., being of sound mind and memory, do constitute this instrument of writing my last will and testament.

"1st. I direct the payment of all my just debts and funeral expenses first out of my estate.

"2d. I will and devise to my daughter, Margaret E. Putnam, my house and lot on Eighth street, Covington, situated immediately east of the property deeded by me to my daughter, Sarah F. Ward, and adjoining the Donnelly property, to have and to hold for and during her natural life, with remainder to her children, if any she may have living at the time of her death, or their descendants; if none, then said property is to go as follows:

One-third to my daughter, Sarah F. Ward; one-third to my son, Edward W. Ward, and one-third to my daughter, Eliza B. Miller.

"8d. One-third of the rest and residue of my estate of whatever character, whether real, personal or mixed, or wherever situated, I will and devise to my daughter, Sarah F. Ward, for and during her natural life; at her death said interest to be disposed of in the manner provided in the section next following to my children, Edward and Eliza, and their children.

"4th. All the rest and residue of my estate not hereinbefore devised shall be divided into seven equal parts, and one of such equal parts shall be received by my son, Edward W. Ward, one part by my daughter, Eliza B. Miller, one part by Roberta Ward, one part by Logan Ward, one part by Anna Ward, one part by Ward Miller, and one part by Virginia Miller. Should any one of said grandchildren die before me without issue, his or her part shall go to his or her brother, or his or her sister or sisters, or sister, Mrs. R. D. Ward, and brother, as the case may be.

"MRS. R. D. WARD.

"I hereby appoint Dr. Vincent Davis, of Louisville, Ky., and my son, Edward W. Ward, executors of this my will, and empower them to sell and dispose of my property in order to effect the division herein provided for, if, in their opinion, a sale by them would be expedient or desirable.

"In witness whereby I hereunto sign my name this the 19th day of April, 1902, in the presence of,

....."(Signature).

"Subscribed and attested by us at the request and in the presence of the testatrix, and in the presence of each other.

"(Witnesses sign here).

"E. M. PUTNAM,
"C. B McVOY."

"As a codicil to the above will I direct that any one contesting this will, or any of its provisions, shall forfeit any and all devises or bequests therein made to them, or any of them, and that such person shall have no interest in my estate, or any part thereof.

"In witness whereof I have hereunto set my hand this the — day of —, 1902, in the presence of,

....."(Sign here).

"Subscribed and attested by us in the presence of and at the request of the testatrix, and in the presence of each other.

"(Witnesses sign here.)"

The paper is in the handwriting of Mr. Simmons. There is no question as to the authenticity of Mrs. Ward's signature, or of the signature of the attesting witnesses, or that she signed the paper and had it witnessed as her will. By section 4820, Kentucky Statutes, no will shall be valid unless it is in writing, with the name of the testator subscribed thereto, and by section 468, Kentucky Statutes, when the law requires any writing to be signed, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing.

In *Soward v. Soward*, 1 Duvall, 126, it was held that under the statute the subscription was insufficient if there was an unnecessary and unreasonable blank space between the conclusion of the will and the signature of the

testator or the names of the witnesses. On the other hand, the rule is that in the attestation of wills a substantial compliance with the statute is sufficient, and if the object and intent of the statute is reached without a violation of its express language nothing more is required. (*Upchurch v. Upchurch*, 16 B. Mon., 102; *Porter v. Ford*, 82 Ky., 191; *Flood v. Pragoff*, 79 Ky., 607.)

The county court admitted to probate the first, second, third and fourth clauses of the will, or so much thereof as is above the signature of the testatrix, rejecting the last clause of the will and the codicil. Mr. Simmons wrote on the paper when he sent it to the testatrix the words in pencil, "Signature," "Witnesses sign here," and "Sign here," as they appear on the paper. It is insisted for appellees that the right to make a will being purely statutory, the entire instrument is invalid as Mrs. Ward did not subscribe the paper at the end thereof. In support of this position we are referred to the cases of *Sisters of Charity v. Kelley*, 67 N. Y., 409, and *Wine-land's Appeal*, 118 Pa. State, 87.

On the other hand, it is insisted for appellants that the intention of the testatrix should be given effect if possible, and that to this end she should be presumed to have signed the paper at the conclusion of the part which she desired to make her will, and that the omitted clause simply appointed an executor, and did not affect in any way the disposition of her property made by the will. In support of this view we are referred to the case of the estate of John McCulloch, Myr. Prob. (Cal.), 76; *Woerner on the Law of Administration*, section 89; *Schouler on Executors*, section 8; *Baker v. Baker*, 51 Ohio State, 217; *Brady v. McGrosson*, 5 Redf., 481; *Matter of Acker*, 5 Dem. (N. Y.), 19.

Some question is made on the ground that the signature of the attesting witnesses is separated from the signature of the testatrix by a small space; but this space being taken up by the written matter which Mr. Simmons put there, the fact that the witnesses signed as they did being clearly explained on the face of the paper, the rule laid down in *Soward v. Soward* does not apply, as here there was no unnecessary space left. So the case comes to this: Can that part of the instrument which is above the signature of the testatrix be probated as her will?

It will be observed that the testatrix signed the paper in fact twice; once in the next to the last line of the fourth clause and once at the close of the fourth clause. It will also be observed that the entire disposition of her estate contemplated by her is above her signature. The only thing following is the appointment of the executors, with power to sell the property for division, if necessary. The fact that she did not sign the codicil we do not regard as material. If she had signed the will at its close, the fact that she did not sign the codicil, which is a separate instrument, would have in no manner affected the validity of the will. As to whether or not the placing of the signature above the end of the will invalidates the entire instrument seems to depend upon the effect of the part following the signature. If the part following the signature is a dispositive clause which adds to or revokes previous bequests, the whole instrument is invalid; but if the clause added below the signature does not affect the disposition of the estate, it is usually

held not to invalidate the instrument. (Page on Wills, section 186; Schouler on Wills, section 8.)

As to whether the instrument is invalid where the clause below the signature merely appointed an executor the authorities are conflicting. In New York and Pennsylvania the whole instrument is held invalid. Thus in *Sisters of Charity v. Kelly*, 67 N. Y., 409, the will was signed thus:

"Likewise, I make, constitute and appoint Edward McCarthy to be executor (J. Kelly) of this my last will and testament, hereby revoking all former wills by me made.

"In witness whereof, I have hereunto subscribed my name and affixed my seal, the 24th day of July, 1874, in the year of our Lord one thousand eight hundred and sixty.

"Witnesses:

"EDWARD McCARTHY,

"DANIEL VAN CLIEF."

The entire paper was held invalid, though the opinion was in the first place rested on the ground that it did not appear that the testator had intended the words "J. Kelly" as his signature to the will. The same rule was followed in *Wineland's appeal*, 118 Pa. State, 37.

In *Glancey v. Glancey*, 17 Ohio State, 154, it was held that the instrument was invalid because the part above the signature alone did not contain the testator's whole purpose or scheme for disposing of his property, and that to probate only that part of the instrument would not be to effectuate his intention. In the subsequent case of *Baker v. Baker*, 51 Ohio State, 217, following the signature of the testator were these words: "My sister-in-law is not required to give bond when probated."

The sister-in-law referred to was by the will made executrix. It was held that this addition did not invalidate the will. The court among other things, said: "While, however, the dispositive part of a testamentary instrument should be above or precede the signature of the testator, words or clauses written before the will is executed and below the place where the testator and witnesses signed may be excluded from probate, and yet not invalidate the entire instrument. * * * The testator by his will had appointed his sister in law executrix. If nothing had been said as to bond, the omission would not have rendered the will inoperative. And a request in the body of the will that an executor be not required to give bond would be subject to the discretion of the court admitting the will to probate, which might grant letters testamentary with or without bond, as it might seem expedient. And when granted without bond, the court might, at any subsequent period, upon the application of any party interested, require bond to be given."

In *Brady v. McCrossom*, 5 Rodf., 431, which is cited with approval in the above case, it was held that the appointment of the executor not being essential to a will, a subsequent clause naming an executor would not invalidate the will, and probate was allowed of all except the appointing clause. In that case the court said: "It was the ancient rule that no paper in the nature of a will would be valid as such unless it contained the appointment of an executor, but such long since ceased to be the law. The statute makes provision for the appointment of an administrator with the will annexed,

where no executor is named in the will. I think the will properly executed as such, and that it should be admitted to probate."

The same conclusion was reached in McCulloch's estate, Myr. Prob. (Cal.), 76. While at common law the appointment of an executor was essential to a will, under our statute it is entirely unnecessary. The court may not only require him to give bond although the will otherwise provides, but may remove him and appoint another, and every power conferred by the will upon the executor may be exercised by the administrator with the will annexed. (Kentucky Statutes, sections 3891, 3892.)

The power to sell and dispose of the property in order to effect the division provided by the will if, in the opinion of the executors a sale by them would be expedient or desirable, in no way affected the disposition of the estate. The discretion of the trustees would be controlled by the court of chancery, and a sale may be made, if necessary, by the chancellor without this clause of the will. So the omission of this clause from the will in no way affects the disposition of the estate as proposed by the testatrix. The instrument above her signature contains her will, and the probate of this much of the paper will effectuate her intention as fully as the probate of the whole paper would have done. In *Flood v. Pragoff*, 79 Ky., 607, these words followed the signature: "Louisville, Ky., April 8, 1877."

It was held that this addition did not invalidate the paper. There are numerous other cases to the same effect. (Page on Wills, page 206.) We see no reason why the same principle should not apply to additions which in nowise affect the disposition of the estate contemplated by the testator; and where the intention of the testator is plain and may be carried into effect without violating the words of the statute it must be done. To hold that an addition which appoints an executor invalidates the entire instrument is to ignore the change made by our statute in the common-law rule and to allow a thing which is not essential to the will to invalidate it. Our statute applies not only to wills, but to all contracts or other writings which the law requires to be signed by the party thereto, and by the same act it is provided that its provisions are to be liberally construed with a view to promote its objects. (Kentucky Statutes, section 460.) If the instrument before us had been drawn as a deed and had been signed, acknowledged and delivered by the grantor, with a clause following the signature appointing trustees to divide the property, would it be maintained that the deed was void? Or, if after a surety signed a note complete in itself, would it be maintained that he was not bound because other words were added below his signature not essential to the obligation? The same rule must be applied to wills as to other documents required by the statute to be signed. Where the signature is placed at the close of the substantial provisions of the document and the writing as signed is sufficient to effectuate the intention of the party signing it, the statute is substantially complied with, although there may be words following the signature which are unessential to the validity of the instrument.

Judgment reversed and cause remanded for a judgment as herein indicated.

372 LETZLER'S ADM'R V. PACIFIC MUT. LIFE INS. CO.

**LETZLER'S ADM'R v. PACIFIC MUTUAL LIFE INSURANCE CO.
OF CALIFORNIA.**

(Filed February 23, 1905.)

1. Life insurance—Contract—Three years' premiums—Extension—Lapse—Under a policy of insurance, which provides that after it has been in force for three full years should it lapse and not be surrendered, the full amount thereof at date of lapse (any indebtedness being repaid within three months) will be extended without request or demand therefor, where the yearly premiums are to be paid in quarterly installments, in advance, a payment of the premiums for two years and for two quarters of the third year will not have the effect to continue the policy in force, where the insured died shortly after the expiration of the third year.

2. Printing rules, by-laws, etc., on policy—Use of small type—Co-operative companies—So much of section 679, Kentucky Statutes, as provides that the policy, or certificate, application, constitution, by-laws or rules shall be plainly printed, and no portion thereof shall be in type smaller than brevier, applies only to co-operative companies.

Caruth, Chatterson & Blitz and Thum & Clark for appellant.

Henry Burnett for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Chief Justice Hobson.

Appellee issued to Theodore Harry Letzler the following policy:

"The Pacific Mutual Life Insurance Co., of California, in consideration of the application for this policy, which is made a part of this contract (a copy of which is hereto annexed), and of the payment in advance of the sum of \$53.20 (which payment may be made in semiannual installments of \$27.70, or quarterly installments of \$14.10, covering the period of half years or quarter years insurance for which the installment is paid in advance), hereby insures the life of Theodore Harry Letzler, of Louisville, county of Jefferson, State of Kentucky, for one year from the date hereof, payable in the amount and to the beneficiary hereinafter named; and in consideration of the further payment of a like sum on or before the 1st day of October in each year thereafter during the continuance of this policy, and until nineteen years' premiums have been paid (which sum may be paid in like installments as aforesaid, but subject to the same conditions), hereby promises to pay \$2,000, less the balance of any partially paid annual premium, to Theodore Harry Letzler's executors, administrators or assigns, or to such other beneficiary as may be designated by the insured as hereinafter provided, at the home office of said company in San Francisco, Cal., upon due notice and satisfactory proof of the death of said insured.

"The benefits, conditions and values on the next page of this policy are hereby made a part hereof.

"In witness whereof, the said The Pacific Mutual Life Insurance Co., of California, has, by its president and secretary, signed and delivered this contract at the city of San Francisco, this 1st day of October, 1898.

"GEORGE H. MOORE, President.

"J. V. PATTON, Secretary."

On the back of the policy was the following provision:

"After this policy has been in force three full years, should it lapse and not be surrendered as provided above, the full amount of the policy at date of lapse, any indebtedness being repaid within three months thereafter, will be extended, without request or demand therefor, as nonparticipating term insurance, but only for the period specified in the 'Schedule of extended insurance' following: Provided, That the said term insurance shall be based upon completed insurance years only, and that if the insured dies within three years from such lapse, all unpaid premiums, with interest at 6 per cent. per annum, shall be deducted from the amount insured. * * *

"Schedule of extended insurance—At end of third year, years three, days 162." * * *

The application which was attached to the policy, but printed in minion type, which is smaller than brevier, contained, among other things, this clause: "That such policy shall lapse and be void if any premium or installment thereon is not paid as therein provided, and that then all previous payments shall be forfeited to the company, except as therein otherwise provided."

Letzler paid the premiums on the policy for the first and second years and paid the first and second quarterly installments of the third years' premium, but failed to pay the third and fourth quarterly installments. After this, and shortly after the expiration of the third year, he died, and this action was brought by his administrator on the policy. At the conclusion of the evidence for the plaintiff the circuit court peremptorily instructed the jury to find for the defendant, and the plaintiff appeals. It is insisted for him that as the application, although printed on the policy, is printed in smaller type than brevier, it can not be considered, and that the policy itself containing no clause forfeiting the insurance for the nonpayment of the quarterly installments, it was in force at the end of the third year, and that, therefore, by the schedule of extended insurance he was entitled to insurance for three years and one hundred and sixty-two days. Section 665, Kentucky Statutes, which applies to the old line companies, provides that they shall not "make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon." Section 679, Kentucky Statutes, which is a part of the law governing co-operative companies, provides that the "application, constitution, by-laws and other rules" of the company, unless attached to the policy, shall not be received as evidence or considered a part of the policy. In *Provident Savings Life Assurance Society v. Puryear's Adm'r*, 109 Ky., 881, and in several subsequent cases, it was held that these provisions as to the old line companies and the co-operative companies were intended to establish the same rule as to both classes of companies, and that the meaning is that the paper which is delivered to the insured, and which is held as evidence of his rights, shall contain the whole contract. The rule rests upon the idea that the legislative purpose was to cut off other papers, though referred to in the policy on the idea that the insured was frequently misled in this way as to his contract. The court did not rule that all parts of section 679 are applicable equally to the old line as well as the co-operative companies. The statute is divided into subdivisions—one of the subdivisions refers to the old

line companies; another refers to the co-operative companies. The purpose of the legislature in thus dividing the statute was to make one set of rules for the government of one class of companies and another set for the government of the other class. The law relating to the co-operative companies is not applicable to the old line companies, unless there is something in the statute showing that the legislature so intended. The ruling in the cases referred to rests upon the ground that there is enough in the statute, taking the two sections together, to show that the legislature had in mind the same thing as to both companies in providing that the policy must contain the whole contract. But the policy in the case before us does contain the whole contract, the application being printed upon it and in main type. The latter part of section 679 is in these words: "The said policy or certificate, application, constitution, by-laws or other rules shall be plainly printed, and no portion thereof shall be in type smaller than brevier."

This provision, as shown on its face, only applies to the co-operative companies, for it refers to the constitution, by-laws or other rules, and to the policy or certificate, thus treating the two words as synonymous. There is no such provision in the subdivision of the act regulating the old line companies, and there is nothing in the statute to indicate that the legislature intended this provision to apply to any other companies than the co-operative companies. The objection, therefore, that the application can not be considered because printed in type smaller than brevier is untenable, as appellee is not a co-operative company.

Moreover, the contract of the insurance company, as shown by the policy, is in consideration "of the payment in advance of the sum of \$52.20 (which payment may be made in semiannual installments of \$27.70, or quarterly installments of \$14.10, covering the period of half years or quarter years insurance for which the installment is paid in advance). * * * and in consideration of the further payment of a like sum on or before the 1st day of October in each year thereafter, etc."

When the first year expired the insurance which had been paid for expired; and if nothing more had then been paid, the policy would by its terms have expired. It is inaccurate to call this a forfeiture. The payment of the premium is the condition upon which the continued existence of the policy depends, and when the premium is not paid the insurance ceases. The second year's premium, however, was paid. When the third year began the insured paid the first quarter. This carried the insurance through the first quarter. He then paid the second quarter. This carried his insurance to the end of that quarter. But when he failed to pay the third quarter his insurance ceased. If the rule were as contended for by appellant, the insured, when he paid the first quarter on the third year, need have paid no more, and he would not only have been insured for the rest of that year, but would have been entitled to the extended insurance just as much as he would have been if he had paid all four of his quarterly installments in advance, according to the terms of his contract. It was not contemplated by the parties that the insured should get insurance for the full year by making one or two of the quarterly payments. The policy expressly provides that the quarterly payment covers the insurance for which the installment is paid, and is to be paid in advance. This utterly excludes the idea that the

insured could get insurance for a whole year by paying one of his quarterly installments, or two of them, as in the case before us.

Judgment affirmed.

CITY OF LOUISVILLE v. ROBINSON'S EX'OR, &c.

(Filed February 23, 1905.)

Municipal taxes—Lien—Personal liability of owner—Agent or personal representative—Under sections 8003 and 8005, Kentucky Statutes, not only a lien may be enforced, but a personal judgment may be rendered under either section against the owner of the property or against the trustee, personal representative or agent in his fiduciary capacity for taxes due the city, and which became due more than five years before the filing of the petition.

H. L. Stone for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Jefferson Chancery Court, First Division, refusing to give appellant judgment on tax bills for the year 1896 against appellee, executor.

This action was instituted on the 8th of August, 1900, by which it was sought to recover taxes, not only for the year named, but also for the years 1898, 1899 and 1900. A personal judgment was prayed for against the personal representative of Robinson, deceased, and for all other equitable relief. On the 19th of April, 1902, the appellant filed an amended and supplemental petition against the executor and all other parties interested in the property described in the original petition. The appellees on July 15, 1902, filed their answer, and stated that the executor of Robinson, deceased, did not own or have any interest in the property taxed, and sought to be subjected to the payment thereof by this action, and pleaded that more than five years had elapsed after the accrual of the cause of action for the taxes due for the year 1896 before the amended petition was filed in 1902. The executor also pleaded the statutes of limitations.

The appellant filed an amended pleading by which it sought to avoid the effect of the plea of the statutes of limitations by the executor, and alleged that he, prior to the year 1895, and ever since that date, had collected the rents and income from the property described in the petition, and that he had enjoyed the profits thereof and the occupancy of same; that he had never made any settlement of his accounts as executor of the estate of Robinson, deceased. This seems not to have been controverted.

The lower court rendered a personal judgment against the executor for the taxes for all the years sued for, except the taxes for the year 1896, and the court disposed of the plea of limitations in the following words: "It is further adjudged that for the sum of \$485.99 for the taxes for the year 1896, and the interest thereon as aforesaid, the plaintiff's action thereon as against all of the defendants except the defendant, Bennett H. Young, executor under the will of Stuart Robinson, deceased, is barred by the stat-

utes of limitations, but the plaintiff, for said sum, for the taxes for the year 1896, and the interest thereon, as aforesaid, has no lien on the right, title and interest of Bennett H. Young, executor of Stuart Robinson, deceased, which he has or had in that capacity at the institution of this action thereon against him as such executor August 8, 1900."

It appears that the lower court did not sustain the executor's plea of limitations, but refused any judgment against him for the taxes. The court was right in failing to sustain his plea, but erred in refusing to render a judgment against him for the taxes for the year 1896. It appears from sections 3003 and 3005 of the Kentucky Statutes that when an owner of property or any trustee, personal representative or agent is sued for taxes, that not only a lien may be enforced on the property, but a personal judgment may be rendered under either section against the owner of the property or against the trustee, personal representative or agent in his fiduciary capacity.

It will be observed, by reference to the sections of the statutes supra, that a personal liability is imposed upon the fiduciary by the statutes for the taxes on lands and improvements of which he has the management, or who enjoys the rents, income and profits of lands and improvements by occupying the same, and it is made his duty to pay such taxes before September 15th of each year, before applying or paying the same to the beneficiaries, and in default of so doing he becomes personally liable, which liability may be enforced in equitable proceedings. The court properly sustained the plea of the statute of limitations as to the defendants other than the executor, but should have rendered a judgment against him for taxes for the year 1896, as proceedings were instituted and a personal judgment sought against him, as such executor, from the inception of the action. The appellee contends that the action of the lower court in relieving the executor from the payment of the taxes for the year 1896 was based upon the ground that the appellant's amendment filed in 1902 was in effect an abandonment of its first cause of action; that his first cause was based upon section 3005 of the statutes, and by this amendment a new and another action was instituted under the provisions of section 3003, and that his plea of the statutes of limitations should have been sustained.

We are unable to agree with the contention of the appellee in this. The cause of action was the same from the beginning, to wit, the recovery of the taxes for 1896, and a personal judgment was at all times sought against him as such executor, which both of the sections of the statutes supra authorized, and the amendment only stated additional or other reasons why he should be compelled to pay the taxes, statutory as well as equitable reasons.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

SHEPHERD v. COMMONWEALTH.

(Filed February 24, 1905.)

1. Homicide—Debauching defendant's wife—Threats of deceased to kill defendant—Communicated by wife to husband—Competency—In a prosecution against one for murder in killing a man who had debauched the de

fendant's wife and caused their separation, it is competent for the defendant to testify that his wife told him immediately before the shooting that deceased had threatened his life, and would kill him rather than let her return and live with him.

2. Emotional insanity—Reduction of offense—Submission to jury—If the fact be that deceased had violated the sanctity of defendant's home, estranged his wife's affections, debauched her person, and threatened his life if he interfered with a continuance of his illicit relations, forcing his presence on them for that purpose, it may well be supposed that the passion of the husband was aroused to an uncontrollable extent; and whether it was such as to have created an emotional insanity so as for the time to dethrone the reason of the outraged husband, or whether it merely reduced the homicide to manslaughter, was a question which, under the circumstances, should have been submitted to the jury.

3. Evidence—Criminal acts of defendant—Competency—On the trial of one for murder in the killing of a man who had debauched his wife it was error in the court to admit evidence that the defendant had committed adulterous acts himself, or that he had shot another man, or that he had said that deceased was the third man he had shot.

4. Misconduct of Commonwealth's attorney—On the trial of one for murder it was error in the court to allow the attorney for the Commonwealth, against the objection of the defendant, to refer to an affidavit admitted as evidence for the defendant, as the "supposed testimony of the absent witnesses, but was not in fact their testimony, but merely an affidavit filed on behalf of the defendant."

B. B. Golden, David Hays, D. D. Field & Son and J. G. Forrester for appellant.

N. B. Hays and Chas. H. Morris for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was convicted of the charge of murder, committed upon Riley Webb. The defense was emotional insanity and justifiable homicide under an apparent necessity. Appellant and his wife had become estranged, and had temporarily separated about two years before the killing of Webb. Appellant claims that the separation was because of Webb's interference with the domestic relations of appellant and his wife. Just before the killing appellant and his wife had agreed to be reconciled, and to resume the married relation. For that purpose appellant visited her at her father's home in Letcher county. Past offenses were condoned, and appellant started to his home, in Leslie county, to prepare for taking his wife there some days later. He was turned back, however, and returning somewhat unexpectedly, found his wife and Webb in company, from which it was reasonably apparent, and proved to be a fact, that they had again been guilty of adultery. The next morning appellant was talking to his wife at her father's, when Webb came to the house. Appellant claims that his wife told him that Webb had threatened his life rather than that she should leave with him. Incensed at the continued provocation, as he claims, appellant picked up a rifle and shot Webb fatally. He also claims that at the moment of the shooting Webb turned upon him with something in his hand, which appellant thought was a pistol.

The verdict of the jury found appellant guilty, and sentenced him to life imprisonment. Upon the trial there occurred a number of errors, for which the judgment must be reversed. In the first place it was error for the trial court to have admitted evidence to the jury that appellant had committed other crimes, or that he had been guilty possibly of adulterous acts himself; that he had shot another man, or that he had said that Webb was the third man he had shot. The fact that appellant had shot Webb was not in dispute. His admission of the fact that he had shot him, and that he was the third man that he had shot, could serve no useful or proper purpose in the trial, as it was testified to, appellant having said merely, according to Commonwealth's evidence, "he is the third one I have knocked down." Its tendency was rather to lead the minds of the jury away from the consideration of the main facts before them, and tended to prejudice appellant's cause in their minds, for it might be argued, not unreasonably, that if appellant had shot two men before, and was boasting of it, he was a bad man, and one very likely to have committed a crime of a similar nature in this case. In fixing his punishment the jury were apt, too, to regulate it somewhat by his previous offenses, whereas the only matter legitimately before the jury was whether appellant had feloniously killed Webb, and if he had, the proper measure of punishment for that act.

Appellant offered to testify that his wife told him immediately before the shooting that Webb had threatened his life, and would kill him rather than let her return with him. The court excluded this evidence upon the ground, it is said, that it was in the nature of a confidential communication between husband and wife, and as such was incompetent as evidence under the Code. In *Arnett v. Commonwealth*, 114 Ky., 593, it was held that a dying statement made to the wife of the declarant could be proved against his slayer; that section 606, Civil Code, "that the wife was incompetent to testify even after the cessation of the marriage relation to any communication made to her by her husband during marriage," did not apply to criminal prosecutions. With respect to these the common law is in effect in this State, of which Greenleaf on Evidence, section 387, says: "The great object of the rule is to secure domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife, and whatever had come to the knowledge of either by the means of the hallowed confidences which that relation inspires can not be afterwards divulged in testimony, even though the other be no longer living."

The rule is founded upon the policy of the law, the object of which is to secure domestic happiness by protecting that state in the inviolability of its confidences. What would tend to create a breach of such confidences is, therefore, disfavored by the law. But under the circumstances shown in the case at bar the liberty or life of one accused with a high crime is involved. The main ingredient of his act, aside from the death inflicted by it, is its motive. If the act were inexcusable, done in cold blood, as the saying is, and, therefore, in malice, the perpetrator became a criminal, subject under the law to capital punishment. On the other hand, if the act was excusable, he has in law done no wrong; or, if the act was done under such provocation as to inflame passion beyond control under the circum-

stances, the offense is greatly reduced. Instead of being a capital one, it might be punished by a short confinement in the State penitentiary. The State is concerned in eliciting the truth with respect to homicides committed within her borders, and in no sense is it the purpose of the State to convict for a higher degree of crime than is really justifiable by the facts in the case. No other policy of the law can override the State's desire to do justice, and no more to those charged in her courts with crime. If the fact be that deceased, Webb; had violated the sanctity of appellant's home; had estranged his wife's affections; had debauched her person, and had threatened appellant's life if he proposed to interfere with deceased's continuance of his illicit relations, forcing his presence upon them for that apparent purpose, human nature is so constituted that the passion of the husband may well be supposed to have been aroused to an uncontrollable extent. Whether it was such as to have created an emotional insanity, so as for the time to dethrone the reason of the outraged husband, or whether it merely reduced the homicide to manslaughter, was a question which, under the circumstances, should have been submitted to the jury. It was not enough, though, to have instructed them appropriately as to the law ordinarily applicable to murder and manslaughter. They should have been allowed to consider in connection with the instructions the facts which probably entered into shaping the conduct of the accused on the fatal occasion. If the fact should be, as appellant claims, that his wife had been debauched by the person whom he afterward slew, and that the debauchee was flaunting his successes in the face of the victimized husband, it would assuredly be competent to prove the fact before the jury, at least in mitigation of the husband's act in taking his life on the spot. The sole question here is whether the husband might show that he got his information from his wife; that he did so get it, for the purposes of this discussion, will be assumed. Having it, it is for the jury to say to what extent, if at all, it palliated his act. But, as shown in this record, that fact could not be brought to the knowledge of the jury except defendant proved, or some one else proved, that defendant had got such information; that he got it from his wife could take nothing from the sting of it. Its effect upon his mind and conduct must have been at least the same, if not indeed worse, than if it had been communicated by some third person. If one is informed by his wife that she had been raped, or that a rape had been attempted upon her person, or that she had been grossly insulted and assaulted, pointing out the perpetrator of the act at the time, it would not be unnatural for the husband to act upon that information. To allow it to be proved that he acted drastically, without being permitted to show why, or upon what basis his belief rested, would be applying the rule for the protection of domestic felicity so as to make it hurt instead of help those for whose benefit it was primarily intended. We perceive no good reason for extending the rule invoked so as to exclude the evidence discussed. The court is of opinion that the evidence should have been admitted, to be weighed by the jury as other facts and circumstances in the case.

Appellant filed an affidavit to procure a continuance on account of the absence of certain witnesses. The Commonwealth consented that the affidavit should be read under provisions of the Code as the depositions of the absent witnesses, whereupon appellant's motion for a continuance was over-

ruled, and the affidavit was so admitted. In the concluding argument to the jury the Commonwealth's attorney said, in evident response to the argument made on behalf of appellant, that the supposed testimony of these absent witnesses was not in fact their sworn testimony, but was merely an affidavit filed on behalf of the defendant. From which it was argued, or at least the inference was necessarily invited, that the testimony of the absent witnesses was not in fact, nor was it to be received by the jury, as their evidence in the case. This was an abuse of privilege by the Commonwealth's attorney, and objections of appellant should have been sustained to the argument, and the jury admonished appropriately. The law gives to the defendant in such case the benefit of such statements as the depositions of the absent witnesses. That is the least that he is entitled to under the guaranty of the Constitution and the law affording one charged with crime compulsory process to procure the attendance of witnesses on his behalf at his trial. If the practice should be indulged by the prosecution of discrediting the affidavit by informing the jury that it was not in fact the deposition of the witness, it would be to nullify the provisions of the statute, and to deprive the defendant of a valuable privilege, which the legislature in its wisdom has deemed a necessary one in the proper administration of justice. In condemning a similar remark (*Redmond v. Commonwealth*, 21 Ky. Law Rep., 331) this court said: "The defendant was entitled to the full benefit of the statements therein as coming from Purcell (the absent witness). This same practice is indulged in, to some extent, throughout the State, but should not be permitted by the court."

The other evidence complained of, we think, was admissible.

But for the reasons indicated the case must be remanded for a new trial under proceedings not inconsistent with this opinion.

MONARCH, &c. v. OWENSBORO CITY RAILROAD CO.

(Filed February 24, 1905.)

1. Contracts—Common Law—Time—Essence of—Precedent covenants—In an ordinary action for breach of contract the general rule is that time is always of the essence of the contract, and a party who seeks damages for a breach of contract must show a compliance by himself of his own precedent covenants within the time required by the agreement.

2. Same—Even in equity, if it be apparent from the contract that the parties so intended, time will be considered of the essence of the contract, and a strict performance within the time fixed will be considered a condition precedent to an action for a breach.

3. Street railway—Granting franchise—Validity—The granting of a franchise to operate a street car line over the streets of a city to any person except to the highest and best bidder, after due advertisement, is in direct conflict with section 164 of the Constitution, and is void.

Little & Slack, Eli H. Brown and Wilfred Carrico for appellants.

Sweeney, Ellis & Sweeney and R. S. Todd for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

The appellant, R. Monarch, owned a tract of land containing about twenty-seven acres in Daviess county, Kentucky, within a short distance of the city of Owensboro. Conceiving that the connection of this tract of land with the city by a street car line would greatly enhance its value, he obtained a franchise from the municipality to operate a street car system over certain of its streets, presumably with the intention of extending it to his own property. Appellee also had a franchise to operate a street car system through the streets of the city of Owensboro.

Appellant deeming that appellee, in extending its system along Triplett street, was invading his exclusive right to operate a line of cars on that thoroughfare, instituted an action against it for an injunction, during the pendency of which the parties litigant entered into the following contract:

"This memorandum of agreement made and entered into this 12th day of June, 1898, by and between R. Monarch, of Owensboro, Ky., of the first part, and the Owensboro City Railroad Co., of Owensboro, Ky., of the second part,

"Witnesseth: That the parties hereto have made the following contract:

"R. Monarch has granted, and hereby agrees to convey by proper conveyance, to be hereafter made by himself and wife to the said company, a right of way ten feet wide from the Roost or Main street road, west of Owensboro, near Paradise Garden, and from a point on said road which lies between the land of Dr. G. B. Tyler and Dr. J. Hale, extending south the same width to Monarch's land, as may be required for necessary siding, and assigns, transfers and sets over to said company all rights of every description under an ordinance of the Owensboro City Council passed and adopted on the — day of —, 1892, giving him and such persons as he might associate with him the right to construct and operate a street car system in Owensboro on all the streets named in said ordinance, and said Monarch agrees to transfer said grant and franchise to said company by any proper writing to be hereafter made and delivered, and to ask the consent of the Owensboro City Council to such transfer, and said Monarch further agrees to dismiss his suit now pending in the Daviess Circuit Court against said company.

"In consideration of the above, the city railroad company agrees to construct the extension of its railway from said point on said Roost road to the Lancaster road on Monarch's land and on the right of way described; thence up Fifth street to the terminus of the present street car line on said street, or as near said street as practicable, as soon as the right of way can be procured to the terminus of said Fifth street line.

"The said extension is to be completed as soon as practicable from this date, and is to be operated during the period of said company's original franchise.

"The said company agrees to put in and maintain three cattle guards on the line from Main street to Monarch's land, at points to be selected by said Monarch, and said parties are to procure the right of way up said Lancaster road and Fifth street, and if any expense is attached thereto it is to be borne jointly.

"In witness whereof the said parties hereunto have subscribed their names, this the day and year first herein written.

(Signed) "R. MONARCH,

"OWENSBORO CITY R. R. CO.

"By W. E. WHITELEY, President."

After the execution of the foregoing contract appellant dismissed his action, and sought to obtain a right of way over a county road leading from the city limits of Owensboro to a point near his land, which was essential to appellee's performing its contract of extending its line to his property. The right of way sought by appellant over this road was refused by the county authorities having the matter in charge, and it then became evident that an extended time would be required in which to secure the right of way necessary to enable appellee to perform its contract. With this fact confronting them, on the 18th day of September, 1893, the original agreement was modified by the parties as follows: "In pursuance of the agreement of June 12, 1893, R. Monarch has this day made and delivered to the Owensboro City Railroad Co. a written transfer of all rights and privileges acquired by him under the ordinance of the common council of the city of Owensboro, enacted October 19, 1892, and requesting said council to approve said transfer; and it is now agreed by said Monarch and said city railroad company that each is to have until the 1st day of May, 1894, in which to execute and complete the stipulations of their aforesaid agreement in regard to said city railroad. This the 18th day of September, 1893."

In 1896 appellant made a tender to appellee of what he seemed to consider a fulfillment of his agreement, and demanded performance of its covenants, which, being refused, he instituted this action in equity, alleging the foregoing facts and the terms of the contract, and praying as a relief a judgment requiring appellee to specifically perform the terms of the contract, or, if that was deemed impracticable, for a judgment against it in damages for the sum of \$57,000. The manner of his performing the conditions precedent to his contract by appellant, his demand of performance from appellee, and its refusal, are thus set forth in the petition: "Plaintiff states that on the — day of May, 1896, he tendered and offered to deliver to the defendant a properly executed conveyance to defendant by his wife and himself of the right of way over the land mentioned in said contract of June 12, 1893, to be conveyed by him to it. At the same time he tendered and offered to deliver to defendant certified copies of the ordinance of October 19, 1892, of the city council of Owensboro, and a certified copy of the ordinance of April 6, 1896, of the trustees of the town of Herrwood, granting rights of way in said city and town, respectively, and accompanied said copies with a written transfer of all the right, title and interest in and to the privileges, rights, immunities and franchises granted to him by said ordinances of said city and town, respectively, and upon the tender and offer to deliver to the defendant said deed, said ordinance and said written transfer of same, he demanded that said defendant should proceed, without unnecessary delay, to perform its said contract of June 12, 1893, upon its part, by constructing lines or street railroad tracks, and operating street car tracks thereon when constructed as contemplated and provided for in said contract. He says the defendant, then and there, through and by its president, refused to accept said deed or ordinances, or the written transfer of same, or either or any of them, and declared it would not perform said contract of June 12, 1893, on its part, nor construct car lines, nor operate them as provided in said contract, or at all."

To this petition appellee filed an answer containing several defenses,

among which was pleaded the modification of the original contract on the 18th day of September, 1893, by which it was agreed that each of the parties should have until May 1, 1894, in which to execute and complete the stipulations of the original agreement, and the failure on the part of appellant within the stipulated time to comply therewith by performance on his part of the conditions precedent to the covenants of appellee. After the issues were made up appellant dismissed so much of his petition as sought a remedy by specific performance, and moved to transfer the action from the equity to the common-law side of the docket for the trial of the legal issues remaining in the case. This motion, over the objection of appellee, was sustained by the court. Upon the trial, after all of appellant's evidence was in, the court, on motion of appellee, awarded a peremptory instruction to the jury to find for it as in case of nonsuit, which was done. Appellant's motion for a new trial having been overruled, he is here on appeal.

By the original contract appellee was to extend its line to appellant's property as soon as practicable after the necessary right of way could be procured from his property to the terminus of its Fifth street line. By the agreement of September 18, 1893, the time in which each of the parties was to perform his part of the contract was definitely fixed to the 1st day of May, 1894. The obtention of the right of way was a condition precedent to the extension of the line. The petition shows, affirmatively, that this right of way was obtained by appellant and tendered to the appellee on the — day of May, 1896, two years after the date fixed in the amended contract of 1893. Passing the question of variance between the contract sued on and that proved, in our opinion this tender was too late. Having determined upon a definite time in which the contract was to be performed, it was necessary, before he could maintain an action against the appellee for a breach of its covenant, to allege and prove, if it was denied, the performance by him, on or before May 1, 1894, of those covenants necessary to be performed to enable it to carry out its contract. Upon his failure to tender the necessary right of way by the stipulated time appellee had a right to consider the contract rescinded. It must be borne in mind that before the trial of the case appellant abandoned his claim to the equitable remedy of specific performance, and caused the action to be transferred to the common-law docket, and, therefore, the authorities cited in support of the equitable rule, that time will not be considered as of the essence of the contract unless the party invoking it is put in a worse condition by its lapse than he otherwise would have been, have no application. The general rule at common law is that time is always of the essence of the contract, and a party who seeks damages for a breach must show a compliance by himself of his own precedent covenants within the time required by the agreement. In 9 Cyc., 605, the rule is thus stated: "At common law time is always of the essence of the contract, that is to say, if a person promises to do a certain thing by a certain day, in consideration that the latter will do something for him, the thing must be done by the date named, or the latter is discharged from his promise." (Cromwell v. Wilkinson, 18 Ind., 365; Allen v. Copper, 22 Me., 133; Hill v. Milburn School District, No. 2, 17 Me., 316.) And even in equity, if it be apparent from the contract that the parties so intended, time will be considered of the essence of the contract, and a strict

performance within the time fixed will be considered a condition precedent to an action for a breach.

"By the weight of authority, however, it is always open to the parties, even in equity, to make time of the essence of the contract by express agreement. And where time is not made of the essence of the contract by express stipulation, it may, however, be held to have been so intended from the nature of the contract. In mercantile contracts, such as contracts for the manufacture and sale of goods and the like, it is generally so fixed. In contracts for the sale of land, for the performance of services, or the construction of buildings and the like, time will be held of the essence if, from the nature of the property and the circumstances, it seems that the parties must have so intended; but generally in such contracts time is not of the essence. A new agreement extending the time of performance of a contract is evidence that the parties considered time material." (Id., 605, note c; *Wiswall v. McGown*, 2 Barbour, N. Y., 270.)

Newman in his work on Pleading and Practice, page 285, says: "The time fixed for the performance of a written agreement should always be stated in the petition, for it is of substance; and it is a general rule that where time is essential or material to the rights of the parties it must be alleged with certainty and precision. Thus in an action to deliver property on a certain day or at a certain period fixed by the parties, at which time it was to be paid for, the failure to allege the time, or a variance between the time alleged and that proved on the trial, would be fatal to the action, unless the pleading should be so amended as to state the true time."

Conceding in full the principle stated by appellant, that where a party to a contract has received a substantial part of the consideration, he can not, as a rule, urge the nonperformance of the remainder within a stipulated time without placing the other party in statu quo. That principle has no place in the facts of this case. Admitting, for the purposes of the argument, that appellant made a proper tender of his rights under the ordinance of the council of the city of Owensboro granting him the franchise to operate a street car line over its streets; that the franchise was valid, and also that he in due time dismissed his action for an injunction, this had all been done prior to the amending of the contract on September 18, 1893. With this partial compliance of his contract before him, he fixed the time for the performance of all the remaining covenants by the 1st day of May, 1894. But that which he claims as a partial performance was without value, either to himself or to appellee. The granting of the franchise to operate a street car line over the streets of the municipality was in direct violation of section 164 of the Constitution, which forbids the granting of such franchises except to the highest and best bidder after due advertisement. In the case of *Nicholasville Water Co. v. Board of Councilmen of the City of Nicholasville*, 18 Ky. Law Rep., 592, it was said: "The granting of the franchise by the town of Nicholasville to the Kentucky Water Heating and Illuminating Co. in June, 1892, may be treated as void, because of the failure of the municipality to receive bids publicly after due advertisement, as provided in section 164 of the Constitution. The prohibitory provision of that instrument became operative upon its adoption."

To the same effect is *Keith v. Jackson*, 109 Ky., 426, wherein it is said:

"We believe that it is mandatory on the municipality to award the franchise to the highest and best bidder." This being true, the grant of the franchise to appellant was void, his assignment carried no rights to appellee, and the dismissal of his action placed him in no worse position than he was before. (Maraman v. Ohio Valley Telephone Co., 25 Ky. Law Rep., 784.)

Judgment affirmed.

EVERSOLE v. EVERSOLE, &c.

(Filed February 24, 1905—Not to be reported.)

1. Sale of lands—Rescission of contract—Appellees having purchased a tract of land from appellant, and it appearing that prior to this sale appellant had sold the mineral rights in the land to Bright, appellees are entitled to a rescission of the contract because a perfect title to the land could not be conveyed as appellant had covenanted to do.

2. Notice—The fact that the deed conveying the mineral rights had been recorded does not alter the question, because if the case turned upon that question either appellees would lose or Bright would lose, and in either event appellant would be the gainer, and it would be violative of equity to enter a decree to the effect that the appellees should have discovered that the conveyance to Bright had been made, or that the index to the record should have put them upon notice, and, therefore, adjudge specific performance.

Lewis & Calvert for appellant.

Logan & Jeffries for appellees.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Paynter.

In 1891 the appellant sold the appellees a tract of land situated on Wooten creek, Leslie county, Kentucky, and executed and delivered to them a title bond therefor, by the terms of which he covenanted to convey the land to them by deed with a covenant of general warranty. A note was executed by the appellees to the appellant for \$339, the balance of the purchase money. After all the purchase money had been paid, except about \$150, the appellees discovered that previous to their purchase the appellant had conveyed to Arthur D. Bright all the coal, gas, salt water, oil and mineral rights of every description in, upon and under the tract of land. The appellant instituted the action upon the note which had been executed by the appellees for the purchase money, less the sums previously paid on it. Appellees resisted the payment upon the grounds that the appellant could not comply with the terms of his title bond, because he had previously divested himself of certain interest in the land to Bright. The court refused to enforce specific performance of the contract, but decreed a rescission upon equitable terms. The deed by the terms of which the mineral rights, etc., were sold to Bright was executed by W. T. Browning and wife and appellant and his wife, and was duly recorded, but the index book made it appear that W. T. Browning and wife alone were the grantors in the deed.

It is earnestly urged by counsel for the appellant that the index should have put the appellees on inquiry, and, therefore, they should have discov-

ered that the appellant had previously divested himself of the title to the mineral rights, etc., in the tract of land which they purchased, and, therefore, it is insisted that the contract should have been enforced. If the case was made to turn upon the question of notice, and we do not think it does, Bright would either lose the interest which he purchased in the land or the appellees would do so. The appellant would be the gainer regardless of which of the others might lose. So the proposition is that the appellant should have specific performance of the contract, and make either Bright or the appellees sustain the loss resulting from his wrongful act. It would be violative of good conscience to enter a decree which would produce such consequences. If there was a question between appellees and Bright as to who should sustain the loss, then the question would arise which is so ably discussed by counsel for appellant.

The appellant covenanted to convey the land to the appellees, but he is unable to do so. The appellees can not be compelled to accept the deed under the contract when the appellant had divested himself of the title to perhaps the most valuable interest in the land. He could not convey a perfect title to the land, hence, under the facts of this case, appellees were entitled to a rescission of it.

The judgment is affirmed.

GUTMAN, &c. v. TURNER, &c.

(Filed February 28, 1905—Not to be reported.)

Wills—Undue influence—Incapacity—Anna Maria Sewher owning an estate of something like \$15,000 died, leaving it all to a daughter except \$150 each to the four children of her deceased son, and \$100 to their mother. The daughter and the four grandchildren were her only heirs at law. The paper was admitted to probate, but upon appeal to the circuit court the jury found it not to be her will. The son's widow and children had nothing but a home worth about \$1,000, and it not fully paid for. There was proof showing the testatrix to be seventy-five years of age; that she was childish and had to be looked after like a child; that she did not realize what was going on about her, and was not deemed by her family as competent to be trusted on the street some time before her death. There was other evidence sufficient to support the will, but the question was for the jury. There was no sufficient reason shown for giving the bulk of the estate to the daughter, to the exclusion of her dead son's children, and there being no error in the admission or rejection of the evidence the verdict will not be disturbed.

James P. Tarvin and H. D. Gregory for appellants.

Wm. A. Byrne for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Hobson.

Anna Maria Schwer died a resident of Kenton county on July 1, 1903, owning an estate worth \$12,000 or \$15,000. After her death a paper purporting to be her will was probated in the Kenton County Court. By this paper she devised to the four children of her deceased son \$150 each and \$100 to their mother. The remainder of her estate she devised to her daughter, Elizabeth Gutman, absolutely. Her daughter, Elizabeth Gutman, and the

four grandchildren were her sole heirs at law. The grandchildren prosecuted an appeal from the order of the county court probating the will. In the circuit court the case was heard by a jury, who found the paper not to be her will. The circuit court overruled a motion for a new trial and entered judgment pursuant to the verdict of the jury, and the propounders of the will appeal.

By the will Joseph F. Gutman, the husband of Elizabeth Gutman, was made executor without bond. It is insisted for appellants that there was no evidence of incapacity or undue influence, and that on all the evidence a judgment should be entered probating the paper. The testatrix was seventy-five years of age. The will was made on February 25, 1902. The son died in the year 1892, leaving his widow and children in a home worth something over \$1,000, which was not entirely paid for. His widow had no other means except her earnings from sewing and such help as her father-in-law gave her. The old gentleman died on December 4, 1901, and by his will he left everything to his wife. Her will was made on the 25th of February following his death, and she lived about eighteen months after her will was made. The daughter-in-law testified that Mrs. Schwer was weak-minded, and had been for four years before her death; that at the death of her husband she acted like she had a house full of company and did not realize that anything had happened, and that Mrs. Gutman then said to her, "just look at mother, she is so childish I have to tend to her like a baby, she does not realize at all what has happened;" that at this time the old lady was looking around and laughing and talking to the people who had come in to the burial as though nothing had happened. She also testified to similar expressions on other occasions by Mrs. Gutman, and these were proved by a number of other witnesses. The testimony of the daughter-in-law is sustained by her children, and by several other witnesses. The grandchildren lived about two or three squares from the old lady. Mrs. Gutman lived next door, and in cold weather in the same house. She looked after her mother, and they substantially constituted one family much of the time. The old lady would tell the grandchildren not to come to her house; that Mrs. Gutman did not want them there. She would go to see them under the guise of going to church, and would tell them that she went two squares out of her way so that Mrs. Gutman would not know that she had come to see them. She told them that they would come in for their father's part of the estate. She would make them presents, but charged them not to let Mrs. Gutman know of it. There is also evidence that she said in speaking of the estate, that one must have peace at home, and one witness testifies to a conversation between Gutman and his wife from which the jury were warranted in inferring that they were discussing the disposition of the property and proposing just such a division of it as was made by the will. A disinterested witness said Mrs. Gutman used to him these words: "Mamma is getting awful ugly; I can't trust her alone in the house. If I go out I am afraid something will happen." Another said she said this: "She is so nervous; she is getting real childish; we have got to watch her all the time; she gets up in the night and wants to run out." The evidence also shows that the old lady was not deemed by any of the family competent to be trusted on the street for some time before her death.

Appellants proved by a number of witnesses, who knew the testatrix and had more or less business dealings with her, that her mind was good, and that she transacted her own business, and was fully competent to make a will. They also proved by the physician who attended her that her mind was good up to six or eight weeks of her death; that after this she suffered from Bright's disease and senile dementia. The evidence was sufficient to justify a finding in favor of the will, but under the proof the question was for the jury. No sufficient reason is shown for her cutting out her dead son's children and giving substantially the entire estate to the living daughter, who was plainly in much more comfortable circumstances than they. We think there was sufficient evidence of both incapacity and undue influence to submit the question to the jury, and under all the facts we see no reason for disturbing the verdict of the jury. There was no error in the admission or rejection of evidence. In fact these matters are not complained of.

Judgment affirmed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v.
MARRS' ADM'X.

(Filed February 28, 1905.)

1. Railroads—Trespasser in switchyard—Drunken—Lying between tracks—Knowledge of servants—Duty of servants—Liability of company—Where defendant's servants in charge of its switchyard saw a drunken man helped off the train, and shortly thereafter found him lying in a drunken stupor between the tracks in the switchyard, in the night time, from which they aroused him, although he was a trespasser they owed him a duty to either safely conduct him from the yard, or in subsequently moving their engine in the yard to keep a lookout so as to avoid injuring him, and in such case where the man was run over and killed in moving the engine in the yard, in an action by his administratrix against the company for negligently causing his death, the trial court properly refused to give the jury a peremptory instruction to find for the defendant.

John Galvin and Thornton & Kerr for appellant.

Matt O'Doherty and Hunt & Hunt for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

William H. Marrs, a resident of Lexington, Ky., on a visit to Louisville, became intoxicated, and while in this condition his friends purchased a ticket for him over the Louisville Southern Railway to his home, put him on the train, and gave his ticket to the conductor. When the train arrived at the depot in Lexington he was in the smoker, asleep, with his head and arm hanging out of the window. One of the brakemen aroused and required him to go from the car to the platform of the station.

The Louisville Southern Railway uses the depot of the Cincinnati, New Orleans & Texas Pacific Railway Co. at Lexington. Near this depot are the private switchyards of the latter corporation. These yards are, perhaps, more than a half mile in length, and covered with a network of tracks and

switches, there being, probably, as many as eighteen or twenty separate tracks.

The train on which Marrs was a passenger arrived at the Lexington depot at about 10:40 p. m. Within thirty or forty minutes after the drunken passenger left the car he was found by the yardmaster, Savage, asleep in the switchyard between tracks Nos. 8 and 4. Appellant's switching crew with their engine, coming along at this time, were stopped by the yardmaster, who called to some of them to come and assist him in arousing the sleeping man. This was responded to by James H. Joyce and John Haney, who left the engine and went to where Marrs was lying. Joyce shook the sleeping man, who looked up, and, with an oath, said: "Kid, did you expect to find a man with his head cut off?" To which Joyce replied: "No, but if you lie around here in this way you will have your head cut off." Whereupon Marrs got upon his feet, "hitched up his trousers," and walked off in the direction of the Versailles pike, cursing, as he went, the men who had disturbed him. The switching crew then went to their supper (a midnight lunch), and returning in an hour, started with their engine along one of the tracks in the switchyard for the purpose of getting a car of stock which was to be transferred from one track to another. The engine was being backed, with several of the crew in front on the tender, keeping a lookout for the car of stock which they intended to shift. While proceeding at the rate of six or seven miles an hour the engine ran over Marrs, who had again fallen asleep (this time on the track), inflicting injuries from which he in a few days died. To recover damages for the death thus occasioned this action was instituted by the administratrix of his estate against both the Louisville Southern Railway and appellant. A trial resulted in a peremptory instruction being awarded in favor of the Louisville Southern Railway, and a verdict and judgment against appellant for the sum of \$4,500, of which it now complains. Was appellant entitled to a peremptory instruction? This is the substantial question presented in the record.

There was no relation of passenger and carrier between Marrs and appellant, and, therefore, his entrance into the private switchyard of the corporation made him a trespasser, and if those in charge of the switch engine had run it over him when he was first found in the yard, then undoubtedly appellant would have been entitled to a peremptory instruction under the evidence as adduced on the trial, because he, being a trespasser, its employees owed him no duty except to refrain, after his peril was discovered, from injuring him, if this could be done by the exercise of ordinary diligence. But having found him drunk and asleep in the yard, could they arouse and start him wandering in the dark through the network of switches and tracks, and then say, when they afterwards ran over him, that they owed him no lookout duty because he was a trespasser? We can not sanction so cruel and inhuman a principle. Both Savage, the yardmaster, and Haney, the foreman of the switching crew, saw Marrs on the Louisville Southern train when it reached the depot, and knew that he was a passenger thereon, and drunk. When they saw him in the switchyard asleep, and aroused him, they recognized him as the man they had seen on the train. They knew he was still intoxicated, and the fact that within so short a time he was found by them asleep in the switchyard, was all the evidence that rea-

sonable men required to know that, owing to his condition, he was unable to take care of himself, and more than probably was dazed and lost. Under these circumstances it was their duty, either to see him safely out of the yard, or, in default of this, to exercise at least ordinary care to avoid injuring him, in moving the switch engine about where, under the circumstances, it was reasonable to anticipate his presence. Haney and Savage, within forty minutes before they found Marrs asleep in the switchyard, had seen him asleep on the train. They had seen him aroused from his stupor by the brakeman and put upon the platform, and when they found him within so short a time after being aroused by the brakeman, again in a stupor in the switchyard, they were bound to know that his condition was such as to render him incapable of taking care of himself; and this being true, as we have before said, common humanity forbade them simply to arouse him from where they found him asleep, and start him on another walk, merely to sink into a torpor in the yard a second time. Indeed the action of these men was a positive injury to the decedent, for as he lay between tracks Nos. 3 and 4, he was then at least safe from being run over. When they aroused him from this position, and started him on his walk in the dark through the yards, they subjected him to the perilous chance, when again overcome by the liquor, of assuming a position of greater danger than he was occupying at first. This chance subsequently became a reality. When the unfortunate man was overcome a second time in the yard, he went to sleep on one of the tracks instead of between them. Under the circumstances the switching crew should have done either more or less than they did, so far as the safety of the decedent was concerned.

We fully concede that Marrs' being drunk did not make him any the less a trespasser when he first went into the yard of the corporation, and his intoxication added no new duty from it to him then. But when its servants actually discovered him, trespasser though he was, they owed him the duty to refrain from injuring him, and this duty was as comprehensive as the helplessness of his condition demanded to insure his safety from injury by them. The fact that his senses were overcome by liquor was demonstrated by what the servants of the corporation actually knew at the time they found him in the yard. It was no longer a question of surmise, but one of positive knowledge; that he was not a tramp awaiting an opportunity to steal a ride they knew from the fact that they had seen him arrive in Lexington as a passenger on the Louisville Southern train, and we think we have a right to assume, from all the evidence in the case concerning Marrs, that his appearance indicated him to be what he really was, an unfortunate man on a spree. The servants of the corporation, after finding him in the yard, could not shut their eyes and close their faculties to what must have been apparent to the most casual observer, and say that, under the circumstances surrounding Marrs, they owed him no duty and could after that treat him as a trespasser; they knew he was intoxicated and in the yard, and having seen him twice before within an hour in a drunken stupor, they had no right to assume that, when left to himself, he would not again sink into a torpor as he had done twice before.

This case comes within the principle of *Fagg v. Louisville & Nashville R. R. Co.*, 111 Ky., 80. In that case the employees of the railroad knew a

drunken man had entered a deep cut through which a train was soon expected. They knew that if this train passed while he was in the cut his life would be in peril. With this knowledge, they permitted the train to run into the cut without informing those in charge of the perilous position of the unfortunate man. He was killed, and we held the corporation responsible. The principle in that case is identical with that at bar, although the facts on the surface are somewhat variant. The servants of appellant knew that Marrs was in the yard in a drunken condition; they had seen him asleep in a stupor; they were bound to know that the chances were that as soon as the stimulus of their presence was removed he would again succumb to the benumbing influence of the liquor with which he was intoxicated. This being true, they owed him one of two alternative duties, either to see him safely out of the yard, which common humanity required, or, failing in this, to watch out for him as the engine was moved about in the corporation's business.

The case of *Brown's Adm'r v. Louisville & Nashville R. R. Co.*, 103 Ky., 211, does not support appellant. In that case the servants of the corporation had no right to suppose, after the drunken passenger was removed from the train at London, he would seek the railroad track as a bed. In this case the employees of appellant knew that Marrs was likely to do this, for they had just aroused him up from such a position. Nor is the case of *Railroad v. Boswell's Adm'r*, 82 Va. R., 933, authority in favor of appellant's claim to a peremptory instruction. In that case the track-walker found the trespasser lying on the railroad track. He accosted him, whereupon the man aroused up on his elbow, and apparently assented, when told to get off the track, as a train would presently be coming along. The corporation's servant did not know that the trespasser was drunk, or in any other way physically incapacitated, the court on this point stating: "There was nothing in the conduct of Boswell which could lead Harrison to suspect that he was drunk or physically disabled. When accosted by Harrison, and told that he must get up and get off the track; that the train was coming presently, he, Boswell, got partly up, leaned on his elbow and assented to the suggestion in such a manner as to convince Harrison that he understood him; and, under these circumstances, Harrison had the right to presume that Boswell would take such measures to protect himself from danger as reasonable persons would be sure to take under such circumstances."

In the case at bar appellant's servants knew Marrs was drunk, and the circumstances surrounding him were such as would lead any reasonably prudent person to believe that he was incapable of caring for himself.

Under these circumstances we think they, after having discovered his perilous condition, owed him the duty of refraining from injuring him by exercising the care for his safety which we have indicated. The trial court correctly overruled appellant's motion for a peremptory instruction, and the instructions given were as favorable to the corporation as it merited.

Perceiving no error in the record prejudicial to appellant's substantial rights the judgment is affirmed.

UNITED STATES FIDELITY AND GUARANTY CO. v. BLACKLEY'
HURST & CO.

(Filed February 28, 1905—Not to be reported.)

Appeals—Practice—It is elementary that on a second appeal the opinion on the first appeal must be treated as the law of the case, and all questions which were then properly before court are as conclusively settled as if each were specifically referred to in the opinion. The pleadings upon the second trial being the same as the first and the evidence substantially the same, the finding of the jury will not be disturbed.

Bodley, Baskin & Flexner for appellant.

Dodd & Dodd for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

The facts of this case are fully stated in the opinion rendered on the former appeal. (United States Fidelity and Guaranty Co. v. Blackley, Hurst & Co., 25 Ky. Law Rep., 1271.) In reversing the judgment which had then been rendered in favor of appellees this court, in concluding its opinion and stating the reasons for the reversal, said: "Whether appellee used ordinary care to post himself as to the condition of Barnett's accounts before he made the statement to appellant was a question for the jury. For the same reason we think the jury, under proper instructions, should have been allowed to determine whether the plaintiff prior to the execution of the bond knew that Barnett was engaged in any gambling or speculative business, would have materially enhanced the hazard of the risk assumed by appellant."

On the return of the case to the circuit court it was tried again, and there was again a verdict and judgment for the plaintiffs. The defendant again appeals, insisting that the court should have peremptorily instructed the jury, to find for the defendant; that the court did not properly instruct the jury and that the court excluded proper evidence offered by it. It is elementary that on the second appeal the opinion on the first appeal must be treated as the law of the case, and all questions which were then presented and properly before the court are as conclusively settled, though not referred to in the opinion, as if each was specifically mentioned and considered. The pleadings on the second trial are the same as on the first. The evidence is not substantially different. It is insisted that a peremptory instruction should have been given because C. M. Barnett, with the knowledge of the plaintiff, was engaged in buying tobacco, and this was not disclosed by the plaintiffs in their answers to the questions asked by the defendant at the time of the application for the bond. This precise question was presented by the record on the former appeal, and the court in deciding what instructions should be given the jury in effect determined that a peremptory instruction should not be given.

The court on the second trial instructed the jury pursuant to the opinion of this court above quoted. The error in the instructions now relied on is that the court did not instruct the jury that they should find for the defendant if Barnett was engaged in the tobacco business, and the defendants knew

it at the time they made the answers referred to. Instruction 6, which was asked on the former trial and refused, presented this idea, and in reversing the case this court not only did not hold that the instruction should have been given, but the principles set out in the opinion were to the effect that it ought not to have been given. The evidence which it is complained that the court improperly rejected, consisted of proof offered to be made by Thomas S. Dugan, to the effect that if the facts had appeared in the employer's statement, as shown by the proof, he would not have accepted the application. But the proof showed that the application did not pass through his hands, and that he had nothing to do with the acceptance of the application. His statement as to what he would have done if he had known the facts was the mere expression of his opinion, and had no connection with the action which the company took. There have been two verdicts for the plaintiffs, and under all the evidence we are unwilling to disturb the finding of the jury.

Judgment affirmed.

AMERICAN BONDING CO. OF BALTIMORE v. FIRST NATIONAL
BANK OF COVINGTON, &c.

(Filed March 1, 1905—Not to be reported.)

Subrogation—Sureties—This being an action to recover of appellee bank the amount that the agent of an ice company had procured from the bank by fraudulent means, which amount appellant was compelled to pay, a demurrer to the petition was properly sustained. Appellant for a valuable consideration had guaranteed the fidelity and honesty of the agent, and it is not entitled to be subrogated to the rights of the ice company as against the bank.

F. M. Tracy for appellant.

S. D. Rouse for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

The case grew out of the case of the Champion Ice Manufacturing and Cold Storage Co. v. American Bonding and Trust Co., 25 Ky. Law Rep., 239. Upon a return of that case to the lower court a judgment was rendered in favor of the ice company against the bonding company for \$500, the amount lost by the conduct of the agent who had been guaranteed by the bonding company. Upon the payment of the judgment the bonding company (appellant) then brought this suit against the bank, the appellee, for the amount which it is claimed Weltkamp, the agent, succeeded in appropriating by means of raised checks. The appellant sues the ice company with the bank, and seeks to be subrogated to the rights of the ice company as against the bank.

A demurrer to appellant's petition was interposed, which was sustained, and the petition was dismissed, from which judgment this appeal is prosecuted. We deem it unnecessary to pass upon the question as to the liability of the bank to the ice company for the amount lost by reason of the fraudulent conduct of Weltkamp, the agent of the ice company, as we think the

action of the lower court in sustaining the demurrer was correct upon another principle. It appears that the appellant, for a valuable consideration, had guaranteed the fidelity and honesty of the agent, Weitkamp; in other words, had become his surety and had agreed, for this consideration, to pay any losses sustained by reason of the dishonesty of Weitkamp. In view of these facts, we can not understand upon what principle of equity the appellant here is entitled to be subrogated.

In the case of *Stewart v. Commonwealth, &c.*, 104 Ky., 489, the accommodation sureties of a clerk, who had been compelled to refund to the State money fraudulently collected of it by reason of the fraudulent act and forged certificates of the clerk, sought to recover of one Stewart, the person who had received the money from the State as the assignee of the clerk. They claimed that as the Commonwealth had a cause against Stewart for the money wrongfully paid him on these forged certificates, and as they had been compelled to pay this money to the State, that they should be subrogated to the right of the Commonwealth as against Stewart. The court held that they had no such right. The principles enunciated in this case settle the one at bar.

Wherefore, the judgment of the lower court is affirmed.

Whole court sitting.

CUMBERLAND TELEPHONE AND TELEGRAPH CO., &c. v. AVRITT, &c.

(Filed March 1, 1905.)

Land—Right of way to turnpike company—Erecting telephone line thereon—Compensation to original owner—Additional servitude—Public purpose—Where a right of way has been granted by a land owner for the building of a turnpike thereon, an agreement by the turnpike company to allow telephone poles and wires to be erected thereon being for a public purpose, is not an additional servitude on the land, for which the original owner can maintain an injunction or recover compensation from the telephone company.

Fairleigh, Straus & Fairleigh and John McChord for appellants.

Sam'l Avritt for appellees.

Appeal from Marlon Circuit Court.

Opinion of the court by Chief Justice Hobson.

The Lebanon and Bradfordsville Turnpike Co. in the year 1855 built a turnpike road from Lebanon to Bradfordsville. For the distance of about half a mile the pike was constructed through the farm of John Avritt. From the time the road was built it was used as a toll road until a few years before this suit was brought, when it was bought by Marlon county and became a free public highway. Before the sale to the county, however, in July, 1895, the Lebanon, Louisville and Lexington Telephone Co. was given the right to build and maintain a telephone line by the turnpike company over the turnpike right of way from Lebanon to Bradfordsville. Under this grant the telephone company in the summer of 1895 built a telephone line from Lebanon to Bradfordsville on the turnpike right of way, and after

that operated the line, furnishing telephone service between those points. The Cumberland Telephone and Telegraph Co. succeeded to the rights of the Lebanon, Louisville and Lexington Telephone Co.

In the year 1894, or the year before the telephone line was built, John Avritt died and the farm descended to his widow and children. Two of his children finally purchased the interest of the others, and on April 27, 1903, filed this suit, alleging that the telephone company had entered upon their lands against their consent, and built and maintained a telephone line thereon against their wishes, and within a short time before the filing of the petition, against their protest, had entered upon their lands and stretched an additional wire, and unless prevented by the court would enter upon their lands, set additional poles and string additional wires. They prayed that the defendants be enjoined from doing these things, and that they be compelled to remove the old line erected in the year 1895. The defendants pleaded the facts above stated, alleging that the telephone line was built on the right of way of the turnpike company which had been granted it by John Avritt. They also pleaded that the plaintiffs were residing on the land and knew that the telephone line was being built, but made no objection to the building of the line in 1895, and that a considerable sum of money had been spent in building the line by the defendants on the idea that the plaintiffs acquiesced in their right to build the telephone line. On final hearing the circuit court entered a judgment in favor of the plaintiffs, granting them an injunction as prayed in their petition, and the defendants appeal. The only question we deem it necessary to consider on the appeal is whether a telephone line upon a public highway is an additional servitude which gives the original owner of the land, or those claiming under him, a cause of action.

In *Lexington & Ohio Railroad Co. v. Applegate*, 8 Dana, 289, it was held by this court that a steam railroad on a public highway is not an additional servitude for which the original owner of the land may bring an action. In *Louisville Bagging Manufacturing Co. v. Central Passenger Railway Co.*, 95 Ky., 50, it was decided that an electric street railway on the streets of a city is not an additional servitude, and in *Georgetown and Lexington Traction Co. v. Mulholland*, 25 Ky. Law Rep., 578, the same rule was applied to electric railroad running on country highways. (*Ashland & Catlettsburg Street Railway Co. v. Faulkner*, 21 Ky. Law Rep., 151.)

We are unable to distinguish a telephone line from a steam railway or an electric railway on the public highway. The telephone line is certainly a much less serious burden than either of these. It in no way interferes with the use of the property as a public highway. The use of the land by the telephone company is no less a public service than the use of it by a railroad company. The telephone takes the place of the private messenger. The transmission of messages by telephone is a business of a public character which is conducted under public control in the same manner as the carriage of persons or property. The easement of the public is not limited to the particular methods of use in vogue when the easement is acquired, but includes improved methods which the progress of society finds necessary for business. The public easement in a highway is not confined to the transportation of persons or things in vehicles. The streets of a city may be used for con-

structing sewers and laying gas or water mains and the like for the public use. There is no sound distinction between urban and rural highways as to the purposes for which they may be used. Public highways are designed as avenues of communication, and a telephone line along a country road is no more an additional servitude than a telephone line along a railroad right of way. No use of the highway can be made which practically subverts its use by the public in the ordinary way, nor may it be used for any purpose not public. The wires of a telephone company are no less immovable than the rails of the railroad, and they are no more a burden to the adjoining property than the rails. The great weight of authority is to the effect that a telephone line on a public highway is not an additional servitude in those State maintaining the Kentucky rule that a railway is not an additional servitude. (Pierce v. Drew, 49 Am. Rep., 7; Julia Building Association v. Bell Telephone Co., 57 Am. Rep., 398; Magee v. Overshiner, 40 L. R. A., 370; Carter v. Northwestern Telephone Exchange Co., 28 L. R. A., 810; Herschfield v. Rocky Mountain Bell Telephone Co., 12 Mont., 103; Southern Bell Telephone Co. v. Frances, 109 Ala., 224; Kirby v. Citizens Telephone Co., South Dakota, 97 Northwestern Rep., 8; Irwin v. Great Southern Telephone Co., 87 La., 63.)

The case of Ward v. Triple State Natural Gas and Oil Co., 25 Ky. Law Rep., 116, is not in conflict with these views. The highway may be used for public, but not for private purposes. In that case, so far as appears, the company rendered no public service. The highway can not be used for a pipe line by a corporation performing no public service and operating the pipe line only for its private purposes. Such use of the highway is not within the purposes of the grant. We, therefore, conclude that the plaintiffs failed to make out a cause of action, and that their petition should have been dismissed.

Judgment reversed and cause remanded for a judgment as herein indicated.

MINNIARD v. COMMONWEALTH.

(Filed March 1, 1905—Not to be reported.)

Criminal law—Beginning of trial—Application for change of venue—Where a petition accompanied by the necessary affidavits were tendered and motion entered for change of venue before the jury was sworn, it was error to overrule the motion on the ground that it came too late because the preparation for trial had been begun. The trial had not begun until the jury was sworn, and, moreover, the state of facts presented authorized the change of venue, and until they were controverted the court did not have the discretion to refuse the application.

B. B. Golden, John B. Minniard, C. M. Horn and Chas. Wooten for appellant.

N. B. Hays and Chas. W. Morris for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge O'Rear.

The only question deemed necessary to be decided on this appeal is the

action of the circuit court in refusing to consider or pass upon appellant's petition for a change of venue. Appellant was put upon his trial two days after the return of the indictment against him. His application for a continuance was refused, and the selection of the jury completed. His counsel stated that they intended applying for a change of the venue of the case, but that owing to the great prestige of the family of the prosecution in that community, and owing to the odium attending defendant therein, he found it difficult to find the persons who would voluntarily make the requisite affidavits, although many citizens had expressed themselves as being of the opinion he could not get a fair and impartial trial in that county at that time; but that, owing to the very great domination of the prosecution which was the basis of the application, they were unwilling to appear as voluntarily siding with appellant in the matter. The jury was not sworn till the following morning. Notice was given the Commonwealth attorney of the application for the change of venue, and on the following morning, before the plea of the defendant had been entered or the jury sworn, a petition, accompanied by sufficient affidavits, was tendered to the court, and the motion entered. The court refused to permit the petition or affidavits to be filed, and refused to entertain the motion because, as the order says, it came too late; that an application for continuance had been overruled and the preparation for the trial had been begun.

We are of opinion this ruling was error. The trial had not begun till the jury was sworn. If the state of affairs existed, as shown in the petition and affidavits, it was evident that the application for change of venue ought to have been granted, and until they were controverted the court had not the discretion to refuse the application. (*Greer v. Commonwealth*, 23 Ky. Law Rep., 489, 111 Ky., 94.)

The judgment of conviction is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

RUTHERFORD v. ILLINOIS CENTRAL R. R. CO., &c.

(Filed March 1, 1905.)

1. Joint action—Concurring negligence—Separable causes—Petition for removal—Conclusion of pleader—Where a joint action for personal injuries was filed against a foreign corporation and three of its resident employees, alleging that the injuries were caused by the joint and concurring negligence of the company and its codefendants, as its agents and employees, in the operation of a railroad train, on which plaintiff was a passenger, a petition by the corporation for removal of the cause to the United States Circuit Court, which alleges that its codefendants were joined with it, for the sole and fraudulent purpose of preventing a removal of the action from the State court, and that all the statements in the petition as to such codefendants are untrue, amounts to nothing more than a conclusion of the pleader, and does not state a single fact from which the court might determine that the cause of action is separable.

2. Jurisdictional facts—In a petition by a nonresident defendant, sued jointly with resident defendants, for the removal of the action from the State court to the United States Circuit Court, a denial therein of the alleged negligence of its codefendants, and an allegation of the purpose of

the plaintiff in joining its agents and servants as defendants with it, was for the fraudulent and wrongful purpose of defeating the jurisdiction of the United States Circuit Court, are conclusions of the pleader, and do not state a single jurisdictional fact.

8. Wrongdoers—Liability—Joint and several—It is a well-established rule that for an injury inflicted by two or more wrongdoers an action may be maintained against one or all of them. The liability is joint and several, and the injured party can elect whether he will proceed against one or all of them.

Lee & Hester for appellant.

Robbins & Thomas and Trabue, Doolan & Cox for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Nunn.

The appellant, Sallie A. Rutherford, filed her petition in the Graves Circuit Court against the appellee, Illinois Central Railroad Co., and George F. Mullinix, Tom Hudson, Tom Caulder and C. H. Hendrix, in which she alleged in substance that on or about the 15th day of July, 1904, she bought a ticket and took passage on one of appellee's trains at Fulton, Ky., for her home at Mayfield, Ky.; that she was a passenger upon this train and was entitled to be conveyed to her home with care and safety; that appellee had its codefendants, Mullinix, Hudson, Caulder and Hendrix, its agents, servants and employees, in charge of this train, and that they so negligently managed and operated it as to cause the coach in which she was riding to be suddenly and unnecessarily jerked and bumped, and this was done in such a violent and reckless manner that it threw her violently against a seat and other objects in the coach, thereby injuring her, both externally and internally, wounding and bruising her so that her health has been permanently impaired, for which she prayed judgment for \$5,000 against all of the defendants.

All the defendants were duly served with process. The appellee appeared within the proper time, and filed its petition and a bond, and sought a removal of the action to the U. S. Circuit Court. This petition, omitting the formal parts, is as follows: "Your petitioner further alleges and shows that the cause of action attempted to be set up in the plaintiff's petition against it and the other defendants is separable, and is wholly a controversy between citizens of different States, viz., the plaintiff, Sallie A. Rutherford, a citizen and resident of the Commonwealth of Kentucky, and your petitioner, the Illinois Central Railroad Co., a citizen and resident of the State of Illinois. Your petitioner further alleges and shows that the allegations in the plaintiff's petition, that she received injuries which were the result of any negligence on the part of the defendants, George F. Mullinix, Tom Hudson, Tom Caulder and C. H. Hendrix, by reason of either of them moving said train or coach in which plaintiff was a passenger, suddenly or roughly, or that the train or coach was so operated by either of them, by negligently pushing, pulling, striking, jarring or jerking the car and coach in which she was a passenger, with such suddenness and violence and in such reckless manner that it threw her down violently, were and are wholly untrue; and she received no injury which was the result of any negligence

or carelessness on the part of either of your petitioner's codefendants; and the plaintiff, at the time this action was instituted, knew, or had good reason to believe, that the allegations of her petition, to the effect that her injuries were the result of negligence on the part of your petitioner's codefendants, or either of them, were wholly untrue; and it says that the defendants, George F. Mullinix, Tom Hudson, Tom Caulder and C. H. Hendrix, were joined as defendants in this action for the sole and fraudulent purpose of preventing your petitioner from removing this action from the State court, and for the sole purpose of fraudulently defeating the jurisdiction of the United States Circuit Court; and your petitioner further alleges that the averments of fact on which the joint liability of your petitioner and its codefendants is asserted are so palpably untrue and unfounded as to make it improbable that the plaintiff could have asserted them in good faith."

Upon the filing of this petition and the bond the court granted appellees' prayer for a removal of the cause, of which action appellant complains. The appellee contends that the action of the lower court was correct, for the reason that it alleged in its petition for removal that appellant's cause of action, stated in her petition, was a separable one. This allegation amounted to nothing more than a conclusion of the pleader. There is not a single fact stated in the petition for removal from which the court might determine as to whether or not the cause of action was a separable one. But, on the contrary, it is shown in the petition of appellant that her cause of action was a joint one against all of the defendants named therein. It is averred by her that appellee's codefendants, as its agents and servants, were in charge of and so negligently operated and managed the train as to cause the injuries complained of.

It is a well-established rule that for an injury inflicted, produced by two or more wrongdoers, an action may be maintained by the person so injured either against one or against all of them. The liability of the wrongdoers is joint and several. The injured party can elect whether he will proceed against one or all of them. While several may be guilty of several and distinct acts, yet if their concurrent effect is to produce an actionable injury, they are all liable therefor. The action, properly speaking, is not to recover for the negligent act or acts, but it is to recover damages for the injury which they produce. (101 Ky., 77.)

The appellee also contends that the removal of the cause by the lower court was correct, for the reason that it denied, in its petition for removal, the negligence of its codefendants, as charged in her petition, and that it also alleged that her purpose in joining its agents and servants as defendants with it was for the fraudulent and wrongful purpose of defeating the jurisdiction of the United States Circuit Court. These allegations are likewise mere conclusions of the pleader, and do not contain a single jurisdictional fact. As well might the appellant, on the other hand, say that these allegations and conclusions were stated for the sole purpose of ousting the State courts of jurisdiction. In the case of *I. C. R. R. Co. v. Jones, Adm'r*, 26 Ky. Law Rep., 81, in discussing the unseemly conflict between State and Federal jurisdictions, the court said: "To avoid these, the congress has wisely made the condition of the Federal court's jurisdiction to depend upon

the filing in the State court in due time of a petition, in which, according to the unbroken current of the decisions of the Federal courts construing the act, all necessary facts to show *prima facie* a right in the petitioner for the removal must be set out, not as conclusions of law; or such necessary facts must affirmatively and explicitly appear elsewhere in the record when the application to the State court is made."

It was further determined in that case that it was the duty of the judge of the State court to determine, from the petition and record, whether or not there was presented a Federal case. The question as to the purpose of one party to avoid the Federal court, or the other to avoid the State court, is immaterial. (*Winston's Adm'r v. I. C. R. R. Co.*, 23 Ky. Law Rep., 1283; *C. & O. R. R. Co. v. Dixon's Adm'r*, 179 U. S., 131; *Powers v. C. & O. R. R. Co.*, 169 U. S., 92.)

Appellee contends that, by reason of its denial of the negligence of its codefendants, its employes, it was the sole and real defendant, and that its codefendants were improperly made parties thereto. We are unable to accept this. The averments in a petition for a removal of a cause of action from a State to a Federal court must be restricted to matters of fact touching the jurisdiction of the court, and all allegations concerning the merits of the case are superfluous and immaterial. The merits of the case are exclusively within the province of the jury trying the case in the court having jurisdiction thereof. (*L. & N. R. R. Co. v. Wanglin*, 132 U. S., 599; *Blackburn v. Portland F. & M. Co.*, 175 U. S., 281; *Bushnell v. Cooke*, 148 U. S., 682; *I. C. R. R. Co. v. Jones, Adm'r*, 26 Ky. Law Rep., 31.)

We are of the opinion that there are not sufficient facts alleged in the petition for removal or appearing in the record which would deprive the State court of jurisdiction to try this case.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

MANION v. MANION.

(Filed March 1, 1905.)

1. Complicated accounts—Settlement—Transfer to equity—In an action between parties embracing about 500 items in the petition, the most of which are controverted and a counterclaim filed involving the settlement of mutual complicated accounts of great detail, it was proper for the court, on motion of defendant, to transfer the case to the equity docket and refer it to the commissioner for settlement.

2. Constitution—Trial by jury—Section 7 of the Constitution, providing "that the ancient mode of trial by jury is to be held sacred and the right thereof to remain inviolate," was not intended to be so strictly construed as to prevent the due and proper administration of justice in cases of complicated accounts when the remedy at law was deemed inadequate, so that a jury could not arrive with accuracy upon the condition of the account between the parties.

3. Variance—Party misled—In the settlement of complicated accounts a variance between the pleading and proof of certain items is not material where the form of the plea is not objected to unless the party complaining was misled thereby to his prejudice.

4. Transcript—Cost—Where, in an equitable action, appellant ordered only a partial transcript of the record, the appellee not knowing what grounds of reversal would be relied on, had the right to have the entire record copied, and should not be taxed with the cost of the additional record.

Ward & Ward and Montgomery Merritt for appellant.

Yeaman & Yeaman for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant, John C. Manion, began this action in the Henderson Circuit Court by a petition in ordinary, in which he alleged that the plaintiff was indebted to him in the sum of \$927.07 for balance of money advanced, paid and furnished to and for him and for his use and benefit at his special instance and request, and for labor and services performed for him at his like request, particulars of which were set out in an itemized account filed with the petition, and it was alleged that each item of the account was just and reasonable. The itemized account which was filed with the petition covers seventeen pages of the transcript and embraces something like five hundred items. The defendant filed an answer in which he denied that he bought of the plaintiff, or that the plaintiff furnished to or for him at his instance or request, any of the goods, wares or merchandise charged on the account sued on, except as therein stated, and he denied that he ever had of the plaintiff, or that the plaintiff ever furnished to or for him, or that the defendant ever in any way got the benefit of any of ninety-four items of the account which were set out in the answer. Among other things the plaintiff claimed services for six months at \$100 a month. The defendant denied that the plaintiff rendered services for more than five months, and alleged that his services were rendered under an agreement that he was to pay therefor what the services were worth, and that they were not worth over \$25 a month. The defendant also alleged that the plaintiff had, while in his employ, put on the defendant's pay roll and paid out of the defendant's money two persons who were not in the defendant's service, amounting to \$199.55. He also alleged that the plaintiff was employed to keep time books and to take care of the feed which the defendant provided for his teams, which was placed in plaintiff's keeping, and that he wasted the feed to the amount of \$500. He also alleged that the plaintiff sold whisky to his employes without license, and that the whisky so sold was charged to him on the account. Finally, he alleged that he had paid the plaintiff, and more than paid him for all the goods, wares, merchandise or cash he ever had of the plaintiff, or that the plaintiff ever used for him and for all the services he ever rendered him. The plaintiff, by reply, controverted the affirmative allegations of the answer. The defendant entered a motion to transfer the case to the equity docket, and refer it to the master commissioner to audit the accounts between the parties. The plaintiff objected to the motion, but the court being of opinion that a transfer was necessary because of the peculiar questions involved, and because the case involved accounts so compli-

cated and such great detail of facts as to render it impracticable for a jury to intelligently try the case, the motion was sustained, and the plaintiff excepted. The commissioner to whom the case was referred reported in favor of the defendant. Numerous exceptions were filed to his report, but the court overruled the exceptions and entered judgment in favor of the defendant. The plaintiff appeals, insisting that the court erred in denying him a jury trial.

In *O'Connor & McCulloch v. Henderson Bridge Co.*, 95 Ky., 683, this court held that as the ancient mode of trial by jury is by section 7 of the Constitution to be held sacred and the right thereof remain inviolate, subject to such modifications as may be authorized by the Constitution, section 10 of the Civil Code of Practice, which provides for the transfer of an action from the ordinary to the equity docket because of the peculiar questions involved, or because it involves accounts so complicated or such great detail of facts as to render it impracticable for a jury to intelligently try the case, adds nothing to the authority of the court to try an action in equity. But it was held in that case that section 7 of the Constitution was not intended to be so strictly construed as to prevent in any case the due and proper administration of justice; that courts of equity have for a long time necessarily had jurisdiction in all cases of mutual accounts upon the ground of the inadequacy of the remedy at law; that in a complicated account a court of law would be incompetent to examine it before a jury with the necessary accuracy, and that courts of equity constantly act by taking cognizance of matters which, though cognizable at law, are so involved with complex accounts that they can not properly be tried at law. In that case it was also said as follows: "This court has uniformly held that a court of equity has concurrent jurisdiction on matters of account, and 'should be exercised when otherwise there may be serious doubt as to the true state of the accounts, or difficulty in satisfactorily adjusting them, and safely striking a balance.'"

In *City of Covington v. Limerick*, 19 Ky. Law Rep., 880; *Sallee's Adm'r v. Eades*, 21 Ky. Law Rep., 109, and *Brashears v. Letcher County Court*, 22 Ky. Law Rep., 1763, the rule announced in the case cited was followed and the transfer of the action from the ordinary to the equity docket was upheld. In the case before us there were mutual accounts or claims. It was incumbent on the plaintiff as agent of the defendant to render to him an account of his stewardship, and of such settlements courts of equity have always had jurisdiction. In none of the cases cited was there a greater complication of accounts than in the case before us. In none of them was it more evident that it was impracticable for a jury to intelligently try the case. For a jury to have attempted to pass on the disputed items of the account between the parties would have been not to arrive with any accuracy at the condition of the account, but to have made a rough guess at it. We, therefore, conclude that the court properly transferred the action to the equity docket, and referred it to his commissioner to make a settlement of the accounts.

The defendant, moreover, testified that certain items of the account were paid by the plaintiff out of money which he had furnished him for that purpose. It is insisted that this proof is incompetent as there was no plea to this effect. The answer of the defendant denied that the plaintiff furnished him these items, or any part of them. He also pleaded affirmatively that he

had paid the plaintiff all the money which he furnished for him. We can not see how under these allegations, the form of which was not objected to, the plaintiff could have been misled. Both the parties took a large amount of proof, and it in fact appears from the record that they went into the case on its merits and that the plaintiff was not in fact misled, but took proof on all the questions involved. It is provided in the Code that the variance shall not be material unless the party complaining was misled thereby to his prejudice. We fail to see that there was any variance here, and clearly it does not appear that the plaintiff was misled to his prejudice. The plaintiff ordered for the appeal a partial transcript of the record, and the defendant then ordered the clerk to copy the remainder of it so as to make a complete transcript. The appellant has entered a motion that the cost of this additional record shall not be taxed. But either party was entitled to have a complete transcript of the record for the appeal. Appellant was not compelled to file an assignment of errors, and, therefore, the appellee not knowing what ground of reversal might be relied on, had the right to have the entire record copied so as to take no chances. The motion that appellee shall be taxed with the cost of the additional record is overruled. On the merits of the case we see no reason for disturbing the chancellor's judgment confirming the report of the commissioner.

Judgment affirmed.

CHENAULT v. GRAVITT.

(Filed March 1, 1905—Not to be reported.)

1. Passways—Adverse use for fifteen years—Matter of right—Injunction—Where the weight of the evidence shows that appellant and his vendors have had the use of a passway over an adjoining tract of land as a matter of right adversely to the claimant of the land and all others, continuously for more than fifteen years, he is entitled to a mandatory injunction for the removal of all obstructions to his free use thereof.

2. Change in part by owner—A temporary or even permanent change in a part of a passway by the owner of the land over which it runs without the consent of the one entitled to its use, or with the understanding that he is to continue its use as changed, gives him the same right to its use as changed as he had before the change.

3. Convenience—Necessity—In an action for the obstruction of a passway claimed as a matter of right by prescription, the question of the convenience or necessity thereof to the plaintiff can not be considered, but only its adverse use as an easement for more than fifteen years.

Pendleton & Bush for appellant.

Leland Hathaway for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Settle.

The appellant is the owner of sixty-seven acres of land in Clark county, seven acres of which he purchased from Lewis Haggard about twenty-nine years ago, and the remainder from Rodney Haggard about ten years later. He lived on the seven-acre tract until he erected a few years ago, and re-

moved to, a more commodious dwelling house upon the parcel of land last purchased by him, where he still resides.

His land adjoins a 200-acre tract owned and occupied by appellee, and this suit was brought by him to recover of appellee damages for obstructing and closing a passway through and over his land from appellant's residence to a public highway, whereby appellant's use of the same has been prevented. The relief asked included a prayer for a mandatory injunction to compel appellee to remove all obstructions from the passway. The answer merely traversed the material allegations of the petition as amended, and upon the issues thus made, and proof taken by the parties, the chancellor held that appellant was not entitled to the relief sought, consequently his petition was dismissed at his cost, and of that judgment he now complains. Appellant claims the passway by prescriptive right, it being his contention that he and his vendors, the Haggards, have had the free and uninterrupted use thereof adversely to appellee, and those under whom he claims title, for more than fifteen years continuously before the closing of the passway by appellee. The passway runs from a point almost in front of appellant's home in a practically straight line over appellee's land along a ridge, down a hill and out to the public road, passing near and to the left of the latter's house, not far from the public road.

A large number of witnesses were introduced by each party, and the testimony was somewhat conflicting, but the weight of it conduced to prove that the land upon which appellee now resides was owned and occupied by Ivan Henry from 1855 to 1878, at which time he sold and conveyed it to one Ecton, who lived upon it two years, and then resold and conveyed it to Ivan Henry and his son, John Henry. They owned it jointly until 1887, when by deed from his father the son became the owner of the father's undivided half, and he (John Henry) continued the owner of the whole until 1895, and it was then sold under execution and purchased by the appellee, who shortly thereafter moved upon and took possession of it under a deed from the sheriff of the county. The appellant testified that when he purchased his land of the Haggards they informed him of the existence of the passway over the land of appellee, and that he was entitled to the use of it, and that one of them, Lewis Haggard, pointed it out to him. The record discloses that Judge Rodney Haggard, appellant's other vendor, was his attorney in this case, and that his name appears to the petition as such, though his death occurred before the trial.

Ivan Henry is dead, but his son, John Henry, and grandson, James Henry, testified that the passway always ran as appellant now claims it to be, and that Ivan Henry, John Henry and Ecton during their ownership respectively of appellee's land, which covered altogether a period of nearly fifty years, always recognized the right of the Haggards and appellant, as their vendee, to the use and enjoyment of the passway in question. The witnesses named were corroborated by Wood Ecton, son of the former owner of appellant's land, Oliver, Parker and others. Indeed it appears from the evidence that appellee himself recognized, and did not interfere with, appellant's right to the use of the passway for about six years after he became the owner of the land over which it runs. It also appears that there has

been all the time in the fence dividing appellant's land from that of appellee, draw bars, or a "slip gap," at that end of the passway, through which appellant, his family and others had access to the passway on appellee's land, and that a gate was, until about the time of the bringing of this suit, maintained on appellee's land at the other end of the passway through which to reach the public road.

It was admitted by appellee and his witnesses that appellant and others were in the habit for years of passing over his land, but claimed by him and some of them that the passway most generally used was not that now claimed by appellant, but one that ran to the left of and some distance from the one in controversy. It is true there appears to have been such a passway that was occasionally used by pedestrians and horsemen, but it ran for much of the distance through a ravine in the bed of a branch, and up a steep hill before reaching appellant's land, and it was well nigh impassible for horsemen, and wholly so for vehicles.

It was further contended by appellee and testified by some of his witnesses that at one time during Ivan Henry's occupancy of the land a field on the ridge through which the passway as claimed by appellant runs was enclosed by a fence and cultivated in corn. This was admitted by appellant, but both he and the Henrys (John and James) stated that the field was closed and cultivated with his consent, and one year it was cultivated by appellant himself, but that while it was in cultivation appellant was given by Ivan Henry a temporary road around the field, and when the field was no longer in cultivation he resumed the use of the old passway through it. A temporary or even permanent change in part of a passway by the owner of the land over which it runs, if made without the consent of one entitled to its use, or with the understanding that he is to continue its use as changed, gives him the same right to the use of such passway as changed that he had to it as formerly located.

It is also insisted for appellee that as appellant has a roadway over his own land to the public road in the rear of his farm, known as the "Indian creek" road, by which he can reach his church, the mill and county seat, he should be excluded from the use of the passway over his land. It appears that appellant's land lies between the Indian creek road, and what is called the "New Cut road," and that the passway claimed by him over appellee's land leads to the "New Cut road." We do not think it material which of the two public roads is the better or more convenient for appellant to travel.

The question of convenience or inconvenience is not before us for consideration, as the passway in controversy is not claimed by appellant upon the ground of necessity or convenience, but by adverse use, as an easement for more than fifteen years, and we are of opinion that the weight of the evidence shows him to be entitled to it upon that ground.

In other words, we think appellant has sufficiently shown by testimony of witnesses, who were in a better position to know of the existence of the passway and of the appellant and his vendor's use of it than were the witnesses of appellee, that he and those under whom he claims have had the use and enjoyment of the passway as a matter of right, and adversely to appellee, his vendors and all others, for nearly fifty, and certainly more than fifteen, years, continuously.

In *O'Daniel v. O'Daniel*, 88 Ky., 185, this court said: "It was not necessary for the plaintiff to show by positive testimony that he had claimed this use as a matter of right, and so proclaimed to his neighbors, the burden being on the defendant after such a long use of his premises to show that the use was merely permissive. Under our statute of limitation the continued use of a passway over another's land for fifteen years unexplained creates the presumption that the use he did claim was adverse." (*Wilkins v. Barner*, 79 Ky., 323; *Bowen v. Cooper*, 23 Ky. Law Rep., 2065; *Anderson v. Southworth*, 25 Ky. Law Rep., 776.)

Being of opinion that the conclusion reached by the chancellor is not supported by the weight of the evidence, the judgment is reversed and cause remanded, with directions to enter a decree adjudging appellant entitled to the passway claimed by him, and granting a mandatory injunction requiring appellee to remove all obstructions to his free use of same and for such other proceedings as may be consistent with the opinion.

SMITH v. BANK OF LEWISPORT.

(Filed March 1, 1905—Not to be reported.)

1. Fraud—Purchasing corporation stock—In this action upon a note executed by appellant for shares of stock in a chair company, in which plaintiff alleges fraud and misrepresentation in its purchase, evidence examined, and Held—That there was neither fraud nor misrepresentation in said sale.

2. Affirmance—Even if there had been misrepresentation in the sale, the fact that appellant was elected a director and president of the chair company, and after knowing all about its financial condition, continued to pay the interest on the note executed therefor, was an acquiescence in, and an affirmance of, the purchase.

Sweeney, Ellis & Sweeney and W. T. Morrison for appellant.

G. D. Chambers for appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Settle.

The appellee, Bank of Lewisport, sued the appellant, H. G. Smith, in the court below upon a note of \$699.50, of date March 4, 1901, due four months after date, with interest from date.

The answer of appellant set up the defense that the note sued on was executed in payment of thirty-two shares of the capital stock of the Kentucky Chair Manufacturing Co. of the face value of \$25 per share, which it was averred one J. M. Combs assigned to appellant at the time of the execution of the note; that appellant was induced to purchase the stock and execute the note therefor by the alleged false and fraudulent representations of T. B. Pell, the president of the appellee bank, and B. H. Poindexter, its cashier, and also president of the Kentucky Chair Manufacturing Co., in regard to the financial condition and prospects of success of the chair company. The alleged false representations were that the indebtedness of the chair company was about \$8,000, and that its property and assets were of the value of about \$6,000; that the chair company had shortly theretofore made

a contract with the Evansville Furniture Co., whereby the furniture company agreed to purchase the output of the chair company for a period of one year, at prices that would enable the chair company to realize a profit of \$1.85 for each dozen chairs furnished under the contract, or \$27 per day, which would enable the chair company to pay all its indebtedness within six months, and justify the directors in declaring a large dividend to the stockholders by the end of the year.

It was further averred in the answer that Pell and Poindexter also represented at the time of the execution of the note that the thirty-two shares of stock in the chair company was worth its par value or more, and that the capacity of the company was twenty dozen chairs per day; that each and all of these representations were untrue, and the property and effects of the chair company were not in fact worth over \$1,000, and its indebtedness was \$4,000, or more; that no such contract as was represented had been made between the chair company and the Evansville Furniture Co., and that the thirty-two shares of stock for which the note was executed by appellant were then, and are now, worthless, for which reason the note given therefor by appellant was without consideration and void, and the court was asked to cancel it, and adjudge a rescission of the contract.

A demurrer was filed by appellee to the answer, which the court overruled. Appellee thereupon filed a reply, containing a specific denial of the material averments of the answer, and in addition alleging that the thirty-two shares of capital stock owned by the appellant were purchased by him from J. M. Combs, and paid for by appellant with the note sued on, which he executed to appellee for a note of the same amount it held against Combs, secured by the thirty-two shares of stock that Combs sold and assigned appellant, and that appellant's note was accepted by appellee in satisfaction of that of Combs, and the thirty-two shares of stock were upon Combs' written order delivered by appellee to appellant when it accepted his note in lieu of that of Combs; that at the same time the thirty-two shares were transferred upon the books of the Kentucky Chair Manufacturing Co. to appellant, the old certificate was cancelled, and a new one issued by the officers of the chair company to appellant.

The reply contained the further averment that appellant inquired of B. H. Poindexter, appellee's cashier and president of the Kentucky Chair Manufacturing Co., about the value of the stock and condition of the company, and the latter informed him before his purchase from Combs of the thirty-two shares of stock that he (Poindexter) could not give him any definite or accurate information of the condition of the chair company, but that its liabilities at the time amounted to \$3,000 or \$3,500, and that the plant and its other property had cost about \$5,000; that it had some money owing to it, and with proper management he believed the company would succeed and its capital stock become profitable, and that he had been informed by the manager of the chair company that a contract had been made with the Evansville Furniture Co., whereby the latter company had agreed to buy the output of the chair company for a period of one year, from which the chair company would derive a profit of about \$1 per dozen for the chairs it might make and furnish the furniture company. The reply also averred that appellant was, after his purchase of the stock in question, elected a director and the president of the chair company, at which election he was present

and voted his stock; that he immediately assumed the active management of the affairs of the company as its president, and continued as its president and manager as long as the company maintained its corporate existence, and that by his acceptance of the directorship in and presidency of the company appellant ratified his contract of purchase of said stock, and by reason thereof was estopped to deny his liability upon the note given therefor. The chancellor upon the issues and proof presented by the record held the defense relied on insufficient to defeat a recovery upon the note, hence the appellee was given judgment against the appellant for the amount sued for. We think the appellant's own testimony establishes the fact that he purchased the stock of Combs. It was to the effect that he met Combs on the train some weeks before the contract of sale was made, and was asked by him as to the prospects of the chair company, and Combs proposed to sell him the thirty-two shares of stock. Appellant told Combs the factory was running all the time and seemed to be in a flourishing condition, but declined at that time to buy the stock. Soon after the meeting between Combs and appellant the latter received a letter from Combs, again proposing to sell his stock for the amount of the note held by the appellee and an account of \$84 he was owing Pell Bros., and after making inquiries, as he claimed, of Poindexter and Pell, and satisfying himself as to the value of the stock, appellant wrote Combs accepting his proposition of sale. Combs thereupon gave appellant an order in writing, which directed Poindexter, as president of the Kentucky Chair Manufacturing Co., to transfer to appellant his stock therein, upon the latter's assuming the payment of his note to the bank and the small account to Pell Bros.

Poindexter filed the written order from Combs with his deposition, in which he testified that he transferred the stock to appellant as directed by the order, and that as cashier of the bank he accepted appellant's note in lieu of that of Combs, as had been arranged between appellant and Combs, and surrendered to Combs the old note. Appellant in his deposition admits in effect that the matter was arranged as testified by Poindexter, and there was no evidence that Poindexter, or any other officer of the bank, had anything to do with negotiating the sale of the stock further than what was done by Poindexter in making the transfer of the stock and accepting the note of appellant. But if it be conceded that the sale of the stock was made by the bank, we are unable to see that appellant would be in any better attitude to assail the transaction, as his claim that there was fraud in the sale to him of the stock is not, in our opinion, sustained by the evidence.

As to the alleged false representations upon the part of Poindexter and Pell, appellant himself testified that Poindexter, in response to his inquiries about the affairs of the chair company, said he thought the "stock was good;" that the indebtedness of the company was about \$3,000, though Poindexter did not profess to state the amount precisely; that he also told him that the property and assets of the company would amount in value to \$6,000, and that it had a contract with the Evansville Furniture Co., under which that company was to take the entire output of the chair company for a year, at a price that would give the company a profit of \$1 per dozen chairs, and that the capacity of the chair company's plant was twenty dozen chairs per day. Appellant admitted, however, that he did not believe Poindexter

had intentionally made a false statement to him. He further admitted upon cross-examination that Poindexter might in the same conversation have informed him that P. Best, the manager of the chair company, had told him (Poindexter) that he had made such a contract with the Evansville Furniture Co. as Poindexter mentioned. The conversation between appellant, Pell and Best, testified to by the former, seemed to have occurred upon a different and perhaps a later occasion, but before his purchase of the stock. Appellant upon entering the bank found Poindexter, Pell and Best talking about the affairs of the chair company. He said that he then inquired about the financial condition and prospects of the company, and they "figured" its property and assets at \$6,000, but said it cost a good deal less, and also figured that the company, under its contract with the Evansville Furniture Co., would be able to pay all its indebtedness within six months, and that Best, the manager, made a statement of the cost of manufacturing chairs, and the profit thereon, and announced the result to be a profit of \$20 a day.

It does not appear from the deposition of appellant that he ever told Pell of his purpose to buy of Combs his stock, or that either Pell or Best knew at the time of the conversation referred to that he had such purpose. While appellant testified that he had no knowledge of the affairs of the chair company except what he learned from Poindexter, Pell and Best, yet an answer which he made to the following question would indicate that he had some information from other sources:

"Q. Now, Mr. Smith, I will ask you to state whether you knew anything about the financial condition of the chair company and its prospects of business at the time Mr. Combs offered to sell you his stock."

"A. Well, I knew nothing, but I gathered from the general talk around here that it was doing well, or very well. They were running all the time, and had been running for some time. I don't know just how long, month or two, or maybe longer."

The force of this statement is realized when we find it disclosed by the record that the Kentucky Chair Manufacturing Co.'s plant is located in the town of Lewisport, and that appellant lives in that community. His opportunities, therefore, for obtaining information of the work and financial condition of the Kentucky Chair Manufacturing Co. at the time of his purchase of the stock were equal to those of other residents of the neighborhood unconnected with the company. There was some conflict between the testimony of appellant and that of Poindexter, Pell and Best; that of Poindexter was to the effect that he informed appellant the liabilities of the chair company amounted to about \$3,000 or \$3,500, and that the plant and its assets invoiced from \$5,000 to \$6,000; but that he also told appellant that he had made no examination of the books, and did not pretend to give accurate statements, and that he never said to appellant that the stock was worth par, or any definite amount. Poindexter further testified that in the same conversation he told appellant that his statement as to the contract between the chair company and the Evansville Furniture Co. was based upon what had been reported to him by Best, the manager of the chair company. Poindexter also testified that the conversation between Pell and Best occurred in the rear of the bank; that he was not present a part of the time; did not hear all that was said, and that he then made no representations at all

about the affairs of the chair company. Pell and Best admitted that while they were in the bank, in a conversation about the affairs of the chair company, and making estimates as to its business and probable profits, appellant came where they were and engaged in conversation, in the course of which they gave him the benefit of their estimates, but did not do so with the purpose of inducing him to buy the stock of Combs, and did not then know that he was negotiating for, or contemplating buying it. Pell was president of the appellee bank and a stockholder in the chair company, but was never a member of its board of directors.

Under the circumstances attending the conversation between appellant and Poindexter, and the later one between him, Pell and Best, there is no ground for the contention that he was deceived by anything they, or any of them, said, and certainly it can not fairly be claimed that they intended to mislead or deceive him. Even if Poindexter and Pell, or either of them, could be regarded as the agents of the appellee bank, or of Combs, to sell the stock, the evidence would not justify the conclusion that they misrepresented the financial condition or prospects of the chair company to appellant, or that he was deceived by what they said, or thereby induced to purchase the stock in question.

"It is likewise the experience of mankind that sellers use expressions of commendation and praise concerning the article being sold, and particularly as to what can be done with it. Where such commendatory laudations do not amount to knowingly misstating some fact not patent to the observer, or to the concealment of some latent infirmity, at the same time inducing the buyer to believe that it does not exist, such action does not make the seller liable for deceit." * * * (German National Bank's Receiver v. Nagel, &c., 26 Ky. Law Rep., 748; Marshall v. Peck, 1 Dana, 609; Perkins, Adm'r v. Embry, 24 Ky. Law Rep., 1990; Beach Modern Law of Contracts, sections 1436-1439)

The evidence discloses the fact that Poindexter's statements to appellant as to the financial condition of the Kentucky Chair Manufacturing Co., though made from memory and upon information from others, was approximately correct. This is shown by the deposition of S. T. McGill, who was secretary of the chair company March 4, 1901, the date of appellant's purchase of the stock from Combs. His testimony was based upon the showing made by the books of the company, from which it appeared that its assets at that time were \$5,809.35, and its liabilities amounted to \$3,610.80, and McGill was corroborated by R. B. Prentiss, who succeeded him as secretary of the company.

We also think the weight of the evidence is to the effect that there was a bona fide contract between the Kentucky Chair Manufacturing Co. and the Evansville Furniture Co., as stated by Poindexter to appellant. The only witnesses as to that contract were Peter Best, the manager of the chair company, and Gus Nonweiler, superintendent of the Evansville Furniture Co. The former testified that the contract was made between the companies, and that by its terms the Evansville company was to take the output of the chair company for one year at prices that would allow the latter company a profit of \$1.35 per dozen chairs. The contract does not seem to have been reduced to writing, and was denied by Nonweiler, who, however, admitted that he

had made some sort of a contract with the manager of the chair company, without disclosing what it was. In short, he proved to be an unwilling and unsatisfactory witness. He testified that he ordered of the chair company after Best became its manager only two small lots of chairs, fifteen dozen to the lot, and that they were so bad he refused to take them. Whereas, the fact was, as shown by a statement from the books of the chair company filed with the deposition of McGill, that he received of the chair company after Best took control \$1,857.70 worth of chairs in four months.

Nonweiler was required to file with his deposition several letters received by the chair company from the Evansville Furniture Co., which clearly sustain the testimony of Best that there was such a contract as claimed. Best, at the time of giving his deposition, occupied the position of a disinterested witness, as he was not in the employ or interested in the business of the Kentucky Chair Manufacturing Co., but Nonweiler at the time of deposing was still superintendent of the Evansville Furniture Co., and as that company's violation of its contract with the Kentucky Chair Manufacturing Co. seems to have largely contributed to the financial disaster that befell the latter company, he will probably become involved in such liability as may be fastened upon his company growing out of its breach of the contract. We think, therefore, that the chancellor's conclusion, that there was such a contract between the two companies as claimed by Best was authorized by the evidence. So if Polidexter represented to appellant before his purchase of Combs' stock, as claimed by the latter, that there was such a contract between the companies, the statement was not a misrepresentation, but the truth.

We are unable to understand why appellant did not sooner complain of the alleged fraud which he says was practiced upon him in the sale of the Combs stock. He testified that in July, 1901, about four months after his purchase of the stock, he discovered that the chair factory was not running, and upon inquiry he learned that it was overstocked with chairs because the Evansville Furniture Co. had repudiated its contract. Yet after receiving this information, he twice paid the interest on his note to the appellee bank without complaint, and still later attended a meeting of the stockholders of the chair company, participated in the election of directors which was then held, was himself elected a director, and by the board of directors was also elected president of the company. In fact, from the time of his election as director and president, he was in charge of the factory, its property and assets, and managed its affairs until it finally went out of business.

In Beach's Modern Law of Contracts, volume 1, section 812, it is said: "The rule is well settled in equity that after knowledge of the fraud, the party must, within a reasonable time, make an election as to whether he will affirm the trade, notwithstanding the fraud, or offer to restore the property and demand the return of his purchase money; if after the knowledge of the facts which entitle him to rescind he deal with the property as owner, this is evidence of his acquiescence and affirmance of the contract."

Under the rule *supra* it is evident that the chancellor could not have adjudged a rescission of the contract, and, besides, Combs, the person of whom appellant purchased the stock, was not before the court, nor a party to the

action, and there was never an offer to return to him the stock, or to return his note with the stock as collateral security to the bank. But independently of this question, we are satisfied from the evidence that there was neither fraud nor misrepresentation in anything that was said by Poindexter, Pell or Best to appellant at the time of his purchase of the Combs stock in regard to the financial conditions and prospects of the chair company. The views herein expressed being conclusive of the correctness of the judgment appealed from, it is unnecessary to notice other questions presented by counsel.

Wherefore, the judgment is affirmed.

SUTTON'S ADM'R v. WOOD, &c.

(Filed March 1, 1905.)

1. Druggists—Negligence—Selling poison—Action for causing death—Pleading statute—In an action by the administrator against druggists for causing the death of his intestate by selling her strychnine for morphine, and which was administered to her by her nurse, without the knowledge of either herself or nurse that it was strychnine, it was error in the court to strike out of the petition the averment that the defendant, Mudd, who sold and delivered the strychnine, "wrapped it in a paper without any mark or label on the outside of the package, designating the name of the poison contained therein, or the name of any antidote therefor; that at the time he, Mudd, was not a registered pharmacist, nor did he have a certificate of registration from the Kentucky State Board of Pharmacists authorizing him to sell or dispense drugs, medicines or poisons, nor was he at the time legally authorized by law to sell or dispense drugs, medicines or poisons; that at said time defendant Mudd did not make any inquiry as to the purpose for which said strychnine was to be used, nor did he satisfy himself that said poison was to be used for legitimate purposes."

2. Statutory regulation—Failure to observe—Per se negligence—The failure to observe a statutory regulation in the sale of poisonous drugs is per se a neglect of duty as well as neglect of care, and, where special damage flows from it, there exists, prima facie, a case of actionable negligence, and it is, therefore, a material and appropriate averment in setting out a cause of action to have charged a specific breach of the statute, although defendants may have been otherwise negligent in the transaction so as to have been liable to the plaintiff therefor.

3. Improper joinder—Striking out—Election—In an action by an administrator against druggists for causing the death of his intestate by selling her strychnine for morphine, it was error in the court to strike from the petition an allegation that "plaintiff's intestate was caused to suffer intense pain and anguish in consequence of having had the strychnine given to her." The proper practice was, by motion, to require the plaintiff to elect whether he would prosecute his action for his "intestate's death" or for her "pain and suffering."

4. Instructions—Contributory negligence—Where death is caused by the negligent sale by a druggist of strychnine for morphine, which was negligently administered to the deceased by her nurse, it was error for the court to instruct the jury that "if they believe from the evidence that the decedent or her agents, or servants acting for or attending on her, negligently failed to open the package (containing the strychnine), or negligently failed

to look at the label thereof, or negligently failed to discover the nature and warning of said label, or negligently failed to examine the character of the drug purchased and administered to the decedent, then, in law, the decedent is chargeable with contributory negligence, and in that event the law is for the defendant, and the jury should so find."

5. Negligence of nurse—Concurring negligence of defendants—If decedent herself was so negligent in the matter, but for which the injury to her would not have occurred, her estate ought not to recover, under the rule of contributory negligence prevailing in this State, but the fact that her nurse or attendant was negligent in administering the strychnine to her, will not excuse the concurrent negligence of the druggists in furnishing the drug whereby the wrong drug was provided. Both the servant and the druggists in such case are joint tort feorsors, and both liable in damages.

6. Proper instructions—The jury should have been instructed that if the defendant, Mudd, who was not a licensed pharmacist, sold to Allen Sutton, for his mother, strychnine, in quantity of five grains or more, without inquiring the purpose for which it was intended, and without entering in a book kept for that purpose the name and residence of the buyer, the name of the article, the quantity sold, and the purpose for which it was intended, and that Nannie Sutton came to her death by reason of such failure, if any there was, the law is for the plaintiff, and the jury should so find.

7. Care in furnishing poison—A druggist and his customer are not under the same degree of care in the furnishing and taking of poison. The latter's duty is to exercise ordinary care for his own safety, while the former is required to exercise the highest degree of care for the safety of the public dealing with him.

W. C. McChord, John W. Lewis and W. D. Claybrook for appellant.

I. H. Thurman and J. W. S. Clemments for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Judge O'Rear.

Appellees were druggists at Springfield. On of their firm, appellee Mudd, was not a registered pharmacist, nor did he know anything about the mixing of drugs, or technically of their nature and qualities.

Mrs. Sutton, through her son, bought of appellees, so the petition charges, a bottle of morphine for medicinal purposes. But instead of delivering morphine, it is claimed appellee Mudd wrapped up and handed young Sutton a bottle of strychnine. Some days later Mrs. Sutton, who was ill and had been taking morphine under the prescription of a physician, called on her daughter, who was acting as her nurse, to give her a dose of the morphine. Without unwrapping the bottle, as is claimed, the young woman removed the stopper and administered what she supposed was morphine, giving of the powder an equivalent of the ordinary dose that had been prescribed. In the course of an hour Mrs. Sutton was dead, having in the meantime suffered horrible agony, from the effect of strychnine poisoning. It was not discovered till after her burial that she had been given the wrong drug.

This suit, brought by her administrator against the druggists, charges that they carelessly, and through gross negligence, sold and furnished to decedent the wrong drug, the strychnine, without taking any of the precautions required of them by the statute, in consequence of which the strychnine came to be administered to her, causing her great physical pain and

suffering and destroying her life. The circuit court struck out of the petition certain matter alleged, of which appellant complains. After alleging the facts set out above, and stating that appellees delivered to intestate's son a package containing one-eighth of an ounce, an unusual quantity of strychnine, the petition continued: * * * "Wrapped in a paper without any mark or label on the outside of said package designating the name of the poison contained therein, or the name of any antidote for such poison; that at the time said strychnine was so sold and delivered by defendant, Herman Mudd, he was not a registered pharmacist, nor did he have a certificate of registration from the Kentucky State Board of Pharmacists authorizing him to sell or dispense drugs, medicines or poisons as authorized by law, nor was he at the time legally authorized to sell or dispense drugs, medicines or poisons. Plaintiff says that at said time defendant Mudd did not make any inquiry as to the purpose for which said strychnine was to be used, nor did he satisfy himself that such poison was to be used for legitimate purposes."

The averment just quoted was stricken out of the petition on motion of defendants and over the plaintiff's objection. The basis of the court's ruling was doubtless that the rejected matter was evidential merely, and not properly pleadable. It was supposed that the averment of negligence covered the particular failures specifically set forth, if indeed the court deemed them as relevant at all. Whether the stricken matter was relevant depends on whether they show a cause of action, taken in connection with the other averments of the petition.

Section 2630, Kentucky Statutes, is as follows: "No person shall sell at retail any poisons, except as herein provided, without affixing to the bottle, box, vessel or package containing same, a label printed or plainly written, containing the name of the article, the word 'poison,' and the name and place of business of the seller, with the common name of two or more readily accessible antidotes, nor shall he deliver poison to any person without satisfying himself that such poison is to be used for legitimate purposes. A poison in the meaning of this act shall be any drug, chemical or preparation, which, according to standard works on medicine or materia medica, is liable to be destructive to adult human life in quantities of sixty grains or less. It shall be the further duty of any one selling or dispensing poisons, which are known to be destructive to adult human life in quantities of five grains or less, before delivering them, to enter in a book kept for that purpose the name of the seller, the name and residence of the buyer, the name of the article, the quantity sold or disposed of, and the purposes for which it is intended, etc."

Other sections (2631-2) prohibit all persons not registered pharmacists or physicians from selling drugs or medicines, except proprietary or patent medicines, and nonpoisonous medicines which may be sold by country stores in small places or rural districts. These sections, enacted under the police power of the State, were designed for the protection of the public health. Their breach is denounced as a crime, punishable by fine. But this punishment may be administered whether any damage is done by the act or not. When, however, damage results from the neglect, the fact that it may also be punished as an offense against the criminal law will not prevent one

especially damaged by it from recovering for it. Indeed such right of recovery is specifically granted by statute. (Section 466, Kentucky Statutes.) Before the statute above quoted an action would lie against a druggist who negligently furnished a customer a poisonous drug instead of some other and different one which had been bought of him, not calling the customer's attention to the substitution, where damage resulted from the act. By the statutes regulating the practice of pharmacy a comprehensive system has been devised to guard the public against incompetent, inexperienced handlers of subtle, dangerous drugs, designed and sold to be administered to people. Great care has been observed in prescribing rules, which in their application are believed to minimize the dangers incident to this business. As the legislation was to enhance the public's protection, the duties imposed on the druggists were intended as statutory tests of care, in so far as the statutes went. Their nonobservance is per se neglect of duty, as well as neglect of care. When special damage flows from it there exists *prima facie* a case of actionable negligence. Speaking of this class of actions, this court, in *Henderson v. Clayton*, 22 Ky. Law Rep., 288, said: "From time immemorial, where a statutory duty for the protection of individuals has been violated, an action at common law may be maintained."

In *Monteith v. Kokomo Wood Enameling Co.*, 58 L. R. A., 944, the Supreme Court of Indiana approved this rule, deduced from English cases, and followed by a considerable number of American cases as well: "Where a statute of public character prescribes in regard to a class of persons the performance of certain acts as reasonable precautions for the health or safety of a class of persons having to do with them, the neglect of such a statutory precaution gives a right of action to any person within the scope of the intended benefit who, by reason of the neglect, suffers damages of the kind intended to be provided against." (Thompson on Negligence, section 10, page 12.)

It was, therefore, a material and appropriate averment in the setting out of his cause of action for the plaintiff to have charged a specific breach of the statute quoted, although defendants might have been otherwise negligent in the transaction so as to have been liable to the plaintiffs therefor. The action of the court in striking out was erroneous. Another averment of the petition stricken out on motion of the defendants was the statement that plaintiff's intestate was caused to suffer intense pains and anguish as a consequence of having had the strychnine given to her. This action of the court was presumably upon the idea that causes of action for physical suffering and for death could not be joined. But each being sufficiently pleaded, it was not the province of the defendant to select which of them he would have stricken out. The proper practice was by motion to require the plaintiff to elect. The court's action in the ruling was erroneous, and under the facts of this case was, in our opinion, prejudicial.

The instructions to the jury, while submitting unobjectionably the question of defendant's negligence, aside from their statutory duties omitted, were erroneous in not also submitting the latter phase of the case. The jury should have been told that if defendant Mudd, who was not a licensed pharmacist, sold to Allen Sutton, for his mother, strychnine in quantity of five grains or more, without inquiring the purpose for which it was intended, and without entering in a book kept for that purpose the name of

the seller, the name and residence of the buyer, the name of the article, the quantity sold, and the purpose for which it was intended, and that Nannie Sutton came to her death by reason of such failure, if any there was, the law is for the plaintiff, and the jury should so find. The measure of damages and the law as to punitive damages were correctly stated to the jury.

The instructions given on contributory negligence are marked "2" and "4," respectively, and are as follows:

"2. The court instructs the jury that it was the duty of the decedent, Nannie Sutton, and of her agents and servants attendant upon her, to use ordinary care to discover the true and real contents of the bottle from which the poison is claimed to have been administered, and if the jury believe from the evidence the said Nannie Sutton, or her agents or servants acting for and attendant upon her, negligently failed to open the package delivered to Allen Sutton for the said decedent, or negligently failed to look at the label thereof, or negligently failed to discover the nature and warning of said label, or negligently failed to examine the character of the drug purchased and administered to the said decedent, or negligently failed to discover the nature of same, then in the law the decedent is chargeable with contributory negligence, and in that event the law is for the defendants, and so the jury should find.

"4. Contributory negligence, as used in these instructions, mean such negligence upon the part of decedent, Nannie Sutton, or her agents or servants acting for her, as that but for same her death would not have occurred."

If Nannie Sutton was herself so negligent in the matter but for which the injury to her would not have occurred, it seems clear that her estate ought not to recover under the familiar rule governing contributory negligence prevailing in this State. But we do not understand, though, that Mrs. Sutton had no right of action because of defendant's negligence if somebody else's negligence than her own concurred in producing her injury. We understand the law to be just the contrary. If Mrs. Sutton's nurse or servant negligently administered the wrong drug or poison, inflicting death, the servant would be liable to the decedent's estate in damages. This, however, would not excuse the druggist who had also been negligent in furnishing the drug, whereby the wrong drug was provided. Both the druggist and the servant might be liable. If the agent neglects his duty to the principal, inflicting an injury on the latter, he is liable just as the negligent master is who inflicts an injury on his servant. If the master and another by their joint or concurring negligence injure the servant, both tort-feasors are liable in damages. Upon the same principle, if the servant's negligence concurs with a stranger's in injuring the master, both should be liable. There is no merit in the proposition that the stranger is not liable for his negligence because the injured person's servant was also negligent, and aided thereby in inflicting the injury. The doctrine of respondeat superior does not work that way. It makes the master liable for the servant's negligence towards others, but does not excuse the servant from his duty toward the master.

It is not true, either, as stated in the 6th instruction, that the druggist and the customer are under the same degree of care in the furnishing and taking of the drug. The fact alone that one is prohibited from acting in the matter at all except under a license, and after a technical training, evinces that there is a difference, and a necessary one, between the care to be observed by the pharmacist and by his customer. The latter's duty is to exercise ordinary care for his own safety. The former's, to exercise the highest degree of care for the safety of the public dealing with him.

The judgment must be reversed and the cause remanded for a new trial consistent herewith.

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COURT OF APPEALS OF KENTUCKY.

WITT v. WILLIS.

(Filed February 24, 1905—Not to be reported.)

1. Lands—Boundary of—Shifting of channel of river—It appearing that the land in controversy was cut off from the main tract by the shifting of the channel of the Kentucky river, and that the river is the boundary between Madison and Jessamine counties, to determine the question as to the location of the land and jurisdiction judicial notice of the act creating the counties must be taken. The shifting of the river occurred since the creation of the counties, and the rule is that where a stream imperceptibly changes its course so as to cut off a strip of land and leave it beyond the thread of the stream the ownership will not be changed, and the shifting of the channel herein does not affect the boundary between the two counties, which remains where it stood before the channel of the river was changed.

2. Amendments—Forcible entry and detainer—In an action for forcible entry where an amendment does not change the cause of action, but only perfected the cause of action aimed to be stated originally, such amendment to the warrant should be permitted to be filed.

Grant & Lilly for appellant.

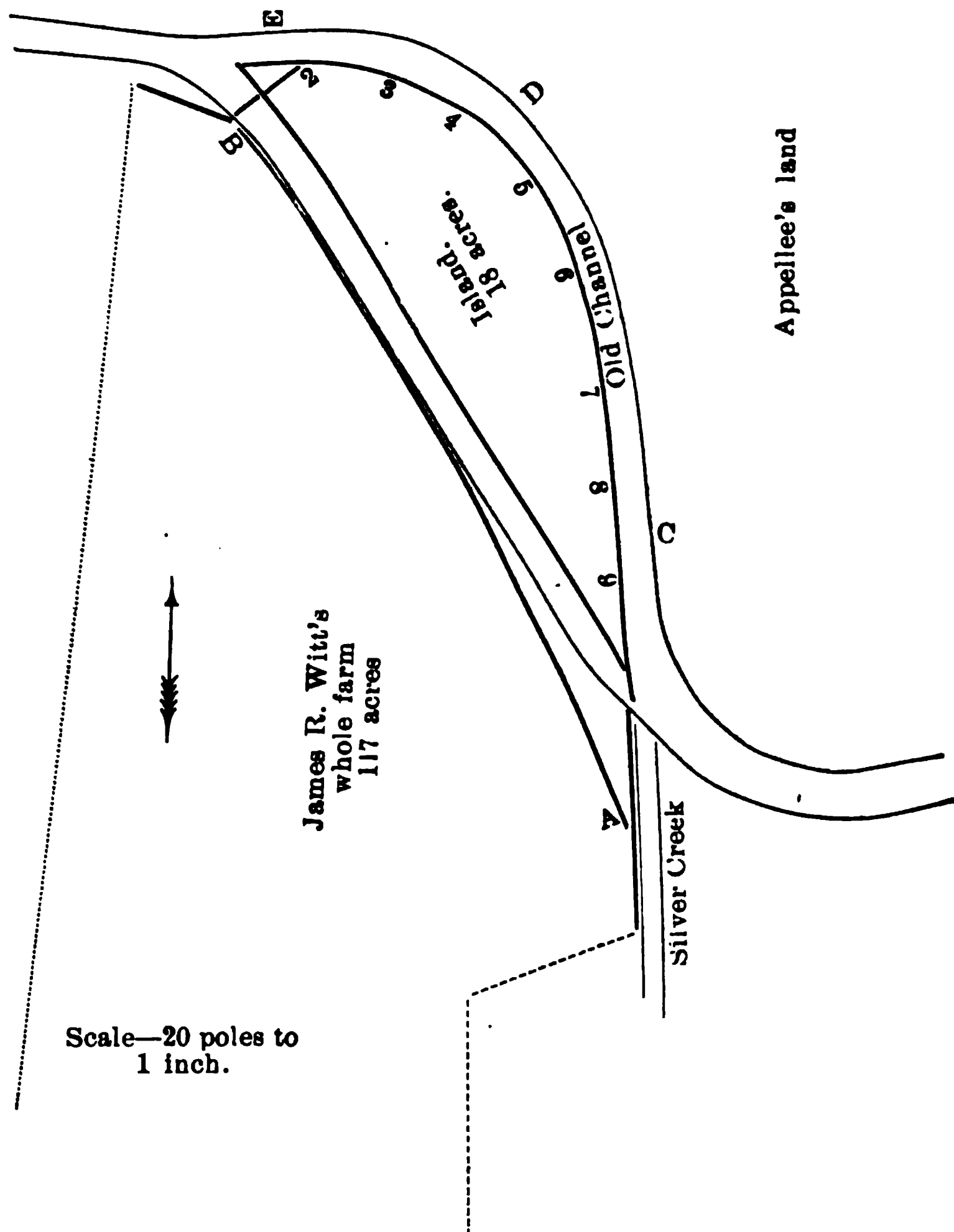
John H. Welsh for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant filed with the county judge of Madison county his affidavit, stating that he was the owner and in the actual possession of eighteen acres of ground in Madison county, particularly described in the affidavit, and that the defendant had forcibly and against his will entered thereon and detained the same from him. Thereupon a warrant of forcible entry was issued, and an order of survey was made. The surveyor reported that the eighteen acres of land was within the calls of the plaintiff's deed, and that he had run the land in the year 1896 before slack-water, or before any change in the Kentucky river; that the old channel to which the deed runs is now dry and that the defendant owns fifty acres of land on the opposite

side of the river in Jessamine county, which is bounded on the east by the river. Accompanying the report of the surveyor is the following plat, which illustrates the situation, the defendant's land being on the opposite side of the river from appellant. The eighteen acres in controversy is the strip between the old channel and the new, indicated on the plat:



On the trial before the county judge the jury found the defendant guilty of the forcible entry complained of. He traversed the inquisition and took an appeal to the circuit court. In the county court the defendant filed a plea to the jurisdiction of the county judge, alleging that the land in con-

controversy lay in Jessamine county. In reply to this plea the plaintiff alleged that the land on which the defendant entered is a large tract, containing one hundred and seventeen acres, lying in Madison county, and defined as shown in the report of the surveyor. In the appeal to the circuit court the plaintiff moved the court to permit him to amend his writ so as to embrace his entire farm of one hundred and seventeen acres, insisting that the writ had been orally amended in the lower court. The court refused to allow the amendment. Thereupon the following agreement of facts was filed by the plaintiff: "That his whole farm contains about one hundred and seventeen acres; that about two years ago the United States government built a lock and dam across the Kentucky river below his farm; that this backs the water for some miles above his farm, and that at the time this proceeding was instituted, and now, the main current of the Kentucky river runs on the southeast side of, and the main bed of said river is on the southeast side of, the eighteen acres of land, which is described in the original affidavit and writ; that he and his father have been in possession of said farm since 1859, and that he was in the quiet possession of same on the day that appellant entered upon the land described in the writ."

On these facts the circuit court sustained the defendant's plea to the jurisdiction, and dismissed the proceeding on the ground that the land lay in Jessamine county and not within the jurisdiction of the courts of Madison county. From this judgment the plaintiff appeals.

The Kentucky river is the boundary between the counties of Madison and Jessamine, and whether the eighteen acres of land in controversy lies in Madison or in Jessamine county depends upon whether the old channel or the present channel of the river is the line. In determining this question the court must take judicial notice of the statutes creating the counties. The county of Madison was formed in 1785. The county of Jessamine was formed in 1798. The river has shifted from the old channel to the new since the establishment of the counties. The rule is that if a stream imperceptibly changes its course the thread of the stream continues to be the dividing line between the adjoining proprietors, and the accretion on one side belongs to him on whose side it is formed. But where a stream changes its course so as to perceptibly cut off a point of land and leave it beyond the thread of the stream the ownership will not be changed. (*Sweatman v. Holbrook*, 18 Ky. Law Rep., 870; *Holcomb v. Blair*, 25 Ky. Law Rep., 975.) In *Gould on Waters*, section 159, the rule is thus stated: "When a tidal river does not work a shifting of the shore, but by the irruption of its waters forms an entirely new channel in private lands, not only does the right to the soil thus covered remain in the owner, but the right of fishery is his and not in the public, though the public right of navigation may extend to the new channel. If an unnavigable stream, in which the title of the riparian owners extends *ad filum aquæ*, slowly and imperceptibly changes its course, the boundary line is at the center of the new channel. But if the change is violent and visible, and arises from a known cause, such as a freshet or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits between the two estates." (5 Cyc., 904.)

In the case of *Indiana v. Kentucky*, 186 U. S., 479, the question was

whether Green River Island lay in Kentucky or Indiana. It was shown that at the time of the trial the Ohio river ran south of the island, and there was no water between it and the mainland at ordinary stages. But it was also shown that at the time of the grant from Virginia the waters of the Ohio river ran between the island and the Indiana shore. It was held that the shifting of the river to the south of the island did not affect the claim of Kentucky to it. So here the shifting of the channel of the Kentucky river from one side of the island to the other does not affect the boundary between Madison and Jessamine counties, which remains where it stood before the channel of the river was changed.

In *Willis v. McNeal*, 8 Ky. Law Rep., 411, it was held that on an appeal to the circuit court from a justice's court the plaintiff may not amend his pleading so as to set up a new cause of action, but that amendments may be allowed by the plaintiff or the defendant to perfect the cause of action or defense relied on as the case is to be tried de novo. In *Puff v. Hatcher*, 78 Ky., 146, the plaintiff failed to file his petition in the magistrate's court, and on the appeal to the circuit court he was allowed to file an amended petition setting up his cause of action. In *Commonwealth v. Cantrill*, 20 Ky. Law Rep., 24, a bastardy warrant was defective, and it was held that the warrant might be amended in the circuit court after appeal to that court, and the judgment of the circuit court dismissing the warrant and refusing to allow it to be amended was reversed. (*N. N. & M. V. Co. v. Henderson*, 11 Ky. Law Rep., 486.) In *Louisville v. Wemhoff*, 25 Ky. Law Rep., 995, it was held that in a criminal proceeding for a misdemeanor the warrant may be amended in the circuit court on appeal. In *Forsythe v. Huey*, 25 Ky. Law Rep., 147, it was held that a warrant for forcible detainer may be amended in the circuit court, to make the description of the land claimed more definite, and in *Hoffman v. Mann*, 25 Ky. Law Rep., 255, this case was followed, it being there held that after appeal to the circuit court the warrant may be amended so as to show that the plaintiff was in peaceable possession of the land at the time of the forcible entry complained of.

The statement in the opinion in *Bailey v. Kelly*, 18 Ky. Law Rep., 718, that a warrant of forcible entry may not be amended after trial in the country, was unnecessary to the decision of that case, as the amendment there was made before the trial in the country. It is purely a dictum, and is in conflict with the rule laid down in the cases above referred to. The circuit court should have allowed the warrant to be amended as asked by appellant. The amendment did not change the cause of action. It only perfected the cause of action aimed to be stated originally.

Judgment reversed and cause remanded for further proceedings consistent herewith.

SPRINGFIELD FIRE AND MARINE INSURANCE CO., &c. v. GRAVES
COUNTY WATER AND LIGHT CO.

(Filed March 1, 1905.)

1. Water company—Contract to supply city—Unavoidable accident—Loss by fire—The appellee, Graves County Water and Light Co., contracted with the city of Mayfield to furnish it an ample supply of water for all purposes,

It being known by all parties that the water had to be obtained from deep bored wells. Appellee sunk three wells, two of which were ample to supply the city at ordinary times. A few days prior to the loss sued for, without the fault of appellee, the plunger at the bottom of one of the wells got fastened and would not work, and after diligent efforts to remedy it, finally had to be abandoned and a new well bored. During the time of this accident (the water supply having diminished by reason of a long drouth) a fire occurred, destroying property for the loss of which this action was brought against appellee. Held—That under the contract an instruction to the jury, that "if they believe from the evidence that the failure of the defendant to furnish an ample supply of water at the time of the burning of the property was due to accidental causes, not the result of defendant's negligence, and which it could not, by the use of ordinary diligence, have foreseen and prevented, the law is for the defendant and the jury should so find," was proper.

2. Contracts—Rule for construction—The general rule for construing a contract is to take it as a whole, and, if possible, ascertain the true meaning and intent of the parties, and where there is any ambiguity in a contract or any doubt concerning its meaning, it should always be resolved against the party preparing it, if it can be done without doing violence to the rights of the parties thereto.

Wm. M. Smith, W. J. Webb and S. H. Crossland for appellants.

Robbins & Thomas for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Nunn.

On the night of June 26, 1901, a fire occurred in the city of Mayfield, Ky., destroying a large amount of property, of the value of about \$200,000. About \$48,000 worth of this belonged to a firm of tobacco dealers, known as Ligon, Allen & Co., who instituted suit against the appellee herein for damages on account of its failure to furnish water under its contract, with which to extinguish the fire. The appellee in this case demurred to that petition, which demurrer was overruled. It filed an answer, but subsequently withdrew it, and stood by its demurrer. The court in that case instructed the jury to find for Ligon, Allen & Co. the amount sued for, less the insurance on the property and salvage. The verdict of the jury was for \$12,000, and from that judgment the water company appealed to this court, and endeavored to have this court overrule its decision in the case of the Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky., 340, and other opinions following it. This court declined to overrule these cases, but approved them, and affirmed the judgment of the lower court. (23 Ky. Law Rep., 2149.)

The appellant, Springfield Fire and Marine Insurance Co., having previous to the fire insured the property of Ligon, Allen & Co. for the sum of \$5,000, paid the insurance after the loss and took from the assured an assignment of all their rights, interests and claims they had for the loss of this property against all persons, and especially against the appellee, Graves County Water and Light Co. The appellant insurance company, together with Ligon, Allen & Co., who joined for the use and benefit of appellant company, instituted this action against the appellee to recover the \$5,000, with interest from the date of payment, alleging in substance that the loss of this property resulted from the failure of appellee to comply with its

contract that it had made with the city of Mayfield and the citizens thereof to furnish at all times sufficient water to extinguish fires. There appears not to have been any contract other than the ordinance passed by the city, which was accepted by the water company, and constituted the contract. The ordinance was filed with the petition, and consists of fourteen sections. By the first section it is shown that the contract was for the supplying of water and electric lights to the city and its inhabitants, both for public and private uses. By the second it is provided that the supply shall be from the most available source where good water can be obtained. This is to be determined by the company. It was also provided therein that the company should keep a sufficiency of engine and boiler power so if one engine or pump should get out of fix that there should be another which could be used for pumping water. By the third it was provided that all mains and pipes used in construction by the company should be of suitable size to furnish an abundant supply of water for present and future requirements for the city, and should be laid in trenches, with not less than thirty inches cover. It is further provided by that section that the company should give a public test of the power and capacity of the waterworks, of which the council should have notice, and at the test they should throw from separate hydrants, in the business part of the city, not less than three simultaneous streams of water through fifty feet of hose and a one inch ring nozzle to the height of eighty feet on a horizontal distance corresponding therewith. By the fourth it is provided that the company shall not unnecessarily obstruct the streets, sidewalks, etc., in constructing or repairing its plant. By the fifth it is provided for the extension of the plant whenever it becomes necessary. By the sixth it is provided how the water company should be paid for the water furnished during the faithful operation of the plant. By the seventh it was provided that the water from the fire hydrants should be used only in the extinguishment of fires, and should furnish effective streams without the aid of portable engines. The eighth section was as follows: "The said Graves County Water and Light Co. shall keep all fire hydrants rented of it supplied with water, and shall maintain them in effective working order, except during the time of repairing or removing any hydrant which has become ineffective by accident or other cause than willful negligence on the part of said company, and the hydrants shall be in charge of such person as the city council shall appoint to that place."

By the ninth the water company agreed to furnish free certain drinking fountains and water for city purposes. By the tenth it was provided the minimum dimensions of the standpipe and mains and also that an arrangement should be made whereby the water could be pumped into the mains direct as well as into the standpipe. By the eleventh it was provided for communication between the pump house and the city. By the twelfth it was provided that the city should protect the company in its property and from waste of water by the consumers. By the thirteenth it was provided as to how the city might purchase the plant at the expiration of the contract. By the fourteenth it was provided when the plant should be completed. It was agreed that the city should organize, equip and maintain a competent fire company, with all necessary appliances for extinguishing fires. It was alleged in the petition that the city complied with all the re-

quirements on its part, and that the loss of this property was occasioned by the failure of the appellee to comply with its contract in failing to furnish the water as it obligated itself to do.

The appellee answered this petition, denying all the material allegations, and alleged that at the time of the organization of the appellee water company, and the entering into the contract stated, it was known by all the parties that the water supply could be obtained only by means of deep bored wells, there being no other available source to obtain it; that it sunk three wells for this purpose, two of them eighteen inches in diameter and the other twelve; that two of them were, under ordinary circumstances, sufficient to supply all the water ordinarily used by the city and private persons; that at the time of the fire they would have had an ample supply of water but for the fact that a few days prior to the fire the "plunger" at the bottom of one of the eighteen-inch wells became fastened and would not work, and rendered this well useless; that this accident was unavoidable and could not have been anticipated, and that it did not occur by reason of any negligence of any character, or by reason of any want of care or caution on the part of appellee; that immediately after the accident they began working to repair and make this well effective, and continued this work from the accident, day and night, and were working on it at the time of the fire, and eventually had to abandon it and sink another well; that notwithstanding the loss of the use of this well, the remaining wells would have furnished sufficient water for all purposes had it not been for the existence of an unusual drouth and excessive heat which had existed for several weeks prior to the fire, and had not the citizens of the city used the water extravagantly and wasted it, which was permitted by the city, contrary to its contract with the appellee; that but for the unavoidable accident stated it would have had its hydrants supplied with water and maintained them in effective working order. The affirmative matter of the answer was controverted.

The facts admitted and proven on the trial are in substance as follows: This fire occurred in the tobacco warehouse district of the city near the hour of midnight, and destroyed the buildings on about ten or twelve acres of ground. The weather was very dry and hot, with the wind blowing a gale sufficiently strong to carry parts of shingles several miles into the country. The proof is somewhat conflicting as to the progress of the fire at the time of its discovery and the arrival of the wagon with the hose at the scene. Appellant's proof was to the effect that there was only one building on fire at that time, and that was about a half a block away from the building of Ligon, Allen & Co. Appellee's proof was to the effect that there were two buildings mostly destroyed and the third was igniting at the time of the arrival of the hose wagon at the place, and that there was but one building between the building of Ligon, Allen & Co. and the third one which had taken fire; that the wind was blowing in the direction of Ligon, Allen & Co.'s building from the fire.

The proof is also somewhat conflicting as to the efficiency and equipment of the fire company. Appellee's proof conduces to show that none of the fire company, except the driver of the hose wagon, were present until some twenty or thirty minutes after the wagon arrived at the fire; that the cap-

tain of the company was not there at all, and that whatever company there was, was made up of inexperienced volunteers; that there was only one hose there when they began to fight the fire. Appellant's proof shows that at the beginning there was one other fireman besides the driver, and that the volunteers were efficient. It was admitted that at the time there was an insufficient supply of water, and that the hydrants were not in an effective working condition to successfully fight the fire at the beginning, and for some little time thereafter. There was much proof to the effect that even if they had had a full supply of water they would have been unable to have successfully fought the fire, owing to the stage of it when discovered and the prevailing conditions of the wind and weather. There was much testimony to the contrary, but this question was submitted to the jury, and it found in favor of the appellee.

The appellee proved that the construction and equipment of its plant in every way filled the requirements of the ordinance, and that it was not deficient in any particular; that its engines and pumps were of the latest and most approved patterns, comparatively new, and apparently in the best of condition and repair; that a few days before the fire the plunger at the bottom of one of its wells became fastened and could not be made to perform its work; that they worked night and day from the time of the mishap, and were working on it at the time of the fire, endeavoring to make it work, but could not do so, and finally had to abandon the well and sink a new one; that this accident happened without any notice to it and could not have been anticipated or foreseen, and occurred without any fault whatever on its part, and by reason of this unavoidable accident it failed to have its mains and hydrants supplied with the usual quantity of water, and in good working condition. It also proved that notwithstanding this, that the two wells, in working condition, were sufficient under ordinary circumstances to have supplied the usual and necessary amount of water, but on account of the unusual drouth and waste of water by the citizens it was unable at the moment of the fire, and for a short time thereafter, to supply the necessary amount of water. The court, under instructions, submitted these questions to the jury, who found in favor of appellee. The court overruled appellant's motion for a new trial, and it has appealed.

The appellant makes serious objection to the following instruction: "The court further instructs the jury that, although it may believe from the evidence that at said fire there was on hand, in time to have extinguished the fire, such fire company, as stated in instruction number '1,' and that it was sufficiently equipped with apparatus for fighting fire as therein stated, and that such fire company so situated and equipped could and would have prevented the loss or damage to said tobacco as therein stated, and that their failure to do so was because such hydrant or hydrants were not supplied with water, and it or they were not in effective working order, yet if the failure of the hydrants to be supplied with water, or to be in effective working order, was due to accidental causes, not the result of defendant's negligence, and which it could not, by the use of ordinary diligence, have foreseen and prevented, then the law is for the defendant and the jury should so find; and the court further says to the jury that by the use of the term 'hydrant' in this instruction is meant any of the means or parts of the

defendant's waterworks system by which it supplies the public fire plugs with water."

The appellant contends that, under the contract, the appellee was not excused from furnishing a sufficient supply of water by reason of any accident of any character to the water plant, except it be the act of God or the public enemy, and that the only question to be determined by the jury was whether or not, if there had been a sufficient supply of water, the fire company as organized and equipped could have extinguished and saved the property under all the circumstances proven in the case. Whether or not appellant is right in this contention depends upon the proper construction of the contract.

The general rule for construing a contract is to take it as a whole, and, if possible, ascertain the true meaning and intent of the parties. Another general rule is that where there is any ambiguity in a contract, or any doubt concerning the meaning and intent of any part of it, it should always be resolved against the party preparing it, if it can be done without doing violence to the rights of the parties thereto. With these principles in view, let us consider the contract before us, to wit, the ordinance of the city prepared by its council for the benefit of the city and the citizens thereof, and accepted by the appellee.

By section 8 it is provided that the appellee should keep all fire hydrants supplied with water, and should maintain them in effective working order except during the time of repairing or removing any hydrants which had become ineffective by accident or other cause than willful negligence on the part of appellee. Is it reasonable to presume that the parties to this contract intended to relieve the appellee for the failure to supply water when an unavoidable accident occurred to the small thing called the "hydrant," and yet to hold it responsible when an unavoidable accident happened to the water mains, standpipe, the engine, pumps or plunger, or other material part of the plant which supplied the hydrants? Certainly the parties in entering into this contract did not intend it to have that meaning and effect. If appellants' contention be correct, that appellee was bound at all hazards to furnish water, the act of God or the public enemy alone excusing it, then why specify in the contract the character and dimensions of the standpipe, the size of and the depth to which the water mains were to be laid under cover, the character and number of pumps, engines, the public test and requirements of it, and especially why incorporate the language as used in section 8 and the other things specified in the ordinance? If appellant's contention be correct, all these things were useless and superfluous. In such case the only contract necessary would have been for the appellee to have bound itself to furnish at all times a supply of water sufficient to throw three simultaneous streams through a one inch ring nozzle to a height of eighty feet in the business part of the city, or to have obligated itself to furnish a supply of water sufficient for the uses of the city and the citizens, and an ample supply to put out fire.

We are of the opinion that the parties on entering into this contract did not mean this, but, upon the contrary, taking the whole contract, they meant and intended that the appellee should furnish an ample supply of water for all purposes and at all times, unless prevented by an accident to

the water plant, which, by ordinary prudence, could not have been anticipated or foreseen and provided against. Entertaining these views, we are of the opinion that the instructions given by the lower court were proper, or at least not prejudicial to the substantial rights of the appellant. (*Owensboro Water Co. v. Duncan's Adm'x, &c.*, 17 Ky. Law Rep., 755.)

As to the question of whether or not the appellant is entitled to be subrogated to the rights of Ligon, Allen & Co., under the terms of the contract as provided in the policy, we do not determine, as it is not necessary to the disposition of the case.

Wherefore, the judgment of the lower court is affirmed.

Whole court sitting.

MATTINGLY V. SHORTELL.

(Filed March 2, 1905.)

1. Accounts—Pleading—Burden of proof—In an action on an account, part of which is denied and payment of the balance pleaded, the burden on the whole case is on the defendant, who is entitled to the closing argument.

2. Entry by bookkeeper—Evidence of character—An entry on the books of the employer by his bookkeeper of a transaction between them, in the way the bookkeeper understood it, and which differs from the understanding of the employer, is an issue of a civil and not of a criminal nature, and does not put the character of the bookkeeper in issue so as to permit him, in a controversy over the transaction, to introduce evidence, over the objection of the employer, of his general reputation for honesty.

3. Account stated—Proof—Variance—Where an account is stated between a debtor and creditor and a balance struck and agreed upon, this constitutes the cause of action, and must be proved, as alleged, and if not so proved, there will be a variance unless the pleadings are amended.

4. Hearsay evidence—Competency—An entry made by a bookkeeper upon his employer's books, of statements made to him by another concerning the transaction, is not competent evidence for the bookkeeper. Such statements were mere hearsay, and the fact that the bookkeeper had entered them upon his employer's books added nothing to their competency.

J. D. Atchison and C. S. Walker for appellant.

Geo. W. Jolly for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

This is an action by James D. Shortell to recover of Miles P. Mattingly a balance alleged to be due him for services rendered as bookkeeper and general manager of his business as a distiller in Owensboro, Kentucky, for a period of time running from 1882 to 1901. This balance is made up of three items: First, an account stated June 30, 1896, showing a balance due of \$1,415.40; second, a balance due for services rendered from June 30, 1896, to December 31, 1900, at \$100 per month, and, third, a balance due from December 31, 1900, to December 20, 1901, at \$75 per month.

The answer placed in issue the account stated as of June 30, 1896; denied the rendition of the services from December 31, 1900, to December 20, 1901, and as to the second item of the claim pleaded payment and counterclaim.

A trial resulted in a verdict in favor of appellee for the amount claimed in the petition. From the judgment entered upon this verdict appellant is here on appeal. The burden of proof and the closing argument were awarded appellee over the objection of appellant. This, we think, was error. Had the case been submitted without any evidence judgment must have gone for appellee for a part of the amount claimed in the petition. Section 596 of the Civil Code provides: "The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." This means that the burden of proof is on the party against whom such a judgment would be rendered as carries the costs. (*Walling v. Eggers*, 25 Ky. Law Rep., 1564.) This being true, it was error to deny the concluding argument to appellant. (*Royal Insurance Co. v. Schwing*, 87 Ky., 410; *Fireman's Insurance Co. v. Schwing*, 10 Ky. Law Rep., 883; *Crabtree v. Atchison*, 98 Ky., 338; *Lucas v. Hunt*, 91 Ky., 279.)

In support of his plea of payment appellant undertook to show by evidence that he had assigned to appellee a note of T. M. Hill for \$1,500, secured by an insurance policy on the life of Hill for the amount of the note, and that appellee accepted it in part payment of his claim for services. This was denied by appellee, who claimed that the note and the insurance policy were transferred to him under the belief that Hill was about to die, and that Mattingly's creditors (he having become financially embarrassed) would attach the amount of the insurance policy; that to prevent this the assignment of the note and the transfer of the policy were made for the accommodation of Mattingly, and the proceeds were to be credited on Shortell's debt for services when paid; that Hill had recovered his health, but was insolvent, the policy had been allowed to lapse, and the note was entirely worthless. In evidence of his side of the transaction Shortell had entered it on the books of his employer (he being the bookkeeper) as he understood it, and also certain statements of Hill concerning the matter. This entry, and especially so much of it as contained a statement that the note was to be credited on the account for services "when paid," Mattingly claimed was entered without his knowledge or consent. Conceiving that this charge placed his character in issue, appellee was permitted by the court, over the objection of appellant, to introduce various witnesses to testify as to his general reputation for honesty. The issue between the parties was of a civil and not of a criminal nature, and, therefore, did not involve the character of appellee in the sense that would authorize the introduction of evidence of general reputation to support it. The question was whether or not Mattingly assigned the Hill note, and Shortell accepted it in part payment. Shortell entered in the books of his employer his understanding of the transaction, but the correctness of his understanding did not involve his character. In the case of *Evans v. Evans*, 93 Ky., 510, it was said: "In civil actions evidence of general reputation is not admissible unless the proceedings be such as to put the character of the party directly in issue." (*Morris v. Hazelwood*, 1 Bush, 210; *Continental Insurance Co. v. Jachmichen*, 59 Am. Rep., 198; *Dudley v. McClure*, 27 Am. Rep., 278.) Under the influence of this evidence the jury might well believe they were trying Shortell for a crime, and hesitate long before they would be willing to blast his good name on an adverse verdict. This was manifestly prejudicial to appellant.

We think the trial court also erred in instructing as to the account stated, permitting the jury to find for the plaintiff on this issue on a quantum meruit, although they might believe that the account was not stated, as alleged, on June 20, 1896. When an account is stated between a debtor and a creditor, and a balance struck and agreed upon, this constitutes the cause of action, and must be proved as alleged, and if not so proved there will be a variance unless the pleadings are amended. The court erred in permitting appellee to read as evidence his entry concerning the note, containing statements made by Hill to him concerning the transaction. These statements were mere hearsay, and the fact that appellee had entered them upon his employer's books added nothing to their competency. There was no variance between appellee's allegation concerning the stated account, in which he alleged an unconditional promise to pay, and the evidence adduced upon the trial, that appellant promised to pay "when able." The citation of authority on this point by appellant were all cases where the party making the conditional promise had been discharged from the debt by proceedings in bankruptcy. This discharge relieved the debtor from his original obligation, and his subsequent promise constituted a new cause of action, and necessarily this must be proved as alleged, and if the condition be alleged, then it must be proved to have happened. This principle has no application to the case at bar. Here there was a subsisting claim for services rendered, which was definitely ascertained by the parties by stating the account, and the law implied a promise to pay. The promise to pay when able meant to pay at once. (*Kincaid v. Higgins*, 1 Bibb, 896; *Cecil v. Welch*, 2 Bush, 168.)

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

PADUCAH RAILWAY AND LIGHT CO. v. BELL'S ADM'R.

(Filed March 2, 1905—Not to be reported.)

1. Damages—Master and servant—Negligence—In this action for damages for the death of appellee's intestate the question appears to have been fairly presented to the jury. The evidence was conflicting, but two juries having reached the same conclusion, rendering verdicts for appellee, the verdict and judgment appealed from herein will not be disturbed.

2. Same—Conduct of counsel—The bill of exceptions failing to show that the statements of counsel for appellee were made which are complained of, they will not be considered.

Reed & Berry for appellant.

Campbell & Campbell for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barker.

Appellee's decedent, Charles E. Bell, was in the employ of the appellant, Paducah Railway and Light Co., as lineman. It becoming necessary to tie a guy wire in an eye-bolt on one of the corporation's poles in Paducah, he was directed to climb it and perform that service. When he reached that point on the pole which brought his head close to the first cross arms he

was heard to utter an exclamation of pain or fright, which attracted the attention of several bystanders, who looked up in time to see him fall head foremost to the pavement below, receiving injuries from which he in a few days died. This action was instituted by his administrator to recover damages for his death, that being alleged to have resulted from the negligence of appellant. There were two trials, the first resulting in a judgment in favor of appellee for \$5,000, which, upon motion of appellant, was set aside by the trial judge and a new trial granted, resulting in a verdict against appellant for the sum of \$3,000, of which it is now complaining.

There are two theories as to the cause of Bell's death. That of appellee is that he was knocked from the pole by an electric shock caused by defective insulation of appellant's wires; that of appellant is that, after he reached the point where he was to commence work he undertook to place his safety belt around the pole, and snap it in place; that by accident or oversight he failed to do this, and when he released the pole with his hands, expecting to be held safe by the belt, he fell to the pavement below. Both of these theories were submitted upon each of the trials, and both juries found adversely to appellant. We have so often held that it is the duty of the employer to furnish the servant with a safe place in which to work that it hardly requires citation of authority in support of this proposition of law. (*Angel v. Jellico Coal Mining Co.*, 25 Ky. Law Rep., 108; *Covington Saw Mill and Manufacturing Co. v. Clark*, 25 Ky. Law Rep., 695.) There was no evidence to show that Bell knew anything of the dangerous condition of the pole or the wires, assuming them to have been so. On the contrary, however, the theory of appellant is that the poles and wires were perfectly safe.

In the case of *McLaughlin v. Louisville Electric Light Co.*, 100 Ky., 198, it is said: "It seems clear to us that appellee should have been required to have had perfect protection on its wire at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. Very great care might be sufficient as to the wires at points where persons need not go for work or business, but the rule should be different as to points where people have a right to go for work, business or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used to keep it so."

The rule thus laid down has not been abated in the many utterances of this court on this question since this case was decided. (*Overall v. Louisville Electric Light Co.*, 20 Ky. Law Rep., 759; *Lexington Railway Co. v. Fain's Adm'r*, 24 Ky. Law Rep., 1443; *Schweitzer's Adm'r v. Citizens General Electric Co.*, 21 Ky. Law Rep., 608; *Macon v. Paducah Railway and Light Co.*, 23 Ky. Law Rep., 50; *City of Owensboro v. Knox's Adm'r*, 25 Ky. Law Rep., 50.)

Without discussing them in detail, we think the instructions given by the court were more favorable to appellant than it was entitled. There is no foundation for the claim for a reversal on the ground of misconduct of appellee's counsel. Certain statements purporting to have been made by him in his argument to the jury are incorporated by appellant in its grounds for a new trial, but the bill of exceptions fails to show that the statements complained of were made, and, therefore, we do not consider them. Upon

the whole case, we are impressed with the belief that the question as to whether or not Charles E. Bell came to his death through the negligence of appellant, or his own, was fairly and fully presented to the jury, who found that issue against the corporation. The evidence was very conflicting on the vital issue, and two juries have reached the same conclusion on practically the same testimony. The verdicts rendered by both, and especially the latter, in amount evidence a conservative spirit, and under all the circumstances we do not believe appellant has any just ground to complain of the result.

Judgment affirmed.

POSTAL TELEGRAPH-CABLE CO. v. PRATT.

(Filed March 2, 1905—Not to be reported.)

1. Telegram—Diligence—Question for jury—Where appellant's messenger in attempting to deliver a telegram to appellee saw a light in his window, and knew that the house was occupied, although the family was out at the precise moment, and had telephone connection from its office with appellee from which the message being prepaid might have been telephoned, the question was for the jury to determine as to appellant's diligence in attempting to deliver the telegram.

2. Same—Jurisdiction—The question as to the place of contract in this case was settled adversely to appellant in the case of Howard v. Western Union Telegraph Co., ante, 224 (opinion delivered by this court February 7, 1905), where it was held that the contract, as in a case like the one at bar, should be construed in accordance with the law of the State where the message was delivered.

Leopold & Pennebaker for appellant.

Campbell & Campbell for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barker.

On September 16, 1902, at 7:55 p. m., a telegraph message for transmission was delivered to appellant at its office in Shaw, Miss., addressed to E. W. Pratt, Paducah, Ky., reading: "Jerome died at 6 p. m.; will bury beside Della at Canton to-morrow. (Signed) Frank." This message was addressed to the house and street number of appellee, and arrived at the Paducah office at 8:03 p. m. on the day it was received by appellant. Within an hour after it reached Paducah appellant's messenger went to appellee's home with the dispatch, knocked at the front door, and, failing to receive a response, walked around to the rear door, and there also knocked. There was a light in the hall, but he found no one in charge to receive the message. Thereupon, after delivering one or two other telegrams, he returned to the office, placed the message in the proper place, and left for the night. He returned the next morning, and between 7 and 8 o'clock delivered it. It was then too late for appellee to attend the funeral of his brother, and he telegraphed his regrets at being unable to do so. Afterwards he instituted this action against appellant for damages for its failure to deliver the telegram, and a trial resulted in a verdict in his favor for \$450, of which it is now complaining.

We think the question of the diligence of the telegraph company in failing to deliver the message was fairly presented to the jury by the instructions. Its messenger saw a light in the hall, and knew the house was occupied, although the family were out at the precise moment he sought admittance. Appellee had a telephone connection with appellant's office, and the message being prepaid, there was no reason why it might not have been telephoned, as is frequently done. The messenger returned to the office, after having failed to find any one in the house, in plenty of time to have done this before the office was closed for the night. Appellee had gone to the drug store, and his wife was visiting a neighbor at the time the messenger applied for admission. They both returned in a few minutes after he left, and were there the remainder of the night. Under these circumstances we are of opinion that the question of diligence was one for the jury.

Appellant urges that when appellee found by the nondelivery of the message on the 16th that he could not reach Canton in time for the funeral of his brother, he should have requested its postponement by telegram. To this we can not agree. The time of funerals is generally arranged by those in charge, who are familiar with the urgency of the occasion, and we do not think it was incumbent upon appellee, by any duty he owed appellant, to request a postponement. The question is as to whether the contract to deliver the message is to be construed under the law of Mississippi, or of this State, was settled adversely to appellant in the case of *John E. Howard v. Western Union Telegraph Co.*, ante, 244. opinion delivered February 7, 1905. It was there held, after a review of the authorities, that the contract in a case such as the one at bar is to be construed in accordance with the law of the State where the message is received. To this we adhere.

We think the petition states a cause of action, and the evidence shows that if appellee had received the telegram in time he would have attended the funeral. While there was nothing on the face of the telegram itself to show that the dead man was appellee's brother, that fact was known to appellant's agent at Shaw, with whom the contract for the transmission of the message was made. But whether it was or not, we are of opinion that the words of the message were sufficient to show its urgency, and imposed upon appellant the duty to exercise ordinary diligence to deliver it within a reasonable time. Upon the whole case we think appellant had a fair trial, and that none of its substantial rights were prejudiced by the rulings of the trial court or the verdict of the jury.

The judgment is affirmed.

SANFORD, &c. v. REED.

(Filed March 8, 1905—Not to be reported.)

1. Lands—Conveyances—Fraud—The evidence in this case establishes the fact that appellee made the deed herein from fright and to avoid a liability, and not in settlement of any claim appellants had against her.

2. Same—While a court of equity will not ordinarily aid a grantor to escape from the consequences of his own fraud, this rule has no application where the grantor is the dupe of the grantee and his weakness has been imposed upon by undue advantage.

J. F. Vanarsdall for appellants.

E. H. Galtner and W. A. Taylor for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee, Eliza A. Reed, shortly after the death of her husband, went to live with her cousin, appellants, Martha J. Sanford, and her husband, William Sanford, and lived with them about eight months. While she was there she went off on a visit and remained away about six weeks. Soon after her return she executed a deed to Martha J. Sanford for twenty-three and three-fourths acres of land which she owned, in consideration, as recited in the deed, of \$450 cash in hand paid. The deed bears date March 7, 1903. By its terms the grantee was to have possession of the property on December 1, 1903. On January 25, 1904, Mrs. Reed filed this suit against Sanford and wife to cancel the deed, and the court having adjudged her the relief sought, the Sanfords appeal.

The facts of the case, as shown by the great weight of the evidence, are as follows: Mrs. Reed had no children and was something over sixty years of age. The Sanfords also had no children, and Mrs. Sanford was a first cousin of Mrs. Reed. Mrs. Reed, in addition to the twenty-three acres referred to, owned a tract of about fifty acres which she inherited from her father. The twenty-three acres she got from her husband. For a while after her husband's death she lived at home with a tenant, but finally moved down to Sanford's, and lived there under an agreement that she was to pay them at the rate of 10 cents a meal. She had signed the bond of one John Adkinson, as guardian of two infants, and while she was living at the defendant's house they instilled into her mind the idea that there was danger that she would suffer loss by reason of her suretyship on the guardian bond, and that all she had might thus be swept away from her. She was a timid, credulous woman, and easily influenced. She had no near kin, at least none with whom she was intimate. So after the defendants had impressed upon her the idea that she could not keep two homesteads, she offered to convey the twenty-three acres to William Sanford, and he said he would not have anything to do with it. She then made the deed to his wife. Nothing was paid at the time and the deed was made simply upon the idea that as soon as the guardianship trouble blew over the property was to be deeded back to her. After the deed was drawn and signed William Sanford took it to town and had it recorded, and Mrs. Reed paid for the recording of the deed. Sanford says he told her when she asked him what she ought to do about the guardian matter that she could not hold two homesteads, and that she had better sell this twenty-three acre piece as it was separated from the other. After the deed was made and recorded she went back to the home place, taking the Sanfords with her, and he rented the place from her, agreeing to take care of her as a member of the family for the land, and they were still living on the place in this way when the proof was taken. After they moved to her place she and Sanford had a settlement as to what she owed him for the eight months she had stayed at his house, and they agreed on \$72, or \$9 a month. She then surrendered to him a note which she held against him and gave him a check for the balance of the amount, but she did not have enough money in the bank to

cover the check and he refused to accept the money when she subsequently tendered it to him, and he still held the check when the action was brought. The defendants claim that the deed was made in consideration of their taking care of the plaintiff, and pleaded a counterclaim for their care and keeping of her in the event the deed was set aside. The court allowed them \$72 on their counterclaim, and adjudged that the plaintiff and defendants should each pay their own costs.

The evidence leaves no room for doubt that the deed was simply made from fright to avoid the guardianship liability and not in settlement of any claim for board or for nursing or other services. While Mrs. Reed's health was not robust, she did not need nursing, and the allowance of \$72 to the defendants is more than we should have allowed, under the evidence, in view of the settlement which the parties subsequently made and the amount which had been paid upon the settlement. The evidence fully warrants the finding of the court that the deed was without consideration and executed to hide the property from Mrs. Reed's liabilities. But it is insisted that if this is true, she can have no relief because a court of equity will not aid a grantor in a fraudulent conveyance to escape from the consequences of his own fraud. This is the ordinary rule, but it has no application where the grantor is the dupe of the grantee, and his weakness has been imposed on to obtain an undue advantage of him. In *Anderson's Adm'r v. Merideth*, 82 Ky., 571, this court thus stated the rule: "The general rule is, in cases of executed contracts, where both parties are guilty of actual fraud, a court of equity will not lend its aid to either, but leave each to the consequences of his own wrongdoing. To apply this rule the parties must be in *pari delicto*, each equally guilty of the fraudulent intention and the fraudulent acting, with equal knowledge and equal willingness. When that is not the case, when there is imposition, duress, oppression, threats, undue influence, taking advantage of necessities or weakness, the party thus placed at disadvantage, although participating in the fraud, may be relieved in a court of equity against his co-wrongdoer."

In 2 Pomeroy's Equity, section 916, the rule is thus stated: "If the plaintiff is himself a party to the fraud, *particeps doli*, to such an extent that he is in *pari delicto* with the defendant, he can obtain no relief; equity does not in general relieve a person from the consequences of his own actual fraud. The mere fact, however, that the plaintiff was a party to the wrong in any degree and is not, therefore, completely innocent, will not necessarily deprive him of relief, defensive or even affirmative. If he is not in *pari delicto*, and is comparatively the more innocent of the two, he may obtain relief by doing full equity to those parties, if any, who have sustained injury by his partial wrong."

The proof leaves no doubt that the plaintiff is comparatively the more innocent of the two, and that her weakness was taken advantage of by the defendants to obtain a deed from her to Mrs. Sanford for the land without consideration, and that she was induced to make this deed by the frame of mind in which she was placed by the statements of the defendants to her.

In regard to her liability on the guardian's bond, and the danger of all she had being swept away.

Judgment affirmed.

HANCOCK v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 3, 1905—Not to be reported.)

Railroads—Appellee having purchased a ticket to a station on appellant's line, contracted to take passage on a train scheduled to stop at that point, and in this action to recover damages against appellant for not taking him on its fast train, which was not scheduled to stop at the station on its line for which he had purchased a ticket, a nonsuit was properly ordered by the trial court.

Gordon, Gordon & Cox for appellant.

Benjamin D. Warfield and C. J. Waddell for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant bought a ticket for a continuous passage over appellee's railroad from Clarksville, Tenn., to Slaughter Station, in Hopkins county, Kentucky. Clarksville and Slaughter are on different branches of appellee's system, necessitating a change of cars by passengers between those points at Guthrie. When appellant arrived at Guthrie he left that train and had to wait for one going north on the Henderson division, due to stop at Slaughter. The first passenger train that came along that way was the fast express from Nashville to Henderson, which was not scheduled to stop at Slaughter. Appellant sought passage on it, but was told by the train crew that it did not stop at his station, and they could not stop for him. He boarded the train notwithstanding, and offered to pay the conductor additional fare to Sebree, a stopping point, or to get off at Madisonville, also a stopping point for that train. The conductor declined to accept that ticket for any purpose on that train, and appellant was ejected at Guthrie.

The circuit court directed a verdict for appellee at the close of plaintiff's evidence. Common carriers may make reasonable rules for the running of their trains. It is a reasonable rule that provides a local train for stopping at all stations, and through trains that stop only at populous places, and at greater distances apart. These through trains are expected to carry passengers intending to continue their journeys on other connecting roads. The volume of such traffic is considerable. The interests of such passengers are certainly entitled to as much consideration as of others. In order to make fast time, to meet connecting trains on time, and to expedite the passenger traffic of a large system, such fast through service is deemed indispensable. It would be unreasonable and unjust to compel the carrier to disarrange its schedule, and jeopardize its trains and the lives of its passengers and servants by compelling the carrier at every whim of a passenger to stop trains at any station, although contrary to the established schedule, for as trains so scheduled are not expected by train dispatchers and the operatives of other trains at nonscheduled points, the movements of other trains

are regulated with that fact in mind; therefore, if any passenger could compel a change of schedule stops, many times at places where there was not a telegraph station, there would be great danger of collision by other trains coming unexpectedly. (L. & N. R. R. Co. v. Miles, 100 Ky., 84.)

A passenger purchasing a ticket for transportation to a station on the carrier's line contracts to take his passage on a train scheduled to stop at that point. Nor can the carrier be required to alter the contract by substituting another for it. As between the passenger and the train conductor the ticket is the sole evidence of the contract. (L. & N. R. R. Co. v. Lyons, 104 Ky., 28.) A train conductor is not authorized to accept the fare from a passenger to a station not scheduled for a stop by his train. (Flood v. C. & O. Ry. Co., 25 Ky. Law Rep., 2136.) He can not, upon the same principle, accept a ticket from a passenger to a point not scheduled for his train to stop. It is contrary to the rules for operating through trains for conductors to do either. They can not confer rights by contract that are violative of their known duties to other passengers, to the employer, and to the public. Nor can they vary the contract already made between the carrier and the passenger so as to cause the latter's right to flow in a different channel. (Schmidt v. C., C., & St. L. Ry. Co., 25 Ky. Law Rep., 11.) Appellant did not offer to pay the fare to Sebree or Madisonville. He showed no right of action against the carrier. The nonsuit was properly ordered.

Judgment affirmed.

CRABTREE v. CRABTREE.

(Filed March 3, 1905—Not to be reported.)

Divorce and alimony—The evidence in this case was examined, and held that the alimony allowed appellee was reasonable, but as the judgment gave her the absolute title to the land directed to be allotted to her, and it is declared by section 2123, Kentucky Statutes, that no allotment of alimony to the wife out of the husband's real estate shall divest of the fee-simple title thereto, the judgment to that extent was erroneous, and upon the return of the case to the lower court a supplemental order may be entered limiting appellee's interest in the land to an estate for life.

W. L. Porter for appellant.

Duff & Hutcherson for appellee.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Settle.

After living together in the married state for about twenty-two years, during which time nine children were born to them, appellant and appellee separated. Soon after the separation she sued for a divorce and alimony upon three grounds: First, that appellant, while they lived together, habitually behaved toward her for not less than six months in such cruel and inhuman manner as to indicate a settled aversion to her, and to permanently destroy her peace and happiness; second, such cruel beating of and injury to her at the hands of appellant as indicated an outrageous temper in him, and probable danger to her life, or great bodily injury from her remaining with him; third, that appellant was living in adultery with another woman.

The appellant resisted the appellee's right to a divorce and claim to alimony by answer controverting the grounds therefor set forth in her petition. His answer was also made a counterclaim, and a divorce from appellee therein demanded upon the ground of her alleged abandonment of him of a year's duration. The chancellor, upon the issues and proof presented by the record, dismissed appellant's counterclaim, granted appellee a divorce a vinculo, gave her one-half of appellant's land and personal property as alimony; also the custody of the four younger children, and allowed her costs, including an attorney's fee of \$75. Appellant complains of so much of the judgment as gave appellee custody of the four infant children and allowed her alimony, and asks its reversal as to these matters. Although this court has no revisory power of a judgment for divorce, it may consider the grounds and proof upon which it was granted, as well as the financial condition of the parties, in determining whether an allowance of alimony complained of is reasonable.

In the case at bar the evidence was conclusive as to the wife's right to a divorce, for it shows beyond question that appellant often cursed her; that he repeatedly kicked her, assaulted and beat her with his hand, whipped her with a switch, and on one occasion at least beat her with a stick or club. According to the evidence he frequently drove appellee out of the house in which they lived. Appellant's cruelty to appellee became so constant and unbearable as to finally compel her to leave her home and infant children, and take up her residence with a married daughter. The evidence fails to show that appellee gave appellant any cause for his brutal treatment of her, and the only reason that can be imagined for her forbearance and submission to the maltreatment to which she was so long subjected at the hands of appellant was her affection for, and disinclination to be separated from, her children, but the intolerable cruelty of appellant, as manifested by his treatment of appellee, is not the only vice attributed to him by the evidence, it also reveals his moral depravity in another and not less revolting aspect, in that it disclosed his adulterous relations with a woman of lewd character, continuing through several years of his married life. Indeed he was still living in adultery with this woman when the witnesses in this case gave their depositions. Several of them testified that appellant had for years maintained his paramour in a house he provided for her, and that after his separation from appellee this paramour spent much of her time at his home with his and appellee's children. It is patent, therefore, that appellee should have appealed to the chancellor for a legal separation from appellant, and to remove her infant children from the evil associations with which their father had surrounded them. Manifestly appellant is not a proper person to have the custody of the four younger children, and in view of the excellent character given appellee by all the witnesses whose depositions appear in the record, the chancellor is to be commended for placing the children in her custody.

Generally the father is entitled to the custody of his infant child, but if it is made to appear that the father's character or habits are such as to unfit him to have the custody of the child, and the mother is shown to be a proper person to have the care of it, the custody should be confided to her. (*McBride v. McBride*, 1 Bush, 15.)

"The chancellor should look to the happiness and comfort of the children, and confide their keeping to that parent whose time and attention can best be devoted to their care and welfare." (Irwin v. Irwin, 96 Ky., 818.)

It is insisted for appellant that the amount of alimony allowed appellee is excessive; that in no event should it have exceeded one-third of the appellant's real and personal estate. Kentucky Statutes, section 2122, provides: "If the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable." * * *

The evidence shows that appellee has no estate in her own right, but that during their married life she, by industry and economy, assisted appellant in accumulating a considerable estate, and that he owns 200 acres of land worth from \$1,800 to \$1,500, and personal property worth about the same amount. In view of her having the care and support of the four small children, and of the further fact that she is in feeble health, we do not think the alimony allowed her by the chancellor, viz., one-half of appellant's land and personal property, was unreasonable or excessive. Appellant complains that the judgment gives appellee absolute title to the half of appellant's land the commissioners are ordered to allot her, and that as it is declared by section 2123, of the statute, supra, that no allotment of alimony to the wife out of the husband's real estate shall divest him of the fee-simple title thereto, the judgment to that extent was erroneous. While the judgment is not explicit on that point, we construe it to mean that she is to have use of the land for life, and it is apparent that no injury can result to appellant by reason thereof, as the court can, upon the return of the commissioner's report of allotment, enter a supplemental judgment limiting her interest in the land given her to the use thereof for her life.

Wherefore, the judgment is affirmed.

THE LINDENBERGER LAND CO., &c. v. PARK & CO.

(Filed March 8, 1905—Not to be reported.)

1. Street construction—Ordinance—Changing of grade—Section 2880, Kentucky Statutes, providing that changes of plans may be had upon the agreement of the board of public works by consent of contractor, it was no defense to the warrant that the grade was changed so as to lessen the cost of improvement after the contract had been let.

2. Same—Where it is not contended that lots affected by the improvement is in territory defined by squares, it is not a defense that the territory in which appellant's lots are situated was divided into squares by principal streets, and that, therefore, the defining of a taxing district so as to bear one-half of the costs was unauthorized.

Lane & Harrison for appellants.

Wm. Furlong for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge O'Rear.

This appeal attacks the validity of apportionment warrants issued by the board of public works of the city of Louisville for the construction of the

carriage way of a portion of Frankfort avenue. Appellant's lots are on the south side of the street.

The ordinance providing for the work fixed the grade of the street. After the contract had been let the common council, by resolution, consented to by the contractor and recommended by the board of public works, changed the grade so as to lessen the cost of the improvement. It is complained that this invalidated the contract. It is expressly provided that changes of plans of work may be had upon the written agreement of the board of public works by consent of the contractor. (Section 2880, Kentucky Statutes, 1908.) So long as they do not add to the burden of the adjacent lot owners, but reduce the cost to the lot owners, as was done by the change in this case, it is no defense to the warrants. (Orth v. Park, 25 Ky. Law Rep., 1910; Barber Asphalt Co. v. Garr, 24 Ky. Law Rep., 2233; Schuster v. Barber Asphalt Co., 24 Ky. Law Rep., 2346.)

The former rule existing under previous statutes on this subject has been modified so as to allow a reasonable and just execution of the work. Technical objections, formerly interposed to defeat wholly the claim of the contractor who had done the work, are now made to yield by the more just provision of the statute, that the court may adjust the rights of the parties after the completion and acceptance of the work if there is some variance, yet is a substantial compliance with the ordinance and contract. Another objection is, that the territory on the north side of Frankfort avenue improved was divided into squares by principal streets, and that, therefore, the defining of a taxing district on that side of the street to bear one-half of the cost of the improvement in question was unauthorized. However that might be, it is unavailing to appellants, for it is not contended that the territory embracing their lots is so defined. Nor would the invalidity of the apportionment warrants of the north side of the way at all affect appellants. The territory in which their property is situated is made to bear only one-half of the cost of the improvement, that is, to the center of the street.

There is no error in the record prejudicial to appellants, and the judgment is affirmed.

BROWNING v. WAYLAND.

(Filed March 8, 1905—Not to be reported.)

Former appeal—Costs—Judgment for—The judgment below only determined that appellant is not entitled to the strip so as to include appellee's right of passway, and subject to this right the title is in appellant, and where appellee had in no way violated appellant's right, no judgment for costs should have been entered against appellee. (Wayland v. Browning, 26 Ky. Law Rep., 485.)

R. L. Greene and C. C. Cram for appellant.

H. Clay White for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Chief Justice Hobson.

In *Wayland v. Browning*, 26 Ky. Law Rep., 485, the facts are stated out of which this controversy arose. In that case it was held that Wayland did not own the sixteen-foot strip in controversy, but only a right of way over it, and the judgment of the circuit court dismissing his petition, seeking to have his title quieted to the strip, was affirmed.

In the case before us Browning sought by a petition in equity to have his title to the strip quieted and to restrain Snow from traveling over it. During the progress of the action a judgment in his favor against Snow was entered, Snow withdrawing all claim to the land. On final hearing the circuit court dismissed the petition as to Wayland, and Browning appeals.

It is not shown in the record that Wayland had violated any right of the plaintiff. He was entitled to a passway over the strip. The plaintiff was not entitled to have his title quieted as against Wayland to the extent of the easement belonging to Wayland, which entitled him to pass over the strip. The same circuit court which rendered the judgment, which was affirmed in *Wayland v. Browning*, also rendered the judgment which is appealed from here. The judgment in this case is not to be construed as affecting in any way Browning's title to the strip, subject to Wayland's right of passway. It simply determines that Browning is not entitled to the sixteen-foot strip so as to exclude Wayland's right of passway. Wayland is entitled to a passway over the sixteen-foot strip, and subject to this the title to the strip is in Browning. This is the meaning and legal effect of the judgment of the circuit court. The circuit court properly entered no judgment for costs against Wayland as it was not shown that he had in any way violated any right of Browning's. Appellant and appellee will each pay his own costs in this court.

Judgment affirmed.

COMBS v. BURT & BRABB LUMBER CO., &c.

(Filed March 7, 1905—Not to be reported.)

Evidence—Failure of proof—An examination of this case shows that there was a total failure of proof to sustain appellant's cause of action, and this being true had a jury been awarded him, the court would have been compelled, under the proof, to peremptorily instruct the jury to find against him.

Phillips & Fugate and Salyers & Baker for appellant.

J. J. C. Bach and Hazelrigg, Chenault & Hazelrigg for appellee.

Appeal from Knott Circuit Court.

Opinion of the court by Judge Nunn.

The appellant, who was plaintiff below, instituted this action against Burt & Brabb Lumber Co. and Elisha Hensley, its alleged agent, to recover \$211, the alleged balance due him on a logging contract. There is no disagreement as to the number of logs hauled under this contract, there being 998.

The appellees controverted the petition and pleaded a final and complete settlement of this logging contract, made with appellant, after the comple-

tion of the hauling and the payment of the balance found due him, to wit, the sum of 81 cents. It appears that the appellee, Hensley, on August 29, 1901, in his own name, made a contract with one Joe Vermillion by which Vermillion was to haul these logs and put them on the bank of Bald Fork of Kentucky river, near appellant's dwelling house, at the price of 14 cents per hundred feet; that Hensley advanced him hay, corn and other things which he hauled to the house of Combs, and proceeded to prepare the roads for hauling out the logs. Before any logs were hauled another contract was entered into by which Vermillion and Combs became partners. This contract was similar to the first one, except each one was to receive one-half of the contract price. It was proven, without much contradiction, that the advancements made to Vermillion were to be charged to the job, and credited to Hensley on the final settlement. Appellant and Vermillion hauled 526 of the logs, when some slight trouble arose between them, and Vermillion quit and appellant completed the contract by hauling the remaining 472 logs. It appears that Hensley advanced to Vermillion and the firm, prior to the time Vermillion quit, about \$226, and after that time paid to appellant about \$224, the two sums making the whole amount due for hauling the logs at the contract price.

The appellant claims that after Vermillion quit the job he made a new contract with Hensley, by which Hensley agreed to pay him a reasonable price for hauling the remaining logs, and that 20 cents per hundred feet was a reasonable price, as the logs he hauled were further away from the place of delivery than the first logs. This was denied by appellees. The proof showed that the logs hauled by appellant were further away from the place of delivery than the first lot, and it was also proven, without contradiction, that appellant should have had more for this long haul, but that matter was to be adjusted and equalized between appellant and his partner, Vermillion. The only attempted proof of the making of a new contract was the statement of appellant and one witness, to the effect that appellee Hensley said to appellant, "Go ahead and finish the job, and I will do what is right." This was denied, but admitting it to be true, we hardly think that it was sufficient to establish any new contract or any change in the written one, as there was no additional consideration shown upon which to base it.

There is some proof tending to show that appellant hauled a few more than 998 logs, but whether he did or not, he sued for the hauling of the only the number named. The appellant also complains that the right of a trial by jury was denied him. In answer to this it is sufficient to say that even if there had been a jury, the court would have been compelled to have given a peremptory instruction to it to find against him, as there was a total failure of proof on his part to sustain his alleged cause of action.

Wherefore, the judgment of the lower court is affirmed.

HARGIS, &c. v. PARKER, JUDGE, &c.

(Filed March 10, 1905—Not to be reported.)

1. Writ of prohibition—Court of Appeals—Authority to issue—Section 110 of the Constitution of Kentucky, which provides, among other things: "That the Court of Appeals shall have power to issue such writs as may be necessary to give it general control of inferior jurisdictions," confers the power and jurisdiction upon this court to intervene by the writ of prohibition to stay the inferior courts of the State from proceeding out of their jurisdiction, and such writ may issue whether or not there is an appeal whether or not it ought to issue in advance of the decision of the lower court, or whether the party will be left to his remedy by appeal, will depend on whether that remedy is given, or whether it is adequate or not.

2. Counties—Concurrent jurisdiction—Homicide—Accessories—Fraudulent proceedings to fix jurisdiction—Where two counties have concurrent jurisdiction of parties charged as accessories before the fact to a murder, and such parties upon their own instigation, or that of some of them acting for all, procure a fraudulent proceeding, by having themselves arrested in one of the counties and executing bond, with the design not to have a trial of the charge there, or elsewhere, but as a cloak to prevent a trial elsewhere, such proceeding is void and no protection to the parties procuring it, against a prosecution subsequently instituted in good faith in the other county.

3. County officials—Concurring in fraud—The fact that the fraudulent proceeding was put in operation by the legally constituted officers of the county acting therein, does not bind the Commonwealth, as the courts which administer the law may protect their own jurisdiction from mere subterfuges intended to defeat their jurisdiction.

4. Accessories before the fact—Acts confined to one county—Where, in a homicide, the wounding occurred in one county and the death in another county, the fact that the accused accessories before the fact all resided in the county where the wound was inflicted and all their alleged acts are admitted to have been done in that county, does not give that county the sole jurisdiction to try them for the offense charged.

J. Smith Hays, Lewis McQuown, Hazelrigg & Hazelrigg, J. B. Hanna, John M. Stevenson and J. J. C. Bach for petitioners.

J. R. Allen, N. B. Hays, C. H. Morris, J. R. Morton, A. F. Byrd and B. R. Jouett for respondents.

Opinion of the court by Judge O'Rear on motion for writ of prohibition.

The respondent, the Hon. Watts Parker, is the judge of the Twenty-second Judicial District of Kentucky, comprising Fayette county. The plaintiffs were indicted by the grand jury of Fayette county, charged with the murder of James Cockrill. A bench warrant issued upon the indictment, and was about to be served upon the plaintiffs in this proceeding, when they appeared in this court and asked that a writ of prohibition issue against the respondent, Parker, to prevent his taking or exercising jurisdiction over the persons of the plaintiffs. The facts upon which the application is based are, that James Cockrill was shot and wounded in Breathitt county, this State, in July, 1902; he was immediately conveyed to Fayette county for treatment of his wound, but shortly thereafter died in Fayette county; he was shot and killed, it is alleged, by Curtis Jett, who has since been tried

and convicted of the crime and sentenced to death. Jett was indicted by the grand jury of Breathitt county, though he was tried in Harrison county upon a change of venue. The claim of the plaintiffs is that, as alleged by the State, they were accessories before the fact to the murder, and that their acts, if done as claimed, were committed wholly in Breathitt county; that on December 8, 1904, warrants were issued against the plaintiffs by one James W. Edwards, a justice of the peace for Breathitt county, charging them with this murder. They were arrested upon the warrants, carried before the magistrate, and were by him held over to answer such indictment as the grand jury might find against them, and were in the meantime released upon bail. On January 24, 1905, the Fayette county grand jury returned the indictment charging the plaintiffs with the same murder in that county, and it is under this last-named indictment that the Fayette court is proposing to take jurisdiction of the plaintiffs and to try the case. Since January 24, 1905, and in fact since the original petition was filed in this court, the grand jury of Breathitt county has been convened in regular session, has examined into the alleged murder of James Cockrill, and has returned in that court several indictments charging the plaintiffs with the murder of Cockrill. Upon these facts the plaintiffs assert that the authorities of Breathitt county first took jurisdiction of the offense and of the persons of the accused, and thereby affixed the exclusive jurisdiction to try them in the courts of that county. It is also contended by plaintiffs that the provisions of the statutes and Code of this State allowing a trial to be had in either county where any part of an offense may have been committed, is violative of the Constitution.

Judge Parker disclaims any intent or purpose in the proceeding other than to discharge his official duty as he sees it. The Commonwealth of Kentucky, at the request of the attorney general, and of the Commonwealth's attorney of the Twenty second Judicial District, was allowed to be made a party defendant, and has defended this suit. The contentions of the Commonwealth are as follows: First, that the writ should not be issued until the petitioners have first applied to the circuit court and had the question of its jurisdiction passed on by that court; second, that under the statutes of this State Fayette and Breathitt counties have concurrent jurisdiction of the offense charged in the indictment, and that the county where proceedings were first begun takes the exclusive jurisdiction; third, that proceedings were first begun in Fayette county; fourth, that the alleged proceedings in Breathitt county previous to the indictment returned in January are a myth, or, if in fact had, were the result of collusion between the accused and the officers, including the examining magistrate, were originated for the fraudulent purpose of preventing any prosecution, and were never intended to have been made public except as a defense to the jurisdiction of Fayette county. The 110th section of the Constitution of Kentucky reads: "The Court of Appeals shall have appellate jurisdiction only, which shall be co extensive with the State, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law. Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

The last sentence was not in any previous Constitution of this State.

From that fact, and inasmuch as it had been held under the former Constitutions, that this court might issue the common law writ of prohibition against any inferior court proceeding out of its jurisdiction (Arnold v. Shields, 5 Dana, 18; Sasseen v. Hammond, 18 B. Mon., 673), provided this court had appellate jurisdiction of the subject-matter, it was said that the last sentence of section 110 of the Constitution "seems to have been intended * * * to give the Court of Appeals plenary power to issue writs in every case when necessary to give it general control of inferior jurisdiction." (Hindman v. Toney, 97 Ky., 413, 17 Ky. Law Rep., 286.) Ordinarily this court might well refuse to issue the writ before the question of jurisdiction had been made in the lower court, for it might be presumed that until that court had proceeded out of its jurisdiction, or had evinced by an order of court that it proposed doing so, that it would not, or, at any rate, that the complainant was not injured, nor threatened with injury till then. But this is not necessarily so in all cases. If the situation disclosed be such as that to take the ordinary course would be of itself to subject the complainant to irreparable loss, the writ should issue without the objections having been made below. The matter of judicial courtesy should yield to substantial personal rights of litigants, such as a sacrifice of their liberty. If it be true that the Fayette court is proceeding without jurisdiction, it is not substantial justice that it should be allowed to take the bodies of the complainants, confine them in jail without bail as it might do at its discretion, subject the parties to enormous expense in defending the case, even if it went no further than a trial of the question of jurisdiction, and say to them, "your remedy is solely by appeal if you have been wronged." We think the section of the Constitution, though it be deemed only declaratory of the common law on the subject, confers the power and jurisdiction on this court to intervene by the writ of prohibition to stay the inferior courts of the State from proceeding out of their jurisdiction. It may issue whether or not there is an appeal; whether it ought to issue in advance of the decision of the lower court, or whether the party will be left to his remedy by appeal, will depend on whether that remedy is given, and whether it is adequate or not. This court will be slow to use the writ where there is an appeal, but its valuable office to the citizen who is being oppressed by unlawful assumption of judicial authority will not be limited by set rules. It is believed the general principles regulating the use of this writ are so well established and understood that it is unnecessary to further define them.

It is not an open question in this State whether an offense committed partly in two counties may be tried in either. Whatever may have been the common law rule, though it seems to have been substantially as now declared by our statute, legislation in this State has settled it, unless it be said that the Constitution is violated thereby. Section 1147, Kentucky Statutes (1903), provides: "If a mortal wound, or other violence or injury be inflicted, or poison be administered, in one county or corporation, and death ensue in another, the offense may be prosecuted in either."

And section 21 of the Criminal Code provides: "If an offense be committed partly in one and partly in another county, or if acts and their effects, constituting an offense occur in different counties, the jurisdiction is in either county."

If such was the common law, as we think it was, "a jury of the vicinage" at common law, was a jury selected from the neighborhood of the crime, which might be either county where it was in part committed. (Commonwealth, By, &c. v. Jones, Judge, 26 Ky. Law Rep., 867.) It has always been understood that the right to trial by a "jury of the vicinage" was subject to certain necessary exceptions, such as changes of venue, and the like. (Parker v. Commonwealth, 12 Bush, 191; Adkins v. Commonwealth, 98 Ky., 539; Smith v. Commonwealth, 21 Ky. Law Rep., 1470.) This was held to be the law under the old Constitution before the provision found in section 11 of the present Constitution was adopted. (Commonwealth v. Davidson, 91 Ky., 162.) As it is admitted that the shot that killed Cockrill was fired in Breathitt county, and that his death from the wound occurred within one year and a day thereafter in Fayette county, they each had concurrent jurisdiction of the crime. Manifestly the courts of two counties could not try the same defendants for the same offense. There must be a time when the jurisdiction of one county becomes exclusive and that of the other county is lost. Section 24, Criminal Code, is: "If the jurisdiction of an offense be in two or more counties, the defendant shall be tried in the county in which he is first arrested, unless an indictment for the offense be pending in another county."

A literal application of the last section might lead to absurdities certainly never contemplated in the purpose of its enactment. It was so held in Massie v. Commonwealth, 90 Ky., 485. Horse stealing is punishable by statute in the county where the horse may be stolen, or in any county into which it may be carried. Massie took a horse in Montgomery county and carried it into Bourbon. At the instance of the Montgomery county authorities, and before an indictment in that county or elsewhere, they caused him to be arrested in Bourbon and brought back to Montgomery for trial, where he was convicted. He relied on section 24, above quoted, in bar of the jurisdiction of the Montgomery court. It would seem that literally his objection was well taken, but this court said: "This provision was not inserted in the Code for the benefit of the criminal, but to prevent a conflict of jurisdiction in cases where it belonged to more than one county."

It is conceded, as it must be under the statute quoted, and the decisions of this court, if adhered to, that where two or more counties have concurrent jurisdiction of an offense committed partly in each of them, that no substantial legal right of the accused can be invaded whether one or the other takes cognizance of the matter. So long as the accused is not put in jeopardy by the proceedings in both counties it can not be the subject of complaint from him which of them takes the jurisdiction and proceeds with his trial, so long as only one does so. The fact may be accepted as established by the proof in this case that magistrate Edwards issued warrants against plaintiffs on December 8, 1904, charging them with the murder of James Cockrill. It may also be accepted as established, for the purposes of this hearing, that the accused were arrested or voluntarily surrendered themselves to the custody of the magistrate, who signed an order committing them to the circuit court of Breathitt county for examination of the charge by the grand jury of that county, and that they executed bonds for their appearance before that court.

It is contended for the Commonwealth, though, and this is the main question presented for decision, that these proceedings are void. For the plaintiffs the argument is that whatever may have been the motives of the officers of Breathitt county, or however their action might have been induced, the fact is that, having jurisdiction to do what was done, the accused are actually bound by the proceedings, and the law's machinery being set in motion, under section 24, Criminal Code, the jurisdiction of Breathitt county becomes exclusive. The court has come to the conclusion upon the evidence before it that the arrests of the plaintiffs in Breathitt county were procured upon their own instigation, or that of some of them acting for all, with the design not to have a trial of the charge there or elsewhere, but as a cloak to prevent the trial elsewhere. If such be not the fact, the plaintiffs are peculiarly unfortunate in the matter of certain coincidences shown in the proof, as well as certain discrepancies between the record of the 'squire's proceedings and the admitted truth. Being of this opinion as to the facts, the question recurs, do the proceedings in Breathitt before the examining magistrate confer exclusive jurisdiction of the plaintiffs on the courts of that county? A judgment of a court may be a punishment, or it may be a protection. It may or may not be a bar, according to whether he who relies on it is in a position to do so. If it be obtained by fraud, the one procuring it ought not to be permitted to use it as a protection. That would be to allow one to profit by his own fraud, which is a doctrine repugnant to the law, and wholly untenable by any kind of right thinking. It is said that the Commonwealth has acted in the matter in Breathitt, through her legally constituted officers, whose authority is as complete to bind the Commonwealth as is that of the officers of Fayette, or any other county. If the Commonwealth is bound, it is upon principles analogous to agency, that he who sets another to do his business is bound by such agent's acts within the scope of his authority. Which is as it should be. But there is a necessary exception to that rule, which is, if the agent, in fraud of his principal, colludes with his opponent, so that instead of acting for his principal, he becomes the tool or accomplice of the opponent, then the principal ought not to be bound by his agent's acts; nor is he. As between two persons, this is undeniably the law. The State will not be given less consideration in matters of public concern than any individual. The courts which administer the law may protect their own jurisdictions from machinations, from palpable subterfuges intended merely to defeat their jurisdiction. The sovereignty of the law depends upon the power of the courts to maintain the integrity of their jurisdiction against mere devices that would defeat them. Judgments obtained by extrinsic fraud ought not to bind anybody not a party to the fraud. They ought to be, and are, subject to impeachment either by direct or collateral attack. This is so, although the court rendering them had jurisdiction of the subject-matter. (*Grignon v. Astor*, 2 Howard, 819; *United States v. Throckmorton*, 98 U. S., 68; *Cole v. Cunningham*, 188 U. S., 112; *Brunk v. Means*, 11 B. Mon., 214; *Talbott v. Todd*, 5 Dana, 110.)

In *Carrington v. Commonwealth*, 78 Ky., 88, the accused was indicted for a violation of the liquor laws. His offense was a misdemeanor. A statute provided that "whenever any person shall be lodged in jail in default of

bail, being charged with a misdemeanor," whether under an indictment or not, the judge of the quarterly court, the circuit court not being in session, had jurisdiction to try the case. The defendant surrendered to the jailer, failed to give bond, and was brought before the quarterly court, tried, convicted and fined, notwithstanding the circuit court proceeded afterwards to try him under the same indictment, rejecting his plea of former conviction in bar. This court said: "The circuit court properly refused to permit its jurisdiction to be ousted, and to allow the prisoner, by a device so transparent, to choose the tribunal in which he would be tried. A judgment of acquittal thus procured was not a bar, and was properly disregarded."

Plaintiffs seek to distinguish Carrington's case from this one upon the suggestion that the quarterly court had not jurisdiction of the case because Carrington was not in fact in jail, but was simply in the custody of the jailer. The court, however, did not rest its decision upon that feature of the case. It was referred to only as indicating a lack of good faith in the matter. The court said: "The evidence in this case shows that the prisoner never was committed to jail, nor was he in good faith committed to the custody of the jailer."

From this it appears that had the defendant been in good faith committed to the custody of the jailer it would not have been necessary to have gone through the idle form of locking and unlocking the jail door. Emphasis was laid upon the lack of good faith in the defendant's surrendering himself to the jailer's custody in this language: "Whatever was done toward bringing the case within the letter of the statute was evidently done to avoid the imprisonment of the defendant, but to secure a trial before the county judge. * * * The evidence in this case shows conclusively that the surrender of the prisoner to the jailer was merely formal, and merely with the design to give the quarterly judge jurisdiction, and not for the safe-keeping of the prisoner, or because he was either unable to give bail or unwilling to do so, except for the purpose of bringing his case within the statute."

Of all this the court said: "It is to be treated as if the prisoner had procured himself to be accused, arrested and tried, and then attempted to plead the judgment thus obtained in bar; for although he had been regularly indicted, he procured a trial in the quarterly court by a fraud upon the statute giving that court jurisdiction."

In applying that decision to this case it follows, a fortiori, that one accused of a crime can not procure himself to be arrested and bound over under form of law, to give jurisdiction to a county of his preference in fraud of the right of the prosecuting officers acting in good faith to fix it elsewhere if they choose to do so in the interest of a fair trial. The position of this court on this subject appears to be in harmony with the trend of authority elsewhere. (State v. Colvin, 11 Hump., 599, 54 Am. Dec., 60; Watkins v. State, 68 Ind., 427, 34 Am. Rep., 273; Commonwealth v. Dascom, 11 Mass., 404; State v. Simpson, 28 Minn., 66, 41 Am. Rep., 270.)

No reflection can be indulged against the judge and prosecuting attorney of the Breathitt Circuit Court. Their fitness and willingness to enforce the law is in no sense involved. This case, as made up on the trial, has to do solely with what occurred before the prosecution took any form in the Breathitt Circuit Court. In view of the language of section 24 of the Crim-

nal Code the case is resting upon the bona fides of the alleged prior arrest in Breathitt county. If that was not, properly speaking, an arrest of the accused, then as the Fayette Circuit Court first indicted them for the offense of murdering James Cockrill, it took jurisdiction of the matter, by virtue of section 24 of the Criminal Code, to the exclusion of the Breathitt Circuit Court.

The final contention of the plaintiff is that they are charged as accessories before the fact to the murder of Cockrill, and as their alleged acts are admitted to have been done in Breathitt county, under the authority of *Tully v. Commonwealth*, 18 Bush, 142, that county alone has jurisdiction to try them. Tully was accused as accessory after the fact to a murder committed in Scott county. The Scott court was held to be without jurisdiction, as the act of 1796 (1 Statute Laws, 530), held in that case not to have been repealed, but expressly continued in force by the Revised Statutes then in effect, provided: "An accessory to a murder or felony committed shall be examined by the court of that county and tried by the court in whose jurisdiction he became accessory, and shall answer upon his arraignment, and receive such judgment, order, execution, pains and penalties as is used in other cases of felony."

But the saving clause contained in the Revised Statutes, which continued the practice provided by the act of 1796, is not in the present statutes or Code of Practice. Section 8 of the present Criminal Code reads: "All laws coming within the purview of this act shall become repealed when this act goes into effect, except as provided in the preceding section." (The preceding section relates alone to prosecution begun before January 1, 1877.)

The Criminal Code of Practice regulates the trial of all criminal prosecutions, but it does not contain the provision from the act of 1796 just quoted. Section 1128, Kentucky Statutes, provides: "In all felonies, accessories before the fact shall be liable to the same punishment as principals, and may be prosecuted jointly with principals, or severally, though the principal be not taken or tried, unless otherwise provided in this chapter."

This section is found under the title of "Crimes and Punishments," in Kentucky Statutes (Barbour), which this court declared in *Buchanan v. Commonwealth*, 94 Ky. —, "to be a complete system of statutory law relating to crime and punishment, and as a consequence to supersede or repeal all existing statutes on that subject." If accessories before the fact can be indicted jointly with principals, and if the principals could be indicted in Fayette, the accessory before the fact could also be indicted and tried there, although his act may have been committed elsewhere. It follows that the present statute and the act of 1796 are incompatible in their provisions, and the latter must of necessity supersede the former.

In *Commonwealth v. Parker*, 108 Ky., 673, 22 Ky. Law Rep., 368, this precise question arose. The accessory before the fact, whose sole connection with the crime was shown to have been in Kenton county, was indicted and tried in Jefferson county. The court said: "We do not desire to go further than is necessary to decide the question here presented, i. e., that an accessory before the fact, who devises in one county a scheme to commit a crime in another, thereafter actually committed, or who in one county procures the commission of a crime in another, is, under section 21 of the Code, properly triable in either county."

The court is of opinion that the Fayette Circuit Court has now exclusive jurisdiction to try the case made by the indictment returned by the grand jury, and that the proceedings before Justice of the Peace Edwards are a nullity, in so far as they attempt to confer jurisdiction upon the courts of Breathitt county. The application for the writ of prohibition against the judge of the Fayette Circuit Court is consequently denied. The temporary writ heretofore issued is discharged.

Whole court sitting except Judge Cantrill, absent.

BALL v. COMMONWEALTH.

(Filed March 7, 1905—Not to be reported.)

1. Criminal law—Evidence—As to whether or not there was any evidence conducing to show the guilt of appellant, for this question see section 340, Criminal Code, and note 20, and cases there cited.

2. Same—Where one Flaverty testified upon the trial of this case that he was so near the parties at the time the shot was fired that blood spurted from the wound inflicted upon deceased upon his (witness') clothing, and the appellant introduced testimony to show that this witness was not present at the time of the difficulty, Held—That the Commonwealth had the right in corroboration of its witness, Flaverty, to show that there was blood upon his clothing, and where appellant's witness did not state what Flaverty said to him about it, there was no error.

3. Same—Conduct of Commonwealth's attorney—Where it appears that the Commonwealth's attorney did not connect appellant in any way with previous crimes in Bell county, this language: "That more than a score of men, perhaps, had been killed in Middlesborough, Bell county, Kentucky, and nothing had been said about it, because the people up there were afraid to talk about it," was not prejudicial to appellant.

W. G. Colson, O. V. Riley and J. G. Rollins for appellant.

N. B. Hays and Chas. H. Morris for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Bell Circuit Court, convicting appellant of the crime of manslaughter and fixing his punishment at confinement in the penitentiary for the term of twenty-one years.

The appellant seeks a reversal, and assigns three grounds: First, that the evidence did not authorize the verdict; second, the court erred in the admission of evidence; and, third, improper remarks of the Commonwealth's attorney in his concluding argument to the jury. Appellant was indicted and tried for the crime of murder, and was convicted as above stated. We deem it of no benefit to give in detail the facts proven as they appear in the record. It is sufficient to say that there was some evidence upon which to base this judgment of conviction, and this court has no power to reverse a judgment of conviction in a criminal case upon the sole ground there was not sufficient evidence to sustain the verdict, being restricted to the single inquiry, whether there was any evidence before the

jury conducing to show the guilt of the accused. (Section 340, Criminal Code, and note 20, and the cases there referred to.)

On the trial the Commonwealth introduced one Flaverty, who was the most damaging witness introduced against the appellant. He stated that he was so near the parties at the time the fatal shot was fired that the blood spurted from the wound given the deceased upon his, the witness', clothing. The appellant introduced witnesses showing from facts and circumstances that the witness, Flaverty, was not present at the difficulty. The Commonwealth in rebuttal introduced one A. Goff, and proved by him that on the night after the killing, or the night after that, he saw blood upon the clothing of Flaverty. He was then asked if Flaverty made any statement to him with reference to it, and he answered "yes," but he was never asked to state, nor did he state, what Flaverty said about it. This is the admission of incompetent testimony referred to. We are of the opinion that the Commonwealth had the right, in corroboration of its witness Flaverty, to show that there was blood upon his clothing. As the witness did not state what Flaverty said to him about it, there was no error.

In the motion for a new trial the appellant ascribed to the Commonwealth's attorney the following improper language: "That more than a score of men had been killed in Middlesborough, Ky., by parties connected with the defendant, and that nothing had been said about it, because the people up there were afraid to talk about it." We find from the record that the following was the language used by the Commonwealth's attorney: "That more than a score of men, perhaps, had been killed in Middlesborough, Bell county, Kentucky, and nothing had been said about it, because the people up there were afraid to talk about it." It appears that he did not connect appellant in any way with the previous crimes in that city and vicinity, and his language was not prejudicial to appellant. The appellant does not complain of the instructions of the court.

He filed his motion and grounds for a new trial, and one of them was newly-discovered evidence. In support of this he filed many affidavits.

By section 281 of the Criminal Code it is provided that the decision of the court upon a motion for a new trial shall not be subject to exceptions, and not subject to review by this court, and by reason thereof this court is powerless to give any relief for any error committed in overruling motions for a new trial.

For these reasons the judgment must be affirmed.

Whole court sitting, except Judge Cantrill.

LOUISVILLE RAILWAY CO. v. SHEEHAN.

(Filed March 8, 1905—Not to be reported.)

1. Damages—Complaint of misconduct of attorney in argument to jury—Upon the trial of this action for damages against appellant the statement of the attorney for appellee, to the effect that appellant was not required to go into trial without its absent witness, but had the right to file an affidavit as to what its witness would testify, and that in default of this affidavit he:

had a right to conclude that the testimony of this witness would have been in favor of appellee, Held—That as the court instructed the jury to disregard this statement of counsel it must be presumed that the jury obeyed the orders of the court, and that no injury accrued to appellant by reason of this occurrence.

2. Same—The statement of counsel for appellee, to the effect that it was the duty of the conductor to assist appellee in alighting from the car, while unwarranted, was not prejudicial, because at most it was but a mere expression of opinion, and had no weight in influencing the verdict of the jury.

Fairleigh, Straus & Fairleigh, David W. Baird and Robt. L. Greene for appellant.

Matt. O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Barker.

In attempting to alight from one of appellant's cars at the corner of Fourth and Breokinridge streets, in Louisville, Ky., appellee fell, or was thrown, to the pavement, receiving severe injuries. Claiming that her fall was the result of the negligence of appellant's employes in charge of the car, she instituted this action to recover damages, and a trial resulted in a verdict in her favor for the sum of \$1,500.

On this appeal appellant, for reversal, insists only on the failure of the trial court to set aside the empaneling of the jury, and reassign the case to another day for trial, because of the misconduct of attorney for appellee in the closing argument. The first act of misconduct complained of was the statement of the attorney to the jury that appellant had summoned a witness who failed to appear; that it was not required to go to trial without its witness, but had the right to file an affidavit as to what the absent witness would have testified to if present; that in default of this affidavit he had the right to conclude that the testimony of the absent witness would have been in favor of the appellee. Upon objection to this the court told the jury, in positive terms, that they must not regard the statement of counsel with reference to what the evidence of the absent witness would have been. The second act of misconduct consisted in the argument to the jury on the part of appellee's counsel, that it was the duty of the conductor to have assisted appellee to alight from the car to the street. Upon objection the court declined to interfere with this argument.

As to the first of these alleged errors it need only be said that as the court instructed the jury to disregard the statement of counsel as to what the evidence of the absent witness would have been, we must presume they obeyed the orders of the court, and that no injury accrued to the interest of appellant by reason of this occurrence. As to the second, assuming, for the purpose of the case, that the statement of counsel was unwarranted, we do not believe it was prejudicial to appellant's interest; at most, it was a mere expression of the opinion of counsel, and taken in connection with all the evidence in this case and the instruction of the court as to the duty of appellant, we do not believe that it could have had any weight in influencing the verdict of the jury.

Judgment affirmed.

COULSON v. FERREE.

(Filed March 8, 1905—Not to be reported.)

Partnership—Action on claim growing out of—One partner can not maintain an action at law against his copartner on a claim growing out of the partnership transaction until the business and accounts are finally settled, therefore, it was erroneous in this action for the trial court to render judgment in favor of appellee upon the claim sued on.

Mather & Creal for appellant.

Williams & Handley for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Ferree, instituted this action against the appellant, Ben L. Coulson, and James E. Leadley. His cause of action may be stated by quoting from his petition. It reads as follows: "The plaintiff, E. A. Ferree, states that he and the defendants, Ben L. Coulson and J. E. Leadley, formed a partnership on the — day of —, 18—, for the purpose of manufacturing spokes, swings, grain fans, and other things; that the style of the firm was the Hodgenville Spoke and Lumber Co.; that in accordance with their contract plaintiff put in capital stock \$2,500, Ben Coulson, — dollars; Jas. E. Leadley, — dollars, amounting in all to \$10,000 in capital stock; that said firm has been in operation from the — day of —, until the — day of —, and that from the time they ceased operation the machinery has been in possession of this plaintiff, the defendants being nonresidents; and that said machinery and capital stock is depreciating in value; and that from the — day of —, until the — day of —, the plaintiff has rendered services and labor under contract at \$20 per month, amounting in all to \$600. Wherefore, he prays judgment for the dissolution of the partnership, for the settlement of business and accounts of the firm, for the division of the assets that may remain after the payment of the firm debts, and for judgment for \$600 for services and labor and all proper relief."

He filed an amended petition which does not aid his cause of action for services rendered the firm, but simply contains averments which, if true, showed that the appellant misappropriated part of the proceeds of two notes which were delivered to him by the firm for negotiation for its benefit. Without referring the case to the commissioner or hearing proof, the court gave appellee judgment against the appellant, Coulson, for \$450 for the alleged services.

From the averments of the petition the partnership had not been settled. Until that was done it could not be known how its affairs stood. The plaintiff might or might not have a valid claim for services against the firm. One partner can not maintain an action at law against his copartners on a claim growing out of the partnership transactions until the business is wound up and the accounts finally settled. The reason for the rule is that until there has been an accounting and partnership affairs settled, no cause of action is ascertained to exist.

In *Stone v. Mattingly*, 14 Ky. Law Rep., 118, the court said: "The allowance of salary was to be out of the proceeds of the business in which the

parties hereto were partners. Losses were to be borne by them in proportion to their interests, and upon a settlement of firm matters it might appear that the appellant was indebted to the firm. In that event he would have no right to recover for salary, even if otherwise entitled to it. In any event his right to recover depended upon the state of accounts between him and the appellee as partners. The subject of the suit was a partnership matter. There had been no act of the parties separating this claim from the partnership. The written contract did not do so, because by it any indebtedness on this score was to be paid out of the proceeds of the venture. The claim for it was against the firm, and it is an elementary rule of the law of partnership that, in general, one partner can not sue the other at law on account of a firm transaction, in the absence of a settlement of the partnership accounts." The same rule is enunciated in *Lawrence v. Clark*, 9 Dana, 259.

The court treated the action as one at law, and rendered judgment on the averments of the petition as we have heretofore stated.

The judgment is reversed for proceedings consistent with this opinion.

LAPP & FLERSHEIM v. CLARK'S ADM'R, &c.

(Filed March 9, 1905—Not to be reported.)

Partnership—Jurisdiction—In this action to compel Bland, surviving partner, and his copartner's administrator, to compel the payment back into the partnership of several thousand dollars which it was alleged Bland had withdrawn after Clark's death, not leaving enough to pay the firm liabilities of about \$150, and to subject the assets to the payment of its debts, the evidence establishing the partnership, it was erroneous to dismiss the appellant's petition. The matter in controversy is not alone, the appellant's claim which was less than \$200, but as to whether there was a partnership which gives this court jurisdiction of the appeal.

Beard & Marshall and P. J. Beard for appellee T. E. Bland.

Gilbert & Gilbert for appellee Clark, administrator.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge O'Rear.

R. H. Clark and T. E. Bland entered into this contract:

"1st. This article of agreement, made July 1, 1896, between R. H. Clark and T. E. Bland, both of Shelby county, Kentucky. Said parties have agreed, and by these present do agree, to associate themselves as copartners for the purpose of carrying on the jewelry business on the following terms:

"2d. That said T. E. Bland contribute as his share of the joint stock \$2,500 in cash, and that said R. H. Clark contribute as his share the time and attention necessary to conduct the business for their mutual benefit.

"3d. All the net profits accruing from said partnership shall be equally divided, and all expenses, except bad debts, shall be borne by R. H. Clark.

"4th. That book of accounts shall be kept in which shall be entered a full account of all transactions and accounts of said partnership.

"That the stock of jewelry shall stand as security to T. E. Bland for the money invested."

The business was conducted in the name of R. H. Clark. Appellant sold to R. H. Clark a bill of merchandise of about \$300. After deducting payments made upon it there is a balance of about \$150. Clark died and this suit was brought by appellants against Bland and Clark's administrator for a settlement of the copartnership between Clark and Bland, and to compel Bland to pay back into the copartnership several thousand dollars which it is alleged Bland had withdrawn after Clark's death, leaving not enough to pay the partnership liabilities, and for subjecting the assets to the payment of the partnership debts. The suit was in equity. Its effect, if successful, was to bring into chancery all the assets of the copartnership for the benefit of all its creditors. The circuit court dismissed appellant's petition.

The first question presented is, has this court jurisdiction of the appeal, the amount of appellant's claim being less than \$200. The matter in controversy in this suit is not alone the amount of appellant's claim. It is whether there was a partnership between Bland and Clark, Bland denying it; also to recover from Bland a sum considerably more than \$200 for the use and benefit of all the creditors in whose behalf the suit may be said to have been instituted by appellants. The motion to dismiss the appeal will, therefore, be overruled. There is testimony that the partnership between Bland and Clark did exist, but aside from that the writing itself shows conclusively that it did.

The judgment of the circuit court is reversed and cause remanded for proceedings not inconsistent herewith.

UNION CENTRAL LIFE INSURANCE CO. v. SPINKS.

(Filed March 9, 1905—Not to be reported.)

Costs--Taxation of--Where attorneys for both appellant and appellee withdrew transcript of record from clerk's office of Court of Appeals, the custom having been uniform to charge for but one copy, this court is unwilling to change it. To charge for two copies where they have not been made has not been recognized by the legislature, and would be an undue addition to the cost of litigation, already very burdensome.

Robert Ramsey and W. W. Helm for appellant.

L. J. Crawford and Hazelrigg, Chenault & Hazelrigg for appellee.

Appeal from Campbell Circuit Court.

Chief Justice Hobson delivered the following opinion on motion to correct taxation of costs:

The attorneys for appellant and appellee both withdrew from the clerk's office the transcript in this case, and the clerk has charged both appellant and appellee with a copy in taxing the cost. A motion is now made to correct this. The custom of the office, approved by the court in *Parrish v. Ferguson*, 83 Ky., 18, and *Shackelford v. Phillips*, 112 Ky., 568, has been to charge a party with a copy of the transcript when he uses it, though a copy is not in fact made. But the custom has been uniform also only to charge for one copy, though both parties used the transcript. The custom had been sustained on the ground that it has been recognized by the legislature, but

the custom so recognized is the custom to charge only one copy, and we are unwilling to extend the custom or to change it. To charge two copies where they have not been made has not been recognized by the legislature, and would be an undue addition to the cost of litigation, already very burdensome. In the case of *Owsley v. Owsley*, 27 Ky. Law Rep., 180, no extension of the rule was intended to be laid down, but rather a limitation of it.

Motion sustained.

LOUISVILLE BRIDGE CO. v. DODD, &c.
 LOUISVILLE, & NASHVILLE R. R. CO. v. LOUISVILLE BRIDGE CO.
 (Filed March 9, 1905—Not to be reported.)

Helm, Bruce & Helm for L. & N. R. R. Co.

Thos. W. Bullitt for Louisville Bridge Co.

Kohn, Baird & Spindle, W. O. Harris and J. C. Dodd for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Judge O'Rear delivered the following extension of opinion:

In stating the account between the Louisville Bridge Co. and the Louisville & Nashville R. R. Co. we have not, as indicated in the original opinion, undertaken to figure out precisely what the parties are entitled to, either as charges or credits. It was intended merely that the basis of settlement should be stated, and the form of account in the opinion was only by way of illustration. It occurs to us that the principal of the sum owing by the L., N., A. & C. Ry. Co., called in the record the "Monon," to the bridge company was about \$34,697. This principal sum, as decided on the former appeal, as well as is held on this appeal, should in no event be charged to the L. & N. R. R. Co. in its settlement with the bridge company. On the contrary, it should be credited upon the total receipts by the bridge company during the life of the contract of June 5, 1872, out of which were to be satisfied the fixed charges provided by that contract. If there should be a deficit for which the L. & N. R. R. Co. could be made responsible under the contract, it must be shown that the receipts of the bridge company were less than enough to provide the fixed charges called for by the contract. This deficit could not exist if the bridge company had actually collected from another railroad company, say the Monon, \$34,000, which it subsequently lost by its own mismanagement. At least it could not exist to that extent.

The circuit court will, therefore, enter this credit in arriving at the state of accounts between the bridge company and the L. & N. R. R. Co.

COMMONWEALTH, FOR USE, &c. v. DONNELLY.

(Filed March 9, 1905—Not to be reported.)

Office and officer—Liens—Application for rule to compel payment of money—This proceeding for a rule to compel a county treasurer to pay into court money that he had collected from the sheriff, which money has upon

a former appeal been held a trust fund for the benefit of the taxpayers, was properly refused where the proceeding was in rem, and was only an effort to obtain a personal judgment against the sheriff and his sureties. The treasurer received the money from the sheriff on an admitted debt owing the county by him, and the money not being in lien, and the deposit not having been stayed by garnishee process, the payment was not illegal.

Winfield Buckler for appellants.

Holmes & Ross and Morgan & Hughes for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge O'Rear.

- Ratliff, as sheriff of Nicholas county, collected some \$3,200 from the taxpayers of that county under a void levy. It was held on a former appeal that he held it in trust for the benefit of the taxpayers who had contributed it. (Whaley v. Commonwealth, For Use, 110 Ky., 154.)

This proceeding is an application by the plaintiffs below for a rule against Donnelly, the county treasurer of Nicholas county, to compel him to pay into court \$3,200 odd, alleged to have been paid to him by Ratliff. It is stated as a basis for the rule that Ratliff had on deposit in bank the funds illegally collected by him from the taxpayers; that he drew his check on the bank, got the cash, and paid it to the county treasurer for an indebtedness owing the county by Ratliff, and that the treasurer had paid it out to various county claimants in payment of sundry claims allowed them by the fiscal court. It is also asserted that Donnelly knew when he received this money from Ratliff that it was the identical money collected illegally from the taxpayers. As these collections have been called a trust fund, and are so treated for certain purposes, appellant contends that he ought to be permitted, under familiar maxims applicable to trust funds, to follow and recover it from whomsoever has received it, so long as he is not an innocent holder, and that as Donnelly had notice of the facts he was not an innocent holder.

Money has not earmarks by which a lien can be got on it by lis pendens. The circulating medium, the currency of a county, can not be subjected to liens, and impressed with trust obligations so as to take it from general circulation. Nor was this a proceeding in rem. It was only to get a personal judgment against Ratliff and his sureties. No steps were taken to stop the money in the hands of the bank. The county treasurer received the cash from the former sheriff on an admitted debt owing the county by him. The currency not being in lien, and the debt of the bank to its depositor, Ratliff, not having been stayed by garnishee process, the payment by the sheriff to the treasurer was not illegal. The rule was properly refused.

Judgment affirmed.

GUNKEL v. SEIBERTH.

(Filed March 15, 1905—Not to be reported.)

1. Land—Conflict in lines—Evidence—Measurements by persons not surveyors—Competency—In a controversy as to the ownership of a strip of land two inches wide and 60 feet long claimed by appellee as being part of his lot No. 14, fronting 25 feet on McCracken avenue, in the city of New-

port, which was also claimed by appellant, evidence of measurements made by persons who were not surveyors, with an ordinary standard tape line, who claimed to have some experience in measuring land, was competent to go to the jury for what it was worth, and it was error in the court to exclude it.

2. Change in deed—Evidence—It was also error in the court to permit a witness to state that the deed to one of the lots had been changed unless it was shown that such change was made after its execution and delivery.

3. Instructions—An instruction by the court to the jury was misleading which told them that if they believed that S. was the owner of and entitled to the possession of a certain lot known as lot No. 14, they should find for him, when it was conceded that S. owned said lot, but the controversy was as to whether the opposing claimant was in possession of any part of said lot as laid down on the plat. The instruction should have been that if the jury believed from the evidence that the defendant was over the line and held any part of lot No. 14 they should find for the plaintiff and say how much he was over the line, but unless defendant was over the line and held a part of lot No. 14, they should find for defendant.

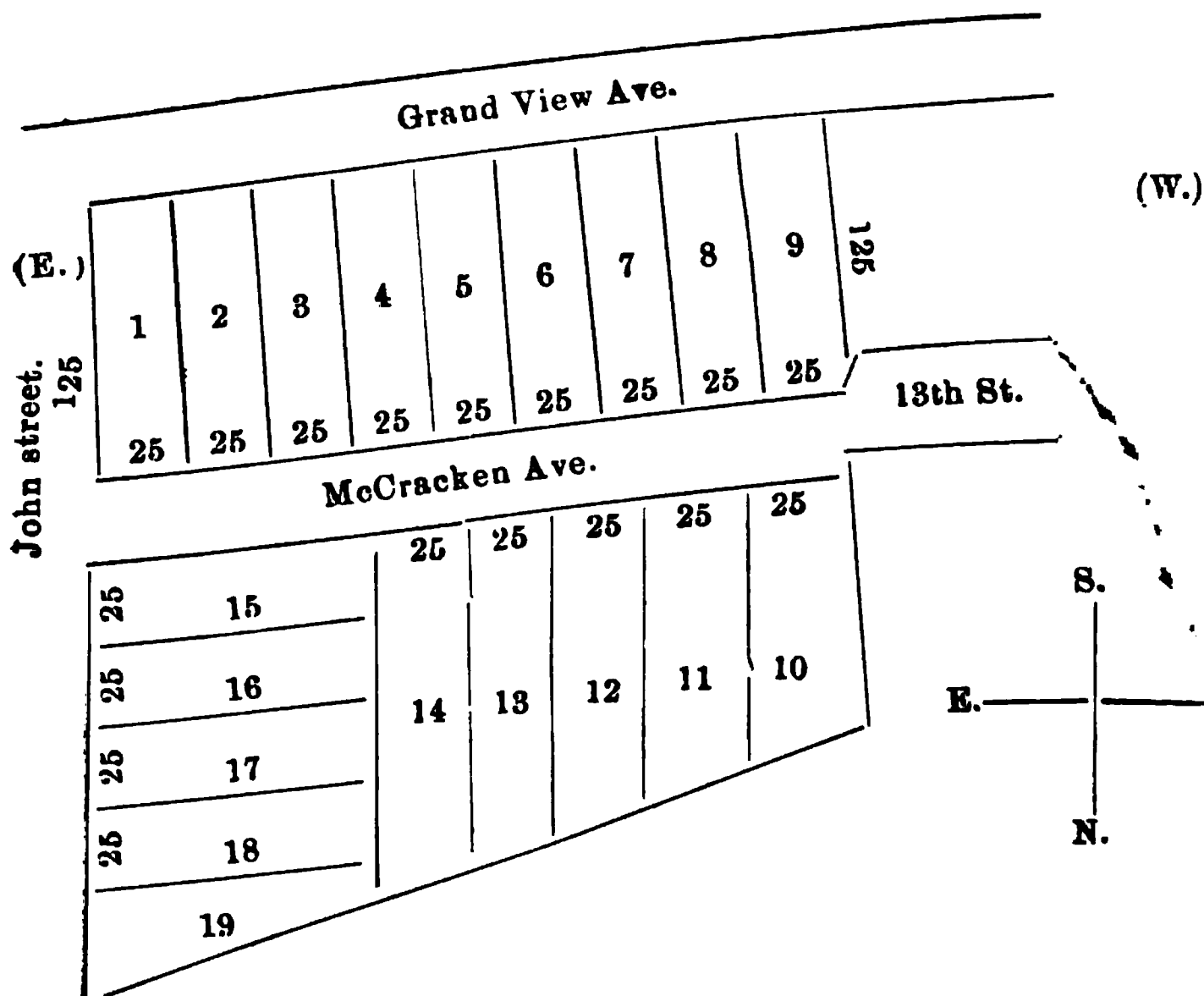
Kendrick & Roebuck for appellant.

John S. Geisher for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee owns lot 14 in one of the subdivisions of Newport. Appellant owns lots 15, 16, 17 and 18. Each of the lots has a frontage of 25 feet according to the plat of the subdivision, which is as follows:



Appellee sued appellant, charging that he held wrongfully a strip of ground two feet in width and sixty feet in length on the east side of his lot (No. 14). Appellant answered, denying that he had in possession any part of lot 14, and alleging that he was two inches within his own line. He also showed that appellee had allowed the owner of lot 18 to fence up two feet of his lot, and that for this reason he was short two feet of the quantity specified in his deed. The case was submitted to a jury, who found for the plaintiff, and the defendant appeals.

When the defendant was on the stand this occurred: "Defendant was then asked by his counsel: 'State if you know where the two-foot strip of land is located which plaintiff claims is occupied by your stable and taken off the east side of his lot No. 14,' and defendant answered: 'The stable is on my own lot, and not any part of it is on lot 14. If there is any land missing from lot 14 it is over on the west side of his lot, and contained in lots 18, 12 and 11, which are west of lot 14, and all of them are wider than the plat calls for. When Seiberth built his fence along the west side of his lot 14, he took Lindsey's word for it, and built his fence, which was only a short time ago, about two feet too far east; then he measured along Thirteenth street twenty-five feet to the corner of his back fence on lot 15, and sets that corner over two feet further east than it ought to be; then of course the back line of his lot 15 doesn't line up right with my stable, nor with his own fence at the rear of lot 16, which is in line with mine.' Plaintiff then moved to exclude said question and answer from the jury, and defendant objected thereto, the objection was overruled, and the question and answer were excluded, and the defendant at the time excepted to said ruling."

The evidence was competent, and should have been allowed to go to the jury for what it was worth. It was evident that the plaintiff had in possession only twenty-three feet front, and in determining whether the defendant had or not the missing two feet they should have been allowed to consider any evidence tending to fix his western line, for manifestly his eastern line was parallel to it and twenty-five feet from it. Further on this follows: "Defendant then introduced in his behalf Fred Wagner, who testified in substance that he had had considerable experience in measuring land, and in company with Joseph Haifle, had measured plaintiff's lot 14 and lots 18, 12 and 11, adjoining it on the west, and found that it measured (lot 14) twenty-five feet front, lot 18 measured twenty-six feet ten inches front, and lots 12 and 11 together measured fifty-one feet, all fronting on Thirteenth street (formerly McCracken avenue); that he began measuring at the surveyor's stake at Thirteenth and John streets, and measured westwardly from that point; that they used an ordinary standard tape line, and the said measuring was done since the filing of this suit and before the trial; that he made a memorandum of said measurements at the time of taking them and referred to it to refresh his memory. In cross-examination plaintiff asked witness if he was a surveyor, and defendant answered 'No.'"

"Defendant then introduced in his behalf Joseph Haifle, who testified in substance that he had had some experience in measuring land; that, with Squire Fred Wagner, they had measured the widths of lots 14, 18, 12 and 11, shown on the plat; that while doing said measuring he held one end of the tape line and Squire Wagner held the other; that it did not require a civil

engineer to measure those lots, as the fences and engineers' stakes were there, and anybody could lay a line across a square lot like those and see how wide it was; that they measured the lots correctly and found the width to be as given by Squire Wagner. Upon cross-examination witness said he was not a surveyor."

The court, upon plaintiff's motion, excluded this evidence upon the idea that the witnesses were not surveyors. But they had measured the ground, and any measurement of the ground, whether made by a surveyor or any one else, is competent, the accuracy of the measurement being a question for the jury. The following exception also was taken: "Upon the conclusion of the defendant's testimony and evidence the plaintiff introduced in rebuttal George H. Ahlering, who testified in substance that he had drawn up the deeds of defendant to lots 17 and 18, and plaintiff then asked the witness: 'What was the depth of lots fronting on John street in said subdivision?' Defendant objected to the question, the objection was overruled by the court, and the witness answered: 'In most of the lots the depth was given as 100 feet, more or less, but in some no depth was given at all,' to which ruling defendant at the time excepted. Plaintiff then asked the witness: 'State whether or not the deed for the lot 18 has been changed or altered in any way since you wrote it,' handing witness the deed from Clifton Suburban Home and Building Co. to Gunkel. Defendant objected to the question, the objection was overruled by the court, and the witness answered: 'The deed to Gunkel of lot 18 has been changed by the addition in different ink of the words '100 feet deep,' to which ruling defendant at the time excepted. On cross-examination the witness testified that he did not know, and could not say, that the deed had been altered after its execution and recording, nor did he know if it had been altered by defendant, or any one for him.'"

The evidence as to the alteration of the deed was incompetent unless it was shown that the alteration was made after its execution and delivery. The deed for lot 18 was made in the year 1867, and the time had passed in which the grantor could have a mistake corrected made before its execution. He had never complained, and the presumption is that any change made in it after it was drawn was made before it was executed and delivered. The lines of lot 14 are straight, and lots 15, 16, 17 and 18 are of the same length. The court gave the jury this instruction only: "If the jury believe from the evidence that the plaintiff, Michael Seiberth, is the owner and entitled to the possession of a certain lot of ground situated in the Clifford Suburban Home and Building Co.'s subdivision in Campbell county, Kentucky, and known as lot 14, in block or section A, fronting twenty-five feet on Thirteenth street and extending back $116\frac{1}{4}$ feet deep, more or less, to the tracks of the L. & N. R. R., they will so say in their verdict and find for the plaintiff; otherwise, they will find for the defendant. Nine jurors may find a verdict, and all so agreeing must sign same."

This did not present to the jury the question they were to try. It was conceded that lot 14 was the property of the plaintiff. The question in the case was whether the defendant had in possession any part of lot 14 as laid down on the plat. The court should have instructed the jury that the plaintiff owned lot 14 on the plat; that the defendant owned lots 15, 16, 17 and

18; that if they believed from the evidence that the defendant was over the line and held any part of lot 14, they should find for the plaintiff, and say by their verdict how much he was over the line; but that unless the defendant was over the line, or held a part of lot 14, they should find for the defendant.

Judgment reversed and cause remanded for a new trial.

**WILLIS, BY, & CO. v. MAYSVILLE & BIG SANDY R. R. CO. AND
CHESAPEAKE & OHIO R. R. CO.**

(Filed February 28, 1905.)

1. Railroads—Operating trains in towns—Street crossings—Negligence—It is the duty of those operating trains through towns to keep a lookout for persons upon streets and especially at street crossings, and it is negligence in the company to have its agents or servants throwing substances from a train into the streets as it passes along or across them.

2. Contributory negligence—It is not contributory negligence for a boy thirteen years of age to stand in a street near a railroad crossing while a freight train is passing, at a place where there is no danger of being struck by the train, and he is not required to anticipate that persons connected with the train will throw freight from the train as it passed across the street, that might strike or injure him.

3. Injury by servant—Scope of employment—Liability of master—It is a matter of common knowledge that property is transported on freight trains, and where the evidence excludes the idea that a brakeman intentionally hurled a cake of ice from a passing freight train that struck and injured a boy standing in a street near a railroad crossing, the presumption is that the ice was being carried as freight and was thrown out at its destination by the servant while acting within the scope of his employment.

A. D. Cole and W. T. Cole for appellants.

W. H. Wadsworth and Worthington & Cochran for appellees.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Paynter.

Ottis Willis, a boy thirteen years of age, was standing on a street in the town of Greenup near the tracks of the appellee where it crosses the street, and while so standing one of appellee's freight trains passed over the track, and as the rear of the caboose reached the point opposite where Willis stood a brakeman on the train kicked a cake of ice, weighing about twenty pounds, from the platform of the caboose, which struck the boy near the heart, from the effects of which it is claimed he sustained a serious injury and endured much pain. The boy was standing quite near the track at the time the injury was received. The street was used by the public as such streets are usually used in towns of that size. The court gave a peremptory instruction to the jury to find for the appellee.

It is contended that the court properly gave the instruction because, first, the appellee did not owe appellant any duty at the time and place and under the circumstances of his injury; second, his contributory negligence was the sole cause of the accident; third, there was no evidence upon which to base

the claim that the brakeman at the time of the injury was acting within the scope of his authority. The boy, in common with the public, had the right to use the street. Under the law as enunciated by this court there is a duty imposed upon those operating trains through towns to keep a lookout for persons upon streets, and especially at street crossings. It certainly would be negligence in a railroad company to have its agents and servants throwing substances from a train into the streets as it passes along or across them. If the agents or servants do so by the authority of the master, and an injury is inflicted on persons using the street, it would be an actionable wrong. It is the duty of railroad companies to exercise proper care, so as to avoid injuring persons on streets of towns over which they pass. A failure to observe such care is certainly a breach of duty.

It is urged that the boy was guilty of contributory negligence because of his position near the train. We fail to see any negligence in the boy standing in the street at a point where there was no danger of being struck by the train. He was not required to anticipate that persons connected with the train would throw large lumps of ice from it as it passed across the street, so we are unable to see wherein Willis was guilty of any negligence. Had he been close enough to the train to have been struck by the cars as they passed, then it could be urged that he was guilty of negligence, and except for which the accident would not have happened. The last and most serious question to be considered is, was there evidence from which the court and jury might infer that the act of which complaint is made was done within the scope of the authority of the brakeman? The law is too well settled to require any discussion or citation of authorities, that where a servant assaults one while not in the performance of a duty imposed upon him by his employment, or who inflicts an injury upon another when not acting within the scope of his authority, the master is not responsible. If a conductor or brakeman on a train while passing over the track should fire a gun at some one standing upon the street or in a field, and inflicts an injury upon the person, the railroad company could not be held responsible. If he should leave his train and willfully assault one with a bludgeon, the master could not be held responsible for that act, because he would be acting entirely without the scope of his employment. If a servant on a train, acting within the scope of his authority, rightfully attempts to eject a person from it, the master is liable if any injury is inflicted upon such one, if it is done by the use of excessive force, or under circumstances as to time and place which renders the act wrongful. Whilst the master has only authorized the use of proper force to make the ejection at a proper time and place, still the master is responsible if an injury is inflicted by the use of excessive force, or at an improper time or place, because the servant was acting within the scope of his authority. The question recurs as to whether the court can infer from the evidence that the servant was acting within the scope of his authority. The brakeman was on a freight train. It is a matter of common knowledge that property is transported on freight trains. The evidence excludes the idea that the brakeman intentionally hurled the cake of ice from the train to injure the boy. It is possible that the ice was being carried for or without compensation, and as an easy means to discharge it, it was thrown from the train at its destination. It was not essen-

tial for the plaintiff to make out his case to prove that the lump of ice was placed on the car with the knowledge of the master or that it was thrown from the train with his knowledge or by his direction. The case is sufficiently made out if a reasonable inference might be drawn from the facts that the servant was acting within the scope of his authority. We shall not anticipate the defense or prejudge the question that may hereafter arise, but we are of the opinion that the evidence was sufficient to warrant the submission of the case to the jury.

The judgment is reversed for proceedings consistent with this opinion.

HARTFORD FIRE INSURANCE CO., OF HARTFORD, CONN. v. McCLAIN, &c.

(Filed March 1, 1905—Not to be reported.)

1. Fire insurance—Policy in trade name—No concealments—Validity—Where L. was conducting a store in the trade name of M. and had taken out a policy of insurance for \$2,500 on his stock of goods in that name, there being no fraudulent concealment of the ownership and interest of L. therein, such policy is a valid contract of insurance.

2. Insurable interest of M.—Interest as pledgee—Although L. and M. were not partners, M. held the title to the property as an indemnity against liability for merchandise bought on his credit by L., which was enforceable as between them, and it appearing that M. was bound for merchandise bills to the amount of \$1,800, he had a material interest in the goods and their preservation. The value of the insured stock being \$2,000 in excess of the direct interest of M., he held such excess as pledgee in trust for the beneficial owner, and these were insurable interests.

W. S. Pryor, W. B. Stanfield and Barger & Ricks for appellant.

Robbins & Thomas for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, R. F. McClain, owned a stock of merchandise at Lynnville, on which he carried an insurance with appellant against fire. In the fall of 1902 he sold his stock of goods to appellee, J. S. Longmire, for \$2,400, and the payment by Longmire of all outstanding debts owing on behalf of that business. It was agreed between them that the business was to be continued in the name of R. F. McClain, who loaned his name and credit to Longmire in the business. McClain was to hold the assets of the business to indemnify him against loss by reason of debts contracted, as well as to secure the sum owing him. A new policy of insurance was taken out on the stock by Longmire in the name of McClain on October 10, 1902, for the term of one year, in the sum of \$2,500. Longmire paid off all he owed to McClain about January, 1903, including debts to wholesale merchants owing by McClain and which Longmire had assumed as part of the purchase price of the goods. But he had continued buying from wholesalers, and owed them about \$1,800 on July, 1903, when the insured property was destroyed by fire. This suit on the policy, issued in the name of R. F. McClain, was brought by appellees, R. F. McClain and J. S. Longmire, alleging the facts first re-

vited, and that they as partners, trading under the style of R. F. McClain, effected the insurance in that name for their joint benefit.

The only defenses necessary to be noticed are, first, that the contract of insurance provides: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * the interest of the insured be other than unconditional and sole ownership."

Second. It is also provided in the contract: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated therein."

The verdict and judgment were for the appellee under instructions that assumed the insurer's liability upon the state of facts set out. If Longmire had been doing business under a trade name of R. F. McClain, and had taken out the insurance in that name, there being no fraudulent concealment of his ownership and interest, we perceive no reason why it might not have been a valid contract of insurance. Or if McClain and Longmire were partners in the ownership of the stock of merchandise, and carrying on their business under the style or firm name of R. F. McClain, there is no reason why an insurance contract made on behalf of the partnership in that name is not as binding as any other contract made by or on behalf of the partnership would be. (Joyce on Insurance, section 944; Ostrander Ins., section 106.) But were they partners? Partnership is a status, dependent upon contract between two or more persons. Its distinguishing essential elements are the contract or agreement to become partners, and the sharing of profits or losses proportionally. Its members may contribute money, property or labor, or any of them, but unless there is an express agreement to share profits (and impliedly if not expressly to bear losses) in a given proportion among the parties to the agreement, it is not a partnership, whatever other rights the parties have. (Miller v. Hughes, 1 A. K. Mar., 182, 10 Am. Dec., 719.) In the case at bar the agreement did not contemplate in any event that McClain was to share profits or to bear any part of the losses. His relation to Longmire was in the nature of a suretyship, or guarantor, holding in pledge as indemnity the stock of goods in question. If the business made money, Longmire was to get all of it. If it lost, McClain, as between him and Longmire, was to bear none of it. It is said, however, that McClain was bound to the public dealing with the concern as a partner. It would rather seem that he was bound as principal to those who dealt with the concern on the faith that it belonged to McClain. But this in no sense affected McClain's right to or claim upon the property as a supposed partner. The reason he was bound to those dealing with the concern upon the faith that it was his business, was upon the principle of estoppel, as well as of agency. Letting himself be held out as a principal, whereby persons were induced to deal with the concern upon a belief that he was principal, estopped him from saying to them afterwards that he was not in fact principal and owner of the goods. In addition, in this case, McClain having expressly authorized Longmire to buy goods for the latter in the former's name as ostensible principal and owner, as between the seller and McClain the latter may be treated as sole principal, or joint, as may be

elected by the seller. So we see that under the agreement between McClain and Longmire they never agreed to become partners; they had not agreed to share profits or losses in the enterprise; they were not, either in fact or in law, copartners for any purpose. Yet McClain was bound to those selling goods to the concern upon the reliance induced by his act that he was principal or partner. As there was not a partnership between McClain and Longmire, there was no insurance issued to such firm.

The question next arises, what was McClain's interest in the property insured? That he was not the beneficial owner was clear enough. As between him and Longmire, he held the title to the property as an indemnity against liability for merchandise bought on his credit by Longmire. The agreement was enforceable as between them. It appearing that McClain was bound for merchandise bills to the amount of \$1,800, he had a material interest in the goods and their preservation. The value of the insured stock was greater than \$1,800 by \$3,000 above the direct interest therein of McClain. The excess, as pledgee, he held in trust for the beneficial owner, Longmire; that these interests were insurable interests we have no doubt. It is said in Joyce on Insurance (volume 2, section 895): "Although an absolute ownership is a common form of insurable interest, the term does not necessarily imply any property in the subject of insurance or ownership thereof, for it is well settled at the present day that an insurable interest need not amount to a right of property or of possession. Whenever a legal connection can be shown to exist between injury to the thing insured and the loss to the party insuring, it is sufficient. So if one has a right which may be enforced against the property, and which is so connected with it that its injury or destruction will necessarily damnify him, he has an insurable interest therein. And whoever has such title, that if the property were lost without insurance the loss would fall on him, has an insurable interest. The interest of a mortgagor is within the rule. So if one insured has any interest that would be injured if the peril insured against should happen, his contract of insurance is a valid one."

Again, in section 928, the same author says: "If a merchant furnishes another with a stock of goods, depending for his payment upon the latter's success in business, he has an insurable interest in such stock."

It is claimed for appellant, however, that although McClain's interest might be an insurable one, yet appellant never agreed to insure that particular interest, but instead expressly restricted its contract to an insurance of the property, provided it was owned solely and exclusively by the insured named in the policy to wit, R. F. McClain. The provision of insurance policies regarding the extent of ownership by the assured has become familiar in the decisions of the courts. The insurance is not of the title, but is to indemnify the insured against loss of the thing. Therefore, if it be lost or damaged by fire, and if the loss to the assured is equal to the indemnity contracted by the insurer, every element material to the risk is satisfied. Anything beyond becomes wholly immaterial. The parties are deemed to have in mind, in contracting, the making of a valid contract by which the insurer for an agreed consideration assumes the risk of loss or damage by fire to the thing insured, instead of the owner's bearing it. The writing between them must be so construed if its terms will admit of it. If the in-

sured has pecuniary interest in the thing insured equal or greater than the insurance, it can not be material to the risk that somebody else has some interest in the property, or that the assured does not own the absolute and unconditional title. (*Germania Ins. Co. v. Rudwig*, 80 Ky., 234.)

A trustee of an implied as well as of an express trust may effect an insurance in his own name for the benefit of the cestui que trust. Such contracts, though the names of the beneficiaries are not disclosed, are not repugnant to the clause in the policies concerning concealments or misrepresentations of any material fact concerning the risk, or of the interest of the insured. (*California Ins. Co. v. Union Express Co.*, 133 U. S., 387; *Phoenix Ins. Co. v. Hamilton*, 14 Wall., 504.) Where, as in this case, no representation was made by the insured, there is no misrepresentation at all; nor is there a concealment of any material fact, although the names of some of the beneficiaries of the policy are not disclosed. McClain holding the excess in the stock above his own liability as trustee for Longmire, the insurance taken in his own name is, nevertheless, for the benefit of his cestui que trust, and will be so treated. In some cases it is important to the insurer to know who is interested in the property in order that it may form a judgment as to the probable care that will be given in its custody and preservation. But in the case at bar the insured and Longmire were known to the insurers to be both in control, and that Longmire was the only one who actually attended to the store, whether as clerk or manager or owner. There was, therefore, no concealed risk, and no material concealment in not divulging the exact nature and extent of Longmire's interest in the property insured.

The statement in the policy as to concealment or misrepresentation is to be construed also in the light of the statute of this State, section 639, which reads: "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy."

The insured is not bound by the exact letter of such statements, nor is his policy voided, if matter though relevant to the transaction, but not material to the risk, has not been disclosed, particularly where no question was asked concerning it. (*Kenton Ins. Co. v. Wigginton*, 39 Ky., 330; *Lancashire Ins. Co. v. Monroe*, 101 Ky., 12.)

Counsel for appellant urges that the stipulation invoked in this case is not found in an application for the insurance, but in the contract itself; and that the statute speaks only of applications for insurance. In the cases from this court, cited above, some of them in applying this identical statute, as is here done, have treated it as applying to the terms of the policy as well as to the application which precedes it. And such seems to be the logic of the matter. The stipulation as to interest and title though in the policy, not signed by the assured, amount to representations by him of facts, if not assurances on his part, and are of the subject-matter and within the very mischief sought to be remedied by the statute quoted.

The judgment of the circuit court, the trial having been in conformity to the principles herein announced, is affirmed, with damages.

MERSCHER, BY, & C. v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 2, 1905.)

1. Railroads—Servants—Negligently exposing torpedo—Injury to child—Liability of company—Alternative allegations—A petition which alleged that "an agent and servant of a railroad company, with gross negligence and carelessness, placed a torpedo on the sidewalk where it was found, or with gross negligence and carelessness placed it on the railroad track so that it could easily be removed or brushed away, and suffered it to be removed to the place where it was found; that one of these statements is true, but he does not know which one is true; that the agent or servant who placed it upon the sidewalk had been and was then charged by the defendant with the duty of safely keeping it; that he knew of its dangerous character; that if he placed it upon the track he had been and was then duly intrusted with its safe keeping, and that the plaintiff, a boy eleven years old, picked said torpedo up from the street in a populous part of the city and in childish curiosity struck it with a hammer, causing it to explode and put out his eye, stated a cause of action, and a demurrer thereto was improperly sustained.

2. Act of agent is act of master—The defendant being a corporate entity, it could only have the custody and control of the torpedoes through the instrumentality of agents or servants. The demurrer admits that the agent and servant was charged with the safe keeping of the torpedo, and use of the same at the time it was placed upon the track or upon the street, therefore, it was the act of the defendant in so placing it.

3. Same—Where a master substitutes another in the care and control of forces or explosives calculated to endanger life, he is responsible for the negligent acts of such other, the same as if acting himself.

4. Pleading—Scope of servant's employment—Where it was alleged in the petition that the agent and servant had the care and custody of the torpedo, it was not necessary to allege that the act of the servant was within the scope of his employment.

Samuel C. Bailey for appellants.

Benjamin D. Warfield and Jas. C. Wright for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Paynter.

The court sustained a demurrer to the petition, and the plaintiff refusing to plead further, the petition was dismissed. From the petition it appears that the appellant is a boy eleven years of age; that he lost an eye by the explosion of a railway torpedo which he had picked up from a public street near the appellee's track in a populous part of the city of Newport, where children were accustomed to play. The boy's childish curiosity to discover the contents of the torpedo lead him to strike it with a hammer, causing it to explode, and thus inflicting the injury of which complaint is made. By the petition, as amended, it is substantially stated that an agent and servant of the defendant, with gross negligence and carelessness, placed the torpedo on the sidewalk where it was found, or with gross negligence and carelessness placed it on the railroad track so that it could be easily removed or brushed away, and suffered it to be removed to the place where it was found; that one of these statements is true, but he does not know which

one is true; that the agent and servant who placed the torpedo upon the sidewalk had been and then was charged by the defendant with the duty of safely keeping the torpedo; that he knew of its dangerous character; that the agent and servant of the defendant, if he placed the torpedo upon the track, had been and was then duly intrusted with its safe keeping. The averment that it was negligently placed upon the track and the one that it was placed upon the sidewalk were made in the alternative, which is permitted under the Civil Code of Practice. The plaintiff proceeded upon the idea that if the agent and servant of the defendant who was intrusted with the care of the torpedo placed it upon the track in such a negligent way as to be easily removed or knocked therefrom to the street, he was entitled to recover the damages sustained. Again, if this was not true, he being charged with the safe keeping of the torpedo, and negligently placed it upon the street, and the plaintiff was thereby injured, he was entitled to recover.

The defendant being a corporate entity, it could only have the custody and control of the torpedoes through the instrumentality of agents or servants. The demurrer admits that the agent and servant was charged with the safe keeping of the torpedo and use of them at the time it was placed upon the track or upon the street, therefore, it was the act of the defendant in so placing it. If the master himself has control of forces or explosives calculated to endanger life, the obligation is upon him to control or superintend them. He is under an obligation to use proper care for the protection of life and property therefrom. If he substitutes another to represent him in their care and control, the same obligation remains upon him. The master is responsible for the negligent acts of his servants in the course of their employment. This is true whether the negligent act be authorized or forbidden.

In Sherman and Redfield on Negligence, 5th edition, section 146, it is said: "The master is responsible for the negligent acts or omissions of his servants in the course of their employment, though unauthorized or even forbidden by him, and though outside of their 'line of duty,' and without regard to their motives. He can not limit his responsibility for any servant, by employing him only with reference to a single branch of the business."

In Cohen v. D. D. E. B. & B. R. R. Co., 69 N. Y., 170, it is said: "The master who puts a servant in a place of trust or responsibility, or commits him to the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, * * * goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another."

In Thompson on Negligence, volume 1, section 523, it is said: "Every person who employs highly dangerous agencies upon his premises or about his business stands under the obligation of exercising, to the end that third persons shall not be injured through those agencies, a degree of care proportionate to the danger of such injury."

This court has recognized the rules announced by the authors quoted as being correct.

In Bransom's Adm'r v. Labrot, & Co., 81 Ky., 688, it is said: "It is held that a party is guilty of negligence in leaving anything in a place, when he

knows it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third person. (1 Addison on Torts, 511.) And said a learned judge: 'It appears to me that a man who leaves in a public place, along which persons, and amongst them children, have to pass a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudence and unauthorized act of another may be necessary to realize the mischief to which the unlawful act, or negligence, of the defendant, has given occasion.' "

In the case of *City of Owensboro v. York's Adm'r.* 25 Ky. Law Rep., 1899, it was said: "It is incumbent on those having dangerous instrumentalities not to leave exposed to the reach of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they could handle and play with."

Our conclusion is that if the agent and servant of the defendant had the care and custody of the torpedo, and negligently placed it upon the railroad track, or upon the street, under the circumstances stated in the petition, it is liable for the injury inflicted upon the plaintiff. It is urged that the petition is defective, because there was no averment that the act was within the scope of the agent and servant's employment. It was not necessary to make this averment, because it was averred in the petition that the agent and servant had the care and custody of the torpedo, and so had it at the time when it was so placed upon the track or street. If the master had imposed the duty upon the servant to care for the torpedo, and that duty was resting upon him at the time it was placed upon the track or street, the wrongful act was within the scope of his employment, though a grossly negligent one. The substance of the averment is that the negligent act was committed by the agent within the scope of his authority. The doctrine enunciated in *Sullivan v. Louisville & Nashville R. R. Co.*, 24 Ky. Law Rep., 2341, does not apply to the facts averred in the petition. In that case the party who caused the injury to be inflicted did not have the care and custody of the torpedo as the agent or servant of the defendant. The act was not done within the scope of the servant's employment. It was an intentional act, apart from the employment, hence a different rule from the one here invoked was adjudged and applied to the facts of that case. Of course this opinion is predicated upon the facts admitted by the demurrer, and may or may not have any application to the facts which may be developed on the trial of the case.

The judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Judge Barker dissenting.

BERRY v. EWEN, &c.

(Filed March 7, 1906—Not to be reported.)

1. Deed to wife—Payment by husband—Fraud on creditors of husband—In an action by a judgment creditor against a debtor and his wife to set aside a deed made to the wife for land alleged to have been paid for by the

husband, and to subject it to the payment of the husband's debts, where the evidence conduced to show that the wife had not a great while before the conveyance received from her father's estate money or property equal to the consideration paid for the land, fraud will not be presumed in making the conveyance in the absence of evidence to the contrary.

2. Homestead proceeds—Invested in another homestead—In an action by a creditor of the husband to set aside a deed made to his wife, which is shown to have been paid for by property of the husband which at the time was exempt to the husband under the statutes, and it is also shown that the land so conveyed is occupied by the husband and wife as a homestead, and is of less value than \$1,000, it can not be subjected to the payment of the husband's debts, and the deed to the wife was not fraudulent.

W. D. Jackson for appellant.

C. F. Spencer for appellees.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Settle.

The appellant having obtained judgment against the appellee, G. W. Ewen, for \$45, and caused execution to issue thereon, which was returned "no property found," instituted this action in equity to set aside certain deeds made to the appellee, Susan F. Ewen, wife of the judgment debtor, and asked that the lands thereby conveyed be subjected to the satisfaction of his judgment upon the alleged ground that they were paid for with the money of the husband, but that he had wrongfully procured the deeds thereto to be made to his wife for the purpose of hindering, delaying and defrauding his creditors.

The first tract is particularly described in the original petition, though the quantity is not given. It was, however, in substance alleged that it was by deed from S. P. Sersain conveyed in January, 1901, to appellee, Susan Ewen, but that the consideration, \$260, was paid with money belonging to her husband, and not to her. The answer filed by appellees to the original petition contained a specific denial of its allegations.

By amended petition appellant set out the conveyance June 25, 1901, of the second tract to appellee, Susan F. Ewen, by deed from G. P. Day and wife, and averred that the consideration therefor, \$150, was likewise paid by appellee G. W. Ewen, with money belonging to him, that is, that he paid \$110 thereof in money, and the remaining \$40 was paid by him in an account for medical services the grantor owed him as a physician. In their answer to the amended petition appellees deny that the last-mentioned parcel of land was purchased of Day by appellee, G. W. Ewen, or that it was conveyed to his wife to cheat, hinder or defraud his creditors, but do not deny that the consideration of \$150 was paid by him in money and a medical account, as charged in the amended petition.

The answer, however, contains the averments that the tract purchased of Day, which includes only one and one-half acres, adjoins the tract purchased of Sersain; that the parcels are worth together less than \$1,000, and that they were at the institution of appellee's action, and are now, occupied by appellees as one place and as a homestead, and that appellee, G. W. Ewen, was then and is now a bona fide housekeeper with a family, consisting of himself, and wife and ten children; that at the time of the convey-

ance to the wife from Day, appellee, G. W. Ewen, did not have or own sufficient provision, including breadstuff and animal food, to sustain himself and family a year, or any considerable part of that time; that he was also without money, personal property or growing crop, other than the money and medical account paid Day, although entitled to have allowed him out of money, other personal property or growing crop, if any such had been on hand, an amount in lieu of such provision equal to \$40 for each member of his family, for which reason the \$150 was not subject to appellant's debt, but exempt to him under the statute.

Appellant did not file a reply to the affirmative averments of the answer to the amended petition, but did file a demurrer thereto. The case was then submitted upon the pleadings and proof, and the chancellor dismissed appellant's action at his cost. Appellant took the depositions of several witnesses, and the facts furnished by them conduced to prove that the appellee, Susan F. Ewen, not a great while before the conveyances to her, received from the estate of her father and grandfather money or property equal in amount to, if not in excess of, the consideration paid for the Sersain land. As fraud will not be presumed in view of this testimony furnished by appellant, and the absence from the record of any competent evidence to the contrary, we concur in the conclusion of the chancellor that the conveyance to the wife from Sersain was without fraud. The only question that remains to be determined is as to the right of appellee, G. W. Ewen, to apply to the purchase of the Day land money exempt to him under section 1697, Kentucky Statutes. The fact that it was exempt is confessed in the record, and if so there could have been no question of his right to give it to his wife, or to invest it in land to which she took the title; in neither event could appellant complain, as the money loaned could not have been reached by attachment or otherwise for his debt.

In *Wallace v. Mason*, 100 Ky., 561, it is said: "If a debtor owns just such personal property as the law exempts from the payment of his debts, why should he not be permitted to sell it and invest it in land, occupy it with his family and hold it as a homestead exempt from the payment of his debts? Where is the difference in principle between the case where the proceeds of exempt realty and those of exempt personalty are invested in a homestead? The creditor is injured no more in the one than in the other case."

Judgment affirmed.

A. O. U. W. GRAND LODGE OF KENTUCKY v. EDWARDS.

(Filed March 7, 1905—Not to be reported.)

Life insurance—Construction of statutes—Waiver—The defense interposed upon the trial of this action in the lower court for the recovery upon the contract of insurance was that as the insured died of smallpox there could be no recovery upon the policy because of an agreement in the application that there should be no liability in the event that insured died of small pox as he had not been vaccinated. The court upon motion struck out the plea of special waiver and peremptorily instructed the jury to find for appellee. Held—That the questions raised by the answer were adversely settled to appellant's contention by this court in *Supreme Commandery, &c., Golden*

Cross v. Hughes, 24 Ky. Law Rep., 984, the court holding that the exemption in section 641, Kentucky Statutes, refers only to those general provisions regulating insurance companies found in subdivision 1 of the insurance law. Section 679, Kentucky Statutes, applies to the certificate sued on in this case, and, therefore, the application for the certificate not having been attached to and accompanying the certificate, can not be received in evidence or considered as a part of the contract in any controversy between the parties interested in the certificate.

Baker & Baker and Caruth, Chatterson & Blitz for appellant.

Bourland & Hunt for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from a judgment for \$1,000 in favor of appellee, rendered against appellant by the lower court upon the verdict of a jury returned for that amount.

The action was upon a benefit certificate issued by the Grand Lodge Ancient Order United Workmen of Kentucky, whereby it agreed to pay appellee as beneficiary \$1,000 upon the death of W. H. Edwards, to whom the certificate was issued. The petition sets out the contract of insurance, the issual to the insured of the certificate in pursuance thereof, his death, the furnishing to appellant of the proofs of death, and its refusal to pay the amount fixed by the certificate. The answer of appellant interposed the defense that at the time the certificate in question was issued it was a secret fraternal society, having lodges under the supervision of a grand body, and owing allegiance to it; that its members are secured solely by admission into subordinate lodges, and that it does not pay commissions, or employ agents, except in the organization or supervision of the work of its subordinate lodges, and that its object was and is to furnish its members benefits and protection at actual cost, and without revenue or profit to the organization. The answer further averred in substance that as a consideration for the issual of the benefit certificate to W. H. Edwards, he executed and delivered to appellant an agreement or waiver to the effect that inasmuch as he had not been vaccinated, there should be no liability on the part of appellant to the beneficiary named in the certificate in the event the death of the assured resulted from smallpox; that the death of the assured was caused by smallpox, for which reason appellant was not liable to the beneficiary for the amount named in the certificate.

So much of the answer as pleaded the special waiver as a bar to a recovery was, upon motion of appellee, stricken out by the court, and an amended answer pleading with greater particularity the waiver being offered by appellant, the court refused to permit it to be filed. The cause then being upon a trial the jury, under a peremptory instruction from the court, found for appellee the \$1,000 named in the certificate. Appellant thereupon made a motion for a new trial, which was overruled, and this court is asked to review the several rulings complained of, especially the striking from the answer of the plea of waiver and the giving of the peremptory instruction.

That the alleged waiver was a part of the application of the assured is shown by the following stipulation therein: "And I do hereby make this waiver a part of the agreement contained in my said application." * * *

It is the contention of appellant that the special waiver is not only a part of the application, and consequently a part of the contract of insurance, but that appellant is not an insurance company or corporation in the meaning of section 679, Kentucky Statutes, for which reason it is not estopped to rely upon the waiver because it was not attached to or made a part of the certificate issued to the assured. In other words, it is insisted for appellant that by section 641 and section 658, Kentucky Statutes, a fraternal society, such as that of appellant, is expressly exempted from the provisions of section 679, supra. The questions raised by the answer of appellant were settled by this court adversely to its contention in the case of Supreme Com., &c., Golden Cross v. Hughes, 24 Ky. Law Rep., 984. In that case the court held that the exemption in section 641 only refers to those general provisions regulating insurance companies found in subdivision 1 of the insurance law. Section 641, which is found under subdivision 1 of the article on insurance, is as follows: "The words 'insurance company,' or 'insurance corporations,' as used in this article, shall be held to mean and include any association, individual, company, corporation, partnership or joint stock company, engaged in or carrying on, in any manner, the business of insurance in this State, except that the provisions of this chapter or article shall not apply to secret or fraternal societies, lodges or councils, which are under the supervision of a grand or supreme body, and secure members through the lodge system exclusively, and pay no commission nor employ any agents, except in the organization and supervision of the work of the local subordinate lodges or councils." * * *

Section 658 is found under subdivision 2 of the insurance law, which treats of what is generally known as standard, or old line, insurance companies, and exempts associations which do not guarantee a fixed amount of insurance on their policy contracts, and do not charge a fixed premium for the performance of such contract from the provisions of the law applicable to the old line insurance companies embraced in that subdivision. Appellant undoubtedly belongs to that class of life insurance companies treated of in subdivision 3, known as assessment or co-operative companies. Section 664, which falls under subdivision 3, provides: "Any corporation, association or society which issues any certificate, policy or other evidence of interest to, or makes any promise or agreement with, its members, whereby, upon the decease of a member, any money, or other benefit, charity, relief or aid is to be paid, provided or rendered by such corporation, association or society, to the legal representative for such member, or to the beneficiary designated by such member, which money, benefit, charity, relief or aid is derived from voluntary donations, or from admission fees, dues and assessments, or any of them, collected or to be collected from the members thereof, or members of a class therein, and interest and accretions thereon, or rebates for amounts payable to the beneficiaries or heirs, and wherein the paying, providing or rendering of such money or other benefit, charity, relief or aid is conditioned upon the same being realized in the manner aforesaid, and wherein the money or other benefit, charity, relief or aid so realized is applied to the uses and purposes of such corporation, association or society, and the expenses of the management and prosecution of its business, shall be deemed to be engaged in the business of life insurance upon the co-opera-

tive or assessment plan, and shall be subject only to the provisions of this subdivision.

"Section 679 of the Kentucky Statutes is found among the provisions especially applicable to co-operative or assessment life insurance companies, and we think unquestionably applies to the benefit certificate sued on in this case. * * * The court, therefore, properly struck out all the paragraphs of the answer which refer to or rely upon the representation made by the insured in his application for insurance, or the report of the medical examiner which accompanied same." * * *

In *Mooney v. Ancient Order United Workmen, &c.*, 114 Ky., 950, it was also held that section 679 of the Kentucky Statutes is applicable to societies such as appellant, and that the application for the certificate, unless attached to and accompanying the certificate as therein provided, can not be received in evidence, or considered a part of the contract in any controversy between the parties interested in the certificate.

Again in *Hunziker v. Supreme Lodge Knights of Pythias*, 25 Ky. Law Rep., 1510, the same construction of the statute was adhered to, and the principle announced in the cases *supra* reaffirmed. It follows, therefore, that there was no error in the ruling of the lower court in striking from the answer the plea of the special waiver or in granting the peremptory instruction.

Judgment affirmed.

KRIEGER, &c. v. CITY OF LOUISVILLE.

(Filed March 7, 1905—Not to be reported.)

Taxation—Life tenant—Remainderman—Lien on property—Limitation—In an action by the city against the life tenant and remainderman to subject a house and lot occupied by the life tenant for the payment of taxes due thereon, Held—That the lien thereon was properly enforced except to so much as was barred by the five years' statute of limitation.

Lane & Harrison for appellants.

Henry L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

This action was instituted in the year 1893 for taxes due the city for four or five years next prior to that date.

The defendants answered and the case remained upon the docket until March, 1897, when they filed an amended answer, disclosing the fact that the real estate upon which the taxes were assessed was owned by their mother who died in the year 1887; that their father, Jacob Krieger, had survived their mother and was still living and had occupied this house and lot since their mother's death as the life tenant by the curtesy, and was entitled to so occupy it so long as he lived. They stated that their father was liable for the taxes, and that the assessment should have been made in his name. They also stated that they owned only three-fourths interest in the property, subject to the life estate of their father; that their sister, Louisa, owned the other fourth. The appellee then filed an amended peti-

tion, making Jacob Krieger and Louisa parties defendant, and sought to enforce the lien for all the taxes against all the interests in the property. The defendants answered and pleaded the statutes of limitations, which plea the court sustained as to the defendants, Jacob Krieger and Louisa, but enforced the lien for three-fourths of the taxes against the three-fourths' interest in the property owned by the other defendants. Of this action of the court the appellants complain. The questions at issue on this appeal were settled in the cases of *Joyes v. City of Louisville*, 26 Ky. Law Rep., 13, and *Woolley v. City of Louisville*, 24 Ky. Law Rep., 1357, and we feel that further discussion is unnecessary.

We are of the opinion that the judgment of the lower court was correct and it is, therefore, affirmed.

BELKNAP, &c. v. COMMONWEALTH, FOR USE, &c.

. (Filed March 7, 1905.)

Taxation—Omitted property — Proceeding in county court — Plea “not guilty” — Sufficiency—In a proceeding by auditor's agent in the county court, in which he filed a statement alleging in substance that defendant had failed and refused to list for taxation for the year 1900 notes, bonds, securities, investments and cash owned by him on September 15, 1899, which were of the cash value of \$50,000, at the price they would bring at a fair voluntary sale, on which summons was issued and served on defendant, who appeared and entered a plea that he was “not guilty” of the matters and things set forth in the statement, which plea, on the motion of the Commonwealth, was stricken out and defendant declined to plead further. Held — That there was nothing of a criminal nature in the proceeding, and the plea of “not guilty” was properly stricken out, and defendant not having made a motion that the statement be made more specific, and failing to file an answer controverting same, the county court properly entered a judgment against defendant for the taxes on the \$50,000, and 20 per cent. damages thereon.

Kohn, Baird & Spindle, Dodd & Dodd and R. A. Thornton attorneys for sundry clients now being proceeded against in the name of the Commonwealth of Kentucky on information analogous in principle to those involved in the above-styled cases, and with the consent of counsel for appellants brief is filed.

Humphrey, Hines & Humphrey and Lafon Allen for appellants.

William H. Holt, H. M. Lane, Lane & Harrison and H. M. Peckinpugh for appellee Commonwealth of Kentucky.

Trabue, Doolan & Cox for B. F. Avery & Sons, &c.

F. M. Sackett for Byrne & Speed Coal Co.

Thomas W. Bullitt and James Hemphill for Kentucky Title Co.

Benjamin F. Washer, N. B. Hays, Matt J. Holt and George H. Alexander for Gregory, Judge, and Commonwealth.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

474 BELKNAP, &C. V. COMMONWEALTH, FOR USE, &C.

This proceeding was instituted by A. J. Bizot as revenue agent of Jefferson county in the name of the Commonwealth against W. R. Belknap, under section 4241, Kentucky Statutes, by filing a statement in the Jefferson County Court, in which it was alleged in substance that the defendant had failed and refused to list for taxation for the year 1900 notes, bonds, securities, investments and cash owned by the defendant on September 15, 1899, which were then of the cash value of \$50,000, estimated at the price they would bring at a fair voluntary sale. A summons was issued on the statement which was served on the defendant; he appeared in the action and entered a plea that he was not guilty of the matters and things set forth in the statement. The Commonwealth moved to strike out the plea of not guilty as insufficient. The court sustained the motion and struck out the plea. The defendant declined to plead further, and the court, by reason of his failure to plead further, without hearing any evidence, entered a judgment against him as prayed in the statement. From this judgment he appealed to the Jefferson Circuit Court, which sustained the judgment of the county court, and from the circuit court he prosecutes the appeal before us. By section 4120, Kentucky Statutes, it is provided that should "any property escape assessment by the assessor or supervisors, in whole or in part, it may be assessed as provided in section 4241." Section 4241, Kentucky Statutes, it as follows: "It shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of valuation and assessment or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office a statement containing a description and value of the property proposed to be assessed, and the value of corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five years after the filing of such statement the clerk of the court shall issue a summons against the owner to show cause before the next regular term of the county court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county by delivering a copy thereof to the owner, if in the county; if not, then to his agent, attorney or person in possession of the property. At the next regular term of the county court after notice has been served five days, if it shall appear to the court that the property is liable for taxation and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as is required by law; if not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment either party may appeal, as in other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to assessment or taxation. If the court shall decide that the property is liable to assessment, the clerk of the county court shall certify to the auditor of public accounts and the sheriff a description of the property and the amount of the assessment for taxation, together with the amount of penalty and cost of assessment. All persons owning property

which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of 20 per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As compensation for his services in causing such property to be assessed the officer filing his statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected. The county clerk shall enter all such assessments in a book to be kept for that purpose, showing the date of the assessment, the name of the person against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax shall, when the same is paid, notify the clerk of its payment, which payment shall be noted by the clerk opposite the entry of such assessment."

It will be observed that the statute provides for the listing for taxation of all property omitted, or any portion of property omitted, by the assessor, board of supervisors, board of valuation and assessment or railroad commission for any year or years. The officer proposing to have the property assessed must file in the clerk's office of the county in which the property is liable to assessment a statement containing a description of the property and its value, the name and place of residence of the owner or person in possession of the property and the year or years for which the property is proposed to be assessed. Within five days (the word "years" in the statute is a clerical error evidently for "days") after the filing of the statement the clerk of the court shall issue a summons against the owner of the property to show cause at the next regular term of the county court, which does not commence within five days after the service of the summons, why the property should not be assessed at the value named in the statement. At the next regular term of the court after notice has been served five days, if it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing its value as provided by law, or if it is not liable to assessment, he shall make an order to that effect. From so much of the order of the court as decides whether or not the property is liable to assessment either party may appeal as in other civil cases. If the court shall decide that the property is liable to assessment, a penalty of 20 per cent. is added to the taxes, and the taxes and penalty must be collected and accounted for as other taxes. For compensation for his services in causing the property to be assessed the officer filing the statement is entitled to the penalty of 20 per cent., which is to be paid to him, after the full amount of the taxes is collected.

There can be no doubt that the proceeding provided for by this section is a civil proceeding. It is so recognized in the statute by the provision that either party may appeal as in other civil cases, and by the further provision that a summons shall be issued against the owner to show cause why the property should not be assessed at the value named in the statement. It can not be maintained that the statute is unconstitutional. From the foundation of the Commonwealth the legislature has imposed upon the owners of property the duty of reporting it for taxation. By the statute he is compelled to make a personal disclosure under oath to the assessor or the

board of supervisors. If the legislature may compel him to do so to the assessor or the board of supervisors, it may in the exercise of its power of taxation, if it sees fit, compel him to do so before other officers.

In *Commonwealth v. Singer Manufacturing Co.*, 14 Ky. Law Rep., 732, which was a proceeding under section 4241, this court said: "The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general. The citation is rather to search the conscience of one who is presumably evading the taxgatherer. It is the duty of each citizen to help bear the burden of taxation in common with his fellow, and equally with him, and even upon slight information that he is violating this duty the court should give him an opportunity to perform it."

In *Marion County v. Wilson*, 105 Ky., 302, the assessor called at appellee's house to take a list, and she not being at home, returned her list the same as the year before. On notice to her the board of supervisors raised her list \$30,000. She appealed from this decision to the county judge, who held that the burden of proof was on her to show that the assessment was wrong. She declined to introduce any proof, and her appeal was dismissed. The judgment of the county court was affirmed by this court. Among other things the court said: "Our whole assessment system rests on the fact that it lays hold of the conscience of the taxpayer. He is required to make a minute list, under oath, of his property; and when he complains of the action of the assessor or the board of supervisors, the same appeal to his conscience should be required. Any other rule would allow great abuses."

It is said that section 4241 is a penal statute because 20 per cent. penalty is allowed, and that any proceeding under it is a criminal or quasi criminal prosecution. The history of the act will throw light upon its proper construction. The original act of April 29, 1880, allowed the agent for his services 20 per cent. of all sums recovered and paid into the treasury under proceedings similar to those provided for by the present statute, and the owner of the omitted property was required to pay interest at 10 per cent. per annum on the assessment made by the county court. But this plan, as it was soon found, held out an inducement to taxpayers to take the chances and not to list their property, as by paying as soon as the assessment was made they escaped the payment of any interest, and the State lost 20 per cent. of her taxes. So in the revision of the statutes the interest at 10 per cent. was omitted, and the 20 per cent. allowed the agent was required to be paid by the taxpayer. In this way the State suffered no loss by the failure of the owner to list his property, and the opportunity was taken away for property owners to be remiss without loss to themselves in order that the revenue agents might make a commission. The statute simply provides a way of paying the revenue agent for his services at the expense of the delinquent taxpayer. Similar statutes are common, and have never been considered as changing the character of the proceeding in which such allowances are made from a civil to a criminal proceeding. In civil cases a taxed attorney's fee is allowed the successful party, and in some cases the unsuccessful party is required to pay the entire attorney's fee of the plaintiff. A tenant is liable for treble damages in cases of voluntary waste. (Kentucky Statutes, section 2328.) A landlord may recover double rent on the refusal

of a tenant to vacate at the expiration of his lease. If property is distrained or attached without good cause, the owner of the property may recover damages for the seizure, including reasonable attorney's fees. (Kentucky Statutes, section 7.)

The case of *Johnson v. Commonwealth*, 7 Dana, 838, rests upon very different principles. In that case the defendant was subject to a fine and treble tax. There is nothing of a criminal nature in the case before us. No execution can issue upon the judgment of the county court except an ordinary fieri facias for the costs. The taxes assessed by the court go into the sheriff's hands for collection, and are collected by him just as other taxes. The 20 per cent. added to them stands on the same plane as the 6 per cent. which is added to other taxes that are unpaid on the 1st of December of each year. We, therefore, conclude that there is nothing of a criminal nature in the proceeding, and that the plea of not guilty was properly stricken out. (*Boyd v. Randolph*, 91 Ky., 472; *Fleming v. Sinclair*, 22 Ky. Law Rep., 496; *City of Lexington v. Woolfolk*, 25 Ky. Law Rep., 1819; *Brady v. Dailey*, 175 U. S., 152; *Co operative Building and Loan Association v. State*, 156 Ind., 466.)

It is also contended that the statement was insufficient, and does not warrant the judgment. In *Commonwealth v. Riley's Curators*, 24 Ky. Law Rep., 2005, where this precise question was made, we said: "Appellees contend that the description of the property in the information filed is insufficient, to wit: 'Money, notes, bonds, mortgages, certificates and national bank stock of the value of \$80,000.' And also that their demurrer was properly sustained. They contend that the information should have stated how much of the \$80,000 was money, how much was notes, and how much of each. Even if they were correct in this, the proper way to have reached it would have been by motion to make the information more specific, and not by demurrer. By their demurrer they admitted that they had in their possession as such curators property of the decedent, Riley, which was subject to taxation, and was not taxed for the year 1897, of the value of \$80,000. They were in a better position to know the truth or incorrectness of this allegation, and the kind and character of such property and the amounts of each, if any, than the appellant."

Again, in *Commonwealth v. Collins*, 24 Ky. Law Rep., 3042, where the same question was again made, we said: "Appellee's counsel contend that the description of the property in the information filed is insufficient, to wit: 'Cash, mortgages, notes, bonds, accounts and choses in action,' and that their demurrer was properly sustained. They contend that the information should have stated how much cash, how much notes, and how much of each. If they were correct in this, the proper way to have reached the error would have been by motion to make the information more specific, and not by demurrer. By their demurrer appellee admitted that she was the owner of the property for each of the years of the value stated, and that it was subject to taxation, and had not been listed for taxation, nor any tax paid thereon. She was in a better position to know the truth or falsity of this allegation and the kind and character of such property and the amounts of each, if any, than the appellant. Under section 4052, Kentucky Statutes, it was her duty to list with the assessor all the estate of every kind that she had or owned each and every year named in the information."

Then, after quoting from the case of *Commonwealth v. Singer Manufacturing Co.*, 14 Ky. Law Rep., 738, the court continued: "It is important to the State, and to each and every taxpayer in the State, that each and every owner of property shall not omit the listing of it, and the payment of taxes thereon. Every owner of property is presumed to be better acquainted with the value and the description of his property than any other person, and we can not understand the necessity for the sheriff or the auditor's agent, in proceeding under section 4241 of the Kentucky Statutes, and indeed it would be impossible for them to give a particular description or the exact amount of cash, notes, bonds, mortgages, choses in action, etc., that the owner may have in his possession, or may have had in his possession, in the years passed. And this court is of the opinion that when the legislature used the word 'description' in that section, that such a construction of the word was not contemplated. We concur in the language of the court by Judge Hazelrigg, to wit: 'The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general.'"

These cases were followed in *Commonwealth v. Williams*; *Commonwealth v. Joerger*; *Commonwealth v. Longnecker*, and *Commonwealth v. Zweigart*, 24 Ky. Law Rep., 2054-5. The same question was made also upon facts very similar to the case before us in *Sebree v. Commonwealth*, 25 Ky. Law Rep., 181, where the statement was the same as in the other cases, and the defendant failed to file an answer in the county court controverting the allegations of the statement. The judgment against him was affirmed.

- In the case at bar the defendant filed no plea except the general plea of not guilty. He made no motion to have the statement made more specific, and so the case falls squarely within the rule laid down in the cases above cited. The other questions discussed by counsel, not being raised by the record, are not determined.

Judgment affirmed.

BISHOP v. GREGORY, JUDGE.

(Filed March 7, 1905—Not to be reported.)

Writ denied upon the authority of opinion in *Belknap v. Commonwealth*, ante, 473, decided March 7, 1905.

Kohn, Baird & Spindle, Dodd & Dodd and R. A. Thornton attorneys for sundry clients now being proceeded against in the name of the Commonwealth of Kentucky on information analogous in principle to those involved in the above-styled cases, and with the consent of counsel for appellants brief is filed.

Humphrey, Hines & Humphrey and Lafon Allen for appellant.

F. M. Sackett for Byrne & Speed Coal Co.

Thomas W. Bullitt and James Hemphill for Kentucky Title Co.

Trabue, Doolan & Cox for B. F. Avery & Sons, &c.

William Holt, H. M. Lane, Lane & Harrison and H. M. Peckinpugh for appellee Commonwealth of Kentucky.

Benjamin F. Washer, N. B. Hays, Matt J. Holt and George H. Alexander for Gregory, Judge, and the Commonwealth of Kentucky.

Opinion of the court by Chief Justice Hobson on motion for writ of prohibition.

The facts of this case are the same as in the case of *W. R. Belknap v. Commonwealth*, ante, 478, this day decided, except that the petitioner, Bishop, when the county judge struck out his plea of not guilty, applied to this court for a writ prohibiting the county judge from proceeding further in the action.

The grounds upon which the application was made are decided adversely to the petitioner in the case above referred to.

For the reasons given in the opinion in that case the application for the writ is denied.

The temporary writ is discharged.

Whole court sitting.

Judge Barker dissenting.

WATERS, &c. v. CLINE, &c.

(Filed March 7, 1905.)

1. Contract—Agreement to devise land—Part performance—Statute of frauds—Consideration—Restoration—W. H. Cline, who had no children, agreed with the parents of appellant, Martha Waters, who was then thirteen years of age and residing with her parents, ~~that if they would allow~~ Martha, who was a niece of Mrs. Cline, to go home with them as one of their family until she was twenty-one years of age, he would clothe her, give her a musical education, and at his death he would, by his will, give her the Gregg farm, worth \$8,000, and put buildings on it worth \$4,000, and give her \$5,000 to run it with. Martha lived with them until she was twenty-four years of age, nursing and taking care of them and being treated as their daughter, when she married and has since lived with her husband. Cline faithfully carried out his contract, except he died without making a will, leaving an estate worth \$500,000. In an action by Martha Waters against Cline's estate on the contract, Held—That an agreement to devise land is not enforceable under the statute of frauds unless in writing, and that part performance thereof will not take it out of the statute, yet it has been uniformly held that the statute is a shield and not a sword, and that where the party has received the consideration of the contract the court will not allow him to rely on the statute and keep the consideration.

2. Rule of damages—Best evidence—In applying the rule in cases where the party who has performed the contract can not be restored to the situation in which he was before the contract was made, and it is impossible to estimate by any pecuniary standard the value of what the other party has received, the contract itself is the best evidence of the value of what has been received.

H. W. Root and Geo. H. Ahlering for appellants.

Laurence Maxwell, Jr., J. C. Wright, L. J. Crawford, M. A. Wright and Joseph T. Graydon for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant, Martha Waters, was the niece of the wife of John Cline, of Kenton county, Kentucky. The Clines had no children. In March, 1872, Cline and wife went on a visit to Mrs. Cline's sister, Mrs. Rogers, near

Brookville, Ind. Mrs. Rogers and her husband and their daughter, Mattie, now Mrs. Waters, constituted the family. Mrs. Cline was in poor health, had heart trouble and asthma, and she and her husband were both very fond of Mattie, who was then a girl about thirteen years old. They proposed to her parents that if they would let her come and live with them just the same as their own child, and stay with them until she was twenty-one years old, they would clothe her, give her a musical education, and he also agreed that by his will, at his death, he would give her a farm, known as the Alfred Gregg farm, and put buildings on it and stock it at an expense of \$4,000, and give her \$5,000 to run it with. The Gregg farm lay in the county where they lived, about a mile from them, and was worth about \$8,000. Finally, after much persuading, the parents agreed to the proposition, and they took the child home with them to be just the same as if she was their own child. She lived with them until she was twenty-four years old, nursing and taking care of her aunt, and being treated as a daughter by Cline and his wife. In the year 1883, when she was twenty four years old, she married Richard Waters, and has since lived with her husband. Cline faithfully carried out his contract as to the girl, except that he died in August, 1903, without making the provision for her by his will, as he had agreed to do. He left a large estate which went to his collateral kindred, as he died intestate. In the suit to settle up his estate Martha Waters filed her petition, setting up the above facts, and alleging that his estate was worth from \$500,000 to \$700,000, and praying judgment against the estate for the sum of \$8,000, the value of the farm; also the further sum of \$4,000, which Cline had agreed he would spend in putting buildings on it, and the further sum of \$5,000 for her to run it with. The allegations of her petition were denied. The case was set for trial by a jury, and at the conclusion of the evidence on both sides the court instructed the jury to find for the defendants, and Mrs. Waters appeals.

The court gave a peremptory instruction on the idea that the contract relied on was within the statute of frauds. (Kentucky Statutes, section 470.) An agreement to devise lands is within the statute of frauds, which requires agreements for the sale of lands to be in writing. The rule in Kentucky is that part performance of a contract will not take it out of the statute. (Grant's Heirs v. Craigmiles, 1 Bibb, 203; Hayden v. McIlvain, 4 Bibb, 57; Worley v. Tuggle, 4 Bush, 168; Holtzclaw v. Blackerby, 9 Bush, 40; Dean v. Cassiday, 88 Ky., 572.) But the court has also uniformly held that the statute is a shield, not a sword, and that where the party has received the consideration of the contract the court will not allow him to rely upon the statute and keep the consideration. (Roberts v. Tennell, 3 Mon., 247; Montague v. Garnett, 3 Bush, 297; Bethel v. Booth & Co., 115 Ky., 145; Weber v. Weber, 25 Ky. Law Rep., 908.) In applying this rule in cases where the party who has performed the contract can not be restored to the situation in which he was before the contract was made, and it is impossible to estimate by any pecuniary standard the value of what the other party has received, this court has adopted the rule that in such cases the contract itself is the best evidence of the value of what has been received, and while it will not enforce specific performance by decreeing a conveyance of the land, it will adjudge compensation for what has been received

by the defendant under the contract measured by the consideration which, by the contract, he agreed to as the value of what he received. This rule was first announced in *Berry v. Graddy*, 1 Met., 553. It was followed in *Benge v. Heatt*, 82 Ky., 666; *Usher v. Flood*, 12 Ky. Law Rep., 722; *Jones v. Comer*, 25 Ky. Law Rep., 773, and *Doty v. Doty*, 26 Ky. Law Rep., 68. It was also recognized in *Brewer v. Hieronymous*, 19 Ky. Law Rep., 645, and *Story v. Story*, 22 Ky. Law Rep., 1733.

It is earnestly insisted that the rule thus laid down is unsound, and that the cases above referred to should be overruled on the ground that they are inconsistent with the line of cases holding that part performance of a contract is not sufficient to take it out of the statute of frauds. There is no conflict between the cases. It is conceded in all the cases that part performance does not take a contract out of the statute of frauds. It is also conceded in all the cases that where the statute is relied on the defendant must restore what he has received under the contract. The cases above referred to following *Berry v. Graddy* rest on the idea that the defendant having received the consideration of the contract, will not be permitted to retain what he has thus received when he repudiates the contract, and that in this character of cases the contract measure of the consideration which the defendant has received is the only measure which will approximate justice between the parties. Under the rule of stare decisis we can not recede from the doctrine so often laid down. By the arrangement the girl gave up her home, her father and her mother. The father and mother gave up their child. Cline secured for himself and his sick wife a daughter in the home. Money can secure the services of strangers; but the love and tender ministrations of a daughter are not to be bought in this way. They had long known and loved the girl. Her presence in their home, with her music, joyousness and dutiful attention, transformed it. Who can measure this in dollars and cents? It is presumed that Cline knew what it was worth to him. He had long been trying to get the girl's parents to give her to him, and when he finally secured what he wanted, we know of no adequate standard to value the consideration which he enjoyed under the contract except that he himself fixed. For authorities in other States see the following: *Sutton v. Hayden*, 62 Mo., 101; *Sharkey v. McDermott*, 91 Mo., 647; *Owens v. McNally*, 113 Cal., 450; *Brinton v. VanCott*, 8 Utah, 480; *Quin v. Quin*, 5 S. Dak., 335; *Rhodes v. Rhodes*, 3 Sandf. Ch., N. Y., 279; *Pursell v. Stryker*, 41 N. Y., 480; *Johnson v. Hubbell*, N. J., 66 Am. Dec., 773; *Wright v. Wright*, 99 Mich., 170, and *Kofka v. Rosicky*, 41 Neb., 328.

We do not mean to pass on the merits of appellant's claim; we only hold that the evidence introduced by her tended to sustain her claim as above stated, and that the case should have been submitted to the jury.

Judgment reversed and cause remanded for a new trial.

Whole court sitting.

EVERS, &c. v. CITY OF MAYFIELD.

(Filed March 8, 1905.)

City ordinance—Occupation tax—Validity—Discrimination—A city ordinance requiring resident attorneys at law, physicians, surgeons, oculists, and opticians practicing their profession in the city to pay an occupation

tax of \$10 per annum is not unreasonable, and is not invalid, because no license is required of such as are temporarily in the city on specific professional business.

J. P. Evers for appellant.

W. H. Hester for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Hobson.

The board of council of the city of Mayfield enacted an ordinance fixing the license tax on certain occupations in the city. Section 24 of the ordinance is in these words: "For each attorney at law, physician, surgeon or physician and surgeon, oculist and opticians or oculist or optician practicing their profession in the city of Mayfield, \$10, provided no license shall be required of such as are temporarily in the city on specific professional business, unless they advertise their professional services, or, in addition to the specific business, solicit additional business, in which event their license shall be \$10."

Appellants, who are attorneys at law, residing in Mayfield, refused to pay the license tax, and being arrested, were fined in the Mayfield Police Court. They appealed to the circuit court, and in that court the following agreement of facts was filed:

"The defendants, J. P. Evers, Pete Seay and L. P. Palmer, having been charged by plaintiff's warrant with the offense of 'practicing law in the city of Mayfield without a special license so to do,' and having been found guilty, as charged, bring the case to this court upon an appeal for the sole purpose of testing the validity and legality of the ordinance under which they were tried and fined, and this appeal is submitted by the parties under the following agreed state of facts:

"1st. That the city of Mayfield, Ky., is a city of the fourth class, and that on the 6th day of August, 1901, it passed an ordinance, entitled 'An ordinance fixing the price of license on certain occupations, businesses and professions in the city of Mayfield, Ky., and providing for the expenditure of the money arising therefrom.' A printed copy of said ordinance is to be furnished the court upon this trial.

"2d. That the ye and nay vote thereon was duly taken and entered at the time upon the journal of the council proceedings as required by charters of the fourth class cities of this State.

"3d. That said ordinance was duly signed by the city clerk and signed and approved by the mayor of the city, as provided by charter of the city.

"4th. That said ordinance was published in the 'Daily Mayfield Messenger,' a daily paper circulated in said city, in manner and form as required by the city charter.

"5th. These defendants being licensed attorneys at law of the State of Kentucky, and residents of and having their law offices in said city of Mayfield, did continue and engage in the practice of law in said city without first having procured and caused to be issued to them a license as is required by said ordinance, contrary to the provisions of said city ordinance, and that other attorneys have been temporarily in the city on specific professional business."

The circuit court held the ordinance valid, and the appeal before us is prosecuted by appellants to test the validity of the ordinance. It is insisted that the ordinance is invalid because of the proviso that no licenses shall be required of such persons as are temporarily in the city on specific professional business. It is contended that the ordinance discriminates against the resident professional man in favor of the nonresident; that there are many attorneys and physicians who live out of the city and practice their profession there, and yet are not taxed; and that the ordinance is in conflict with section 3 of the Constitution, forbidding the granting of exclusive privileges except in consideration of public services. The rule is that a city ordinance must be fair, impartial, general and reasonable. If it discriminates unduly against the nonresident and in favor of the resident, it is void. (*Simrall v. Covington*, 90 Ky., 444.) On the other hand, if it discriminates unduly in favor of the nonresident and against the resident, it is equally obnoxious. The powers of the city council are confined to the city of Mayfield. Their power to tax occupations is confined to occupations "within the city." (Kentucky Statutes, section 8490.) If a physician living in Louisville is sent for to perform a surgical operation in Mayfield, and comes there on that business, he should not be required to pay the occupation tax in Mayfield, because that is not the place where he practices his profession. The power given by the statute to tax occupations refers to occupations followed in the city, and not to people who come there under specific employment to attend to a special matter. A tax on vehicles using the streets has been held to refer to a vehicle which uses them continuously, and not to a nonresident driving through the city. (*Bennett v. Birmingham*, 31 Pa. St., 15.) The by-laws of a city are intended to govern the people of the city, and it is doubtful if an occupation tax may be imposed on an attorney who does not reside, or keep an office, or ordinarily pursue his avocation within the corporate limits. (*McQuillin on Municipal Ordinances*, section 423.) In *Bean v. Middleborough*, 22 Ky. Law Rep., 415, we held an ordinance valid which taxed hucksters, but did not apply to persons living in the country and selling their own products. In 21 Am. & Eng. Ency. of Law, 811, the rule is thus stated: "As a general rule the performance of a single act, or even a number of isolated acts, pertaining to a particular business, will not be considered as engaging in or carrying on such business within the meaning of a law imposing a license tax; but it may be so considered where an intent to engage in the business is clearly apparent. So a statute imposing a tax upon persons who engage in a certain business for hire or profit does not warrant the collection of the tax from a person who performs certain acts pertaining to such business for his own benefit and in connection with his regular business."

This rule was approved by this court in *Hays v. Commonwealth*, 107 Ky., 655; *Joseph v. Randolph*, 46 Am. Rep., 347; *Mona County v. Flannigan*, 130 Cal., 105; *Davis v. Macon*, 37 Am. R., 60.

The ordinance is not unreasonable. The object of the statute is to tax occupations within the city. It would be a great hardship if lawyers were required to pay an occupation tax in every town to which they might be called to attend to some specific business for a client. To illustrate: The sessions of this court are held at Frankfort, but it would not perhaps occur

to appellants that they should be required to pay an occupation tax in Frankfort if they followed one of their cases appealed to this court and attended to it here; or that a city ordinance like that before us would unduly discriminate against the resident attorneys because it exempted them in so doing from its operation.

Some question is made in the brief about a taxed attorney's fee, but this matter is not presented by the record.

Judgment affirmed.

HARDWICK v. FRANKLIN.

(Filed March 8, 1905.)

1. Roads and passways—Falling of bridge—Injury to traveler—Liability of builder—Where \$75 was appropriated by the fiscal court for the building of a bridge on a public road and a special commissioner appointed to let out the contract and superintend its construction, such commissioner is not liable in an action for damages to one who was injured by the falling of such bridge by reason of its defective construction, the provision of section 4820, Kentucky Statutes, referring to his bond and his liability, must be held to protect the county and not to include causes of action by persons damaged.

2. Counties—Sovereignty—The rule in Kentucky is that as a county is but an integral part of the State, and the fiscal court is a part of the machinery of the State government, no action lies against the county or the fiscal court, or the judge or justices composing it, for injuries done to a traveler by the falling of a bridge constituting part of a highway and under the control of the court, although guilty of gross negligence in failing to repair it.

Gordon, Gordon & Cox for appellant.

Ruby Laffoon and Lee Gibson for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant Hardwick, while driving over a bridge on one of the public roads of Hopkins county, was injured by the bridge falling, as he alleged, by reason of the gross negligence of appellee Franklin, while acting as special commissioner of the fiscal court in failing to make the bridge reasonably safe and leaving it in a defective condition. He filed this suit to recover of Franklin for the injury. The defendant filed an answer, traversing the allegations of the petition and afterwards filed a general demurrer to the petition, which was sustained by the court, and the plaintiff declining to plead further, his petition was dismissed, and he appeals.

The orders of the fiscal court, a copy of which was filed with the petition, are as follows:

"Hopkins County Fiscal Court,

"April 5, Regular Term, 1900.

"Hon. John G. B. Hall, P. J. :

"Ordered, that the sum of \$75 be, and the same is hereby, appropriated for the purpose of building a bridge over Lick creek, on Madisonville and Charlestown road, and J. R. Franklin appointed commissioner, same payable out of the county levy for the year 1900.

"JOHN G. B. HALL, Judge."

"Hopkins County Fiscal Court.

"Regular Term, October 19, 1900.

"Hon. John G. B. Hall, P. J.:

"J. R. Franklin made written report as commissioner to build a bridge over Lick creek, on Madisonville and Charlestown road, near T. G. Chapel's, showing that said work had been done by E. Williams at a cost of \$40, that being \$35 less than the amount appropriated for said purpose at the last April term of this court, leaving the said balance in the hands of the sheriff unexpended:

"Ordered, that court adjourn.

"JOHN G. B. HALL, Judge."

It will be observed that by these orders the fiscal court appropriated \$75 for the building of the bridge, and appointed Franklin commissioner to execute the order; that at the next term he reported that the work had been done by E. Williams at the cost of \$40, leaving \$35 of the appropriation unexpended. It will thus be seen that Franklin was commissioner to let out the work and accept it after it had been done by Williams. Section 4320, Kentucky Statutes, relating to the appointment of commissioners by the fiscal court, is as follows: "The fiscal court may appoint a special commissioner to let out and superintend the construction or repairing of any bridge or bridges, and fix his compensation therefor: Provided, however, That the supervisor, shall not be liable for any defects or failure in regard to such bridge; but the special commissioner shall be liable therefor, and the court shall require him to give bond, with surety."

It is insisted for appellant that by the statute the commissioner is liable for any defect or failure in regard to the bridge which he is authorized by the fiscal court to let out and superintend the construction of. The rule in Kentucky is that as a county is but an integral part of the State, and the fiscal court is part of the machinery of the State government, no action lies against the county or the fiscal court, or the judge or justices composing it, for injuries done to a traveler by the falling of a bridge constituting part of a public highway and under the control of the fiscal court, although they were guilty of gross negligence in failing to repair it or notify travelers of its condition. (Wheatly v. Mercer, 72 Ky., 704; Downing v. Mason County, 87 Ky., 208; Hite v. Whitley County Court, 91 Ky., 168.)

Following this rule, it was held in Coleman v. Baker, 111 Ky., 131, that the county supervisor was not liable on his bond to a traveler on the highway who was injured by reason of a defective county bridge. Section 4314, Kentucky Statutes, relating to supervisors, contains language as broad as section 4320, above quoted, relating to commissioners. In Moss v. Howlett, 112 Ky., 121, the same rule was followed in the case of a contractor where a traveler was injured by the falling of a county bridge. The case before us can not be distinguished from those above cited.

The commissioner here spent \$40 and received for his services an allowance proportionate thereto, and yet it is sought to make him liable for \$5,000 for appellant's injuries. If such were the law good men could not afford to fill such positions. No such responsibility rests on the road overseer, and it being the legislative policy not to make the county officials responsible to travelers on the highway for defects therein, the last clause of section 4320, Kentucky Statutes, referring to the bond of the commissioner, and his lia

bility must be held to be intended to protect the county and not to include causes of action such as that sued for.

Judgment affirmed.

COMMONWEALTH, &c. v. GINN & CO., &c.

(Filed March 9, 1905.)

1. School books—Publishers—Discrimination in sale—Execution of bond—Authority to accept—Action on bond—Presumptions—Section 448, Kentucky Statutes, provides that "where an act is required to be done by three or more, when done by a majority of them it will be deemed the act of all." Section 4541 provides "that the secretary of state, with the assent of the governor, may appoint an assistant secretary, who, in case of absence or indisposition of the principal, may do the business of the office in his name." By section 4377 "the superintendent of public instruction, together with the secretary of state and the attorney general, shall constitute the State Board of Education," of which board, by section 4379, the superintendent is made chairman. Section 4424 requires "the publishers of school books to execute before the ex-officio members of the State Board of Education the bond therein required." In an action by the Commonwealth on the bond of appellees, Ginn & Co., school book publishers, to recover the penalty for its breach, which was filed with and approved and accepted by the superintendent of public instruction and assistant secretary of state, the presumption that at the time of such approval the secretary of state was absent or indisposed is not overcome by the filing of an answer by the appellees, Ginn & Co., that "the bond was approved on October 20, 1898, not later than 9:30 o'clock, a. m., in the city of Frankfort, and that the secretary of state left said city on that day at 9:50 o'clock, a. m., for a temporary purpose only, viz., to make speeches in a political campaign, and would certainly return in a few days, and there was no occasion in passing immediately on the acceptance of the bond; that the schools throughout the State for that year had begun, and the books for that year had been adopted and were being used at that time," the pleading must be taken against the pleader, and it must be presumed, from the facts stated, that the secretary of state was not at his office when the bond was accepted, but was preparing to leave Frankfort, and had absented himself from his office with the purpose of not returning for a few days, and a demurrer to this plea should have been sustained.

W. I. Williams, W. G. Welch, L. L. Walker and J. H. McMurtry for appellants.

Beckner & Jouett and J. H. Hazelrigg for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Hobson.

On the former appeal of this case (Commonwealth v. Ginn & Co., 23 Ky. Law Rep., 521) it was held that the plaintiffs could maintain an action to recover the entire \$10,000 stipulated as liquidated damages if there had been a breach of the bond. The case was here on a demurrer to the petition, and, among other things, it was insisted for the appellees that the record failed to show that the bond had been accepted. In answer to this objection the court said:

"Another question presented in the argument is the bond, a copy of which is filed with the petition, shows that it was 'examined and approved in accordance with section 62, Common School Law, October 20, 1896. (Signed) W. J. Davidson, Superintendent of Public Instruction. E. D. Guffy, Assistant Secretary of State.' By section 4877 of Kentucky Statutes, the superintendent of public instruction, together with the secretary of state and attorney general, shall constitute the 'State Board of Education,' and by section 4879 the superintendent is made its chairman, with power to call meetings of the board, of which all the members shall have timely notice in writing. It appears that but two members acted, if the assistant secretary of state was authorized to act as a member of it.

"Under section 448 of Kentucky Statutes, where an act is required to be done by three or more, when done by a majority of them it will be deemed the act of all.

"Section 4541, Kentucky Statutes, provides: 'The secretary of state, with the assent of the governor, may appoint an assistant secretary, who, in case of absence or indisposition of the principal, may do the business of his office in his name, and the secretary shall be responsible for the acts of such assistant, who, before he acts under such appointment, must take the oath prescribed by the Constitution.'

"Thus it will be seen any official duty required of the secretary of state may be performed by his assistant in the absence or indisposition of the principal. It must be presumed when the assistant secretary of state, who acts under oath, affects to officiate in his official capacity that his principal is either absent or indisposed. Of course it is permissible to rebut such presumption upon proper allegation and proof. It being alleged in the petition and amended petition that the bond sued on was accepted and approved by the State Board of Education, that averment will be held sufficient; and that it was not so approved, or that the secretary of state was present or not indisposed, or that the board had not notice in writing, signed by the chairman, are all matters of defense, and can not be considered upon demurrer to the petition."

On the return of the case to the circuit court the defendants filed an answer, denying that the bond was accepted or approved by the State Board of Education, and being required by the court to make certain averments in the answer more specific, they filed the following amended answer: "Defendants, Reid, Beauchamp and Price, for amendment to their answer say that the paper sued on as a bond herein was presented to the superintendent of public instruction at an early hour on the morning of October 20, 1896, at his office in the capitol building, at Frankfort, Ky., and not later than 9:30 o'clock a. m., of said day; that the secretary of state had been in said Frankfort the night before and left Frankfort for Louisville, as defendants believe and state, at 9:50 o'clock a. m., on the same day for a temporary purpose only, to wit, to make speeches in a political campaign, and would certainly return within a few days, as the election was then near at hand; that there was no occasion for passing immediately on the acceptance of said bond; that the common schools throughout the State had been begun, and the books for that year had been adopted, and were being used at that time. And having amended, defendants pray as before."

The plaintiffs demurred to the answer as thus amended, and their demurrer being overruled, stood by their demurrer, and their petition having been dismissed, they appeal.

Section 4424, Kentucky Statutes, requires the publisher of school books to "execute before the ex-officio members of the State Board of Education the bond herein required." It was held on the former appeal that the assistant secretary of state could act in the place of the secretary of state in taking the bond in the absence or indisposition of the secretary. It was also held then that the act of any two of the board must be deemed the act of all three as a majority of them were authorized to act. The bond was approved by W. J. Davidson, the superintendent of public instruction, and E. D. Guffy, the assistant secretary of state, which was sufficient in case of the absence or indisposition of the secretary of state. So the question on the appeal is, do the facts stated in the amended answer show that the secretary of state was not absent at the time the bond was accepted? It will be observed that it is alleged in the amended answer that the bond was accepted not later than 9:30 a. m., and that the secretary of state left Frankfort at 9:50 a. m. for the purpose of being away a few days on a stumping tour, and that there was no occasion for passing immediately on the acceptance of the bond as the schools had then begun, and the books for that year had been adopted.

The pleading must be taken against the pleader, and it must be presumed from the facts stated that the secretary of state was not at his office when the bond was accepted, but that he was preparing to leave Frankfort, and had absented himself from his office with the purpose of not returning for a few days. We must give some force to the word "indisposition," as well as to the word "absence," in the statute. Its meaning is that when the secretary of state is not on hand to carry on the business of the office, it may be transacted by the assistant secretary. In other words, it was not intended that the business of the office should stop when the secretary was sick, at home, or absent for other reasons. While a mere physical absence will not alone be sufficient in a matter not requiring immediate attention, when he left the office in charge of the assistant secretary, with the intention of absenting himself from the seat of government on a stumping tour, the interests of the Commonwealth required that the business of the office should go on. Ginn & Co. had a right to present their bond. They had a right to ask that it should be either accepted or rejected, so that if rejected they might tender a better bond. We do not well perceive what business the assistant secretary could carry on in the absence of his principal if he could not accept or reject a bond. While no doubt in such cases the matter might have waited for the return of the secretary, still they were entitled to have their bond passed on then. The purpose of the statute would be entirely defeated if everything that could be put off must be postponed until the return of the secretary, in case of his absence from his office. This would not only prevent the prompt transaction of the business of the office, but it would often cause an accumulation of business which would seriously impair its efficiency.

The case of *Watkins v. Mooney*, 24 Ky. Law Rep., 1469, is relied on for appellees. But that case was a controversy between an appointee of the

mayor and an appointee of the president of the board of aldermen, the latter appointment having been made during the temporary absence of the mayor from the city, although the mayor had previously made an appointment to fill the vacancy. A special meeting of the board of aldermen was called when the mayor had come to Frankfort to appear before a legislative committee, and it was a transparent effort to subvert the policy of the mayor by running that matter through in his absence. Such a maneuver was not contemplated by the statute, and it was properly said in that case that until the legislature has spoken more definitely, the court must determine each case largely upon the particular facts presented.

In this case there is no conflict between the action of the secretary and the assistant. All parties acquiesced in the regularity of the action of the assistant secretary. Ginn & Co. went on with their contract, and the State proceeded upon the idea that the bond was accepted. There is no evidence of bad faith, or of a purpose of any one to take advantage of the temporary absence of the secretary to do something that he would not otherwise have done, or to reverse any action he had taken; but the business of the office was simply transacted in its proper order as it was presented. The rule laid down in *Watkins v. Mooney* has no application to such facts as are here shown. To so apply it would be to defeat the purpose of the statute, for, in that event, the assistant secretary could never know when he could act in the absence of his principal, and all the business done by him, though transacted in good faith and acquiesced in by all parties, might years afterwards be held void to the great detriment of innocent persons. This would make the statute intended to protect the public service a public injury. The principles upon which that decision rests are not to be extended to cases like this.

Judgment reversed and cause remanded, with directions to sustain the demurrer to the fourth amended answer and for further proceedings consistent herewith.

VINCENT, &c. v. BLANTON, Sr., &c.

(Filed March 9, 1905—Not to be reported.)

1. Lands—Adverse possession—Infants—In this action the evidence examined and held that appellee's claim of adverse possession will not avail him, as he was not in the actual possession of the land, and had he been, appellants were infants, against whom the statute did not run. Moreover, it appears that before he purchased the land from Vincent he knew of the equitable claim of appellants, and was, therefore, not an innocent purchaser.

2. Surveys—Conflict of—Where the two surveys have a corner and division line in common it is impossible that Morris, appellee's vendor, could have owned any land between the two surveys. If there was a conflict in the surveys the elder title would prevail, and appellee failed to show the Morris deed to be the elder, and relying upon it his case must fail.

J. S. Wortham, Milton Clark and Wortham & Clark for appellants.

J. S. Lay for appellees.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1865 one S. D. Vincent purchased a tract of land containing 240 acres, known as the Stice survey, which was south of and adjoined a tract known as the Mustaine survey. S. D. Vincent was the guardian of M. H. and J. B. Minton. In the year 1877 he conveyed to the elder of his wards, M. H. Minton, seventy acres of this land off the north end, which adjoined the Mustaine survey, in satisfaction of what he owed him as guardian. Soon after this M. H. Minton conveyed thirty-five acres of this seventy to G. W. Blanton, a son of the appellee, who conveyed it, a short time thereafter, to his father, the appellee. M. H. Minton sold the balance of this seventy acres, the west end of it, to one Wood Vincent, the father of appellants, and gave him a bond for title. Wood Vincent built a cabin on it and live there a few years, when he died. Soon after this his widow married again, and took these children, who were then small and of tender years, away from the county.

Some time in the early eighties S. D. Vincent sold the balance of this 240-acre survey to Rube Vincent, and took notes for the purchase price. Afterward his second ward became the owner of these notes, in satisfaction of S. D. Vincent's indebtedness to him, and instituted an action to enforce the lien on the land for the payment of them. The land was sold under this judgment on October 6, 1884, and was bid in by D. W. Webb for J. H. Vincent, to whom the commissioner made the conveyance. Afterward J. H. Vincent sold the same to the appellee, J. W. Blanton, Sr. It appears that the boundary given in the deeds from the commissioner to Vincent and from Vincent to the appellee covered and included the whole of the 240 acres, the Stice survey.

The appellants instituted this action against the appellees for the recovery of the thirty-five acres, the balance of the M. H. Minton seventy-acre tract. They alleged that they were the only children and heirs of their father, Wood Vincent, and that they owned it under the bond for title, above referred to, which had been lost by their mother. They also alleged that their father had paid Minton in full for the land, and they made M. H. Minton a party defendant to their action. He answered, and in effect admitted all the allegations of the petition. The appellee, Blanton, answered, and denied that they were the owners of the land, and alleged that the deed from S. D. Vincent to M. H. Minton had never been recorded, and that when he purchased the land he was ignorant of the existence thereof, and also ignorant of the existence of the title bond, if any there was; that when he purchased he had no knowledge or information that the appellants were the owners of or had any interest in this land. He also pleaded the fifteen years' statute in bar of their right of recovery, and he further alleged that one Mason Morris was the owner of this piece of land claimed by the appellants, and that he, in the year 1893, purchased it and received a conveyance from Morris therefor. Appellants controverted the affirmative matter in the answer.

It appears from the proof in the record that the appellee, Blanton, sold an acre of the land in controversy to the school district, and a schoolhouse was erected thereon. This transaction took place three or four years since. Appellee also sold and conveyed six or seven acres of this land to one T. M.

Higgs, who enclosed it with a fence six or seven years since. The trustees of this school district and Higgs are the other appellees with J. W. Blanton, Sr. It does not appear that appellee Blanton ever at any time had actual possession of any part of this land, but that it has been wild and unenclosed land all the time, with the exceptions stated. Appellee claims actual and adverse possession by reason of the fact that he was living upon and in possession of the Stice survey by virtue of his deed from J. H. Vincent.

We are of the opinion that his claim of adverse possession will not avail him, as he did not have the actual possession, and if he had had, these appellants were infants, against whom the statutes did not run. It appears from the commissioner's report of sale of the land made in the case of J. B. Minton v. Rube Vincent, above referred to, that the commissioner, in making the sale, expressly reserved from sale the seventy acres which had been previously conveyed to M. H. Minton, and this reservation was expressly stated in his written report filed in that action. It is evident that the commissioner made a mistake in drafting the deed to J. H. Vincent by including the boundary of the whole of the 240 acres which included the seventy. J. H. Vincent testified that he knew of the sale of the seventy acres to M. H. Minton, and that he purchased only the survey excluding that. It was also in proof that J. H. Vincent informed appellee Blanton of this fact at the time he conveyed the land to him. It was also shown that when appellee Blanton conveyed to the school trustees this one acre, that he proposed a quit claim deed, which the trustees refused to accept. He then consented to make a deed of general warranty, and stated that he guessed he could safely do it, as he had had the land in possession long enough to hold it against the heirs of Wood Vincent, if they ever returned and claimed it. It was further proven that appellee made a trip to Grayson county and made inquiries as to the whereabouts of the widow and children of Wood Vincent, with the view to purchasing it. It was also proven that he, on several occasions, referred to this land as belonging to the heirs of Wood Vincent.

From these facts, and other facts and circumstances proven, we are of the opinion that appellee, at and before the time he purchased this land from J. H. Vincent, knew of the equitable claim of the appellants, and he was not an innocent purchaser thereof, even if he were a purchaser at all, of the small piece claimed by the appellants. We are of the opinion that appellee can not sustain his claim to this land by reason of his deed from Morris, above referred to. It appears from the proof that the Stice and Mustaine surveys of land have a corner and division line in common. If this be true, it is impossible that Morris could have owned any land between these two surveys. If Morris' boundary entered upon the Stice survey, it shows a conflict between the surveys, and the elder title would prevail; but it devolved upon appellee, as he introduced the Morris deed to defeat the claim of appellants, to show that the Morris title was the elder. This he failed to do.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

ADVANCE THRESHER CO. v. CURD.

(Filed March 9, 1905—Not to be reported.)

1. Sales of personal property—Notice to seller of defect—Appellant can not complain that notice that the machine sold by it was not satisfactory was not given in accordance with the stipulation in its contract of sale where it waived its right and acted upon the notice it did receive and sent an expert to examine the machine.

2. Same—Contract—Warranty—The verdict and judgment by which appellee was awarded \$500 damages upon the sale to him of a thresher will not be disturbed where, though the evidence was conflicting, it showed the machine to be almost worthless for the purpose for which it was sold, and that by reason of its inferiority appellee sustained a loss in attempting to operate it, and showed that appellant warranted it to thresh 3,000 bushels a day, but that it was almost worthless.

W. W. Stephenson for appellant.

E. H. Gaither for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Nunn.

The appellant instituted this action upon two notes executed by the appellee as a part of the purchase price of a separator sold to appellee June 6, 1900.

Appellee answered, admitting the execution of the notes, but averred that the separator he received from the appellant was worthless for the purpose of threshing wheat, for which he purchased it; that at the time he purchased this machinery appellant, by its agent, stated that the machine, if properly handled, would thresh from 3,500 to 4,000 bushels per day; that he guaranteed it to thresh as many as 3,000 per day, and that upon the faith of this warranty he purchased it, and gave a Garr-Scott separator as part pay, and executed three notes for \$179 each as a balance of the purchase price. Appellant filed a reply, denying the warranty alleged, and stated that a certain printed contract, which it filed and marked "X," was the only contract made with reference to the sale and purchase of this separator, and that the only warranty made by appellant was contained in this writing, without alleging what the warranty was.

Appellee filed a rejoinder, denying the execution of this written contract marked "X," and alleged that by false representations and fraud his signature was obtained thereto, and specified the false representations and fraud. He also alleged that by this written contract the appellant warranted and guaranteed that when this separator was properly run and managed it could not be excelled by any separator manufactured, of the same size, in separating and saving from the straw the various kinds and conditions of grain. He alleged that he properly operated and managed it, but stated that it did not excel, or even equal, other separators of the same size, and that it, in fact, was worthless. Appellant controverted these allegations. A trial was had by a jury, which resulted in a verdict for appellant for the amount of the notes and interest and allowed appellee \$500 in damages, and the court rendered a judgment for the appellee for the difference, from which judgment appellant appeals.

The evidence was conflicting, but that of appellee conduced to show that appellant did warrant the machine as alleged, and that it was almost worthless for the purpose for which it was purchased, and that by reason of the inferiority of the machine appellee suffered great loss in attempting to operate it; that he never could thresh more than 1,000 bushels per day, but that ordinarily only from 800 to 400. The proof showed that other machines of like size and character threshed from 1,800 to 2,500; that the old Garr-Scott machine, which he exchanged for this one, was shown to have threshed from 1,200 to 1,500 bushels per day during the same year in which he purchased the one from appellant. Appellee informed appellant's agent at the time he made the trade that the engine he owned had greater power than was necessary to run a Garr-Scott separator, and that his purpose in purchasing a new one was to get a separator that would thresh more wheat. When appellee started the separator it failed to work properly, and he notified appellant's agent at once, and within a day or two appellant sent an expert to adjust and repair it. The expert failed to make it work, and appellee, with appellant's agents, continued to try to make it work, but they could not do so, and appellee had to cease threshing before the season was over, as he was losing money every day he ran it.

In the fall of the year, after the first note became due, appellant's general agent for the State visited appellee for the purpose of collecting the note, and appellee refused to pay it because the machine was worthless. This agent then informed appellee that the company had not treated him right in sending him that machine; that it was made to be used in Eastern territory, where the straw was short, and that it was not suited for this territory because of the long straw. The agent then agreed with appellee that he would take back the feeder, and credit his notes with the value of it, and if he would pay the first note, the one then due, he would send a man there before the next threshing season and would have him re-adjust the machine so as to give it more straw room, and then it would work all right; but that if it did not, he would return him his money, pay him the value of his old machine, deliver to him the unpaid notes, and take back the machine. Under this agreement appellee soon after paid the first note. The expert was sent before the next season opened, and worked on the machine, but it would not perform any better than it had before, and during that season he was able to thresh only his own crop of a few hundred bushels. Appellant then attempted to repair it for the next season, but failed to make it work. The court instructed the jury in effect to find for the appellant the amount of the notes, with their interest. It also told them that if they believed from the evidence that the appellant warranted the machine as alleged, and that it failed to come up to the warranty, or approximately so, then they should find for the appellee in damages the difference between the value of the machine as warranted and what it proved to be actually worth. The instructions were as favorable to appellant as it could have reasonably asked, and were in substance the same as those it offered.

Appellant complains that appellee did not give written notice by registered letter to it at Battle Creek, Mich., within five days after he discovered the machine would not work properly.

In the case of *E. T. Kenney Co. v. Anderson, &c.*, 26 Ky. Law Rep., 372.

the court said: "The purpose of this stipulation in this contract of warranty was to give the seller of the engine an opportunity to have an expert visit it and repair the defects, for its protection and benefit, as well as that of the buyer. The notice was the essential thing, and it appears that it did get the notice and act upon it by sending its expert to the engine; and even if appellant had the right to demand the giving of the notice in the exact way and manner as prescribed in the contract, it waived its right thereto by accepting and acting upon the notice it did receive." (Frick Co. v. Morgan & Co., 24 Ky. Law Rep., 837.)

Perceiving no error prejudicial to the substantial rights of appellant the judgment of the lower court is affirmed.

ROBARDS V. ROBARDS.

(Filed March 8, 1905—Not to be reported.)

1. Lands—Verbal agreement to convey—Pleading—Appellee in his petition alleged that appellant agreed to convey land to him in consideration of improvements to be made by him upon it, and upon her failure to convey he sought to recover for the improvements and to be adjudged a lien on the land to secure the payment of same. Upon the trial she denied the contract as set out by appellee, alleging a different one. The court below struck from the answer all the allegations except the traverse, and appellee was awarded judgment for \$200, and adjudged a lien upon the whole tract. Held—It appearing from the petition that only a part of the land was to be conveyed, it was error to adjudge a lien upon the whole tract, and under the rule of pleading, in the absence of any specific allegation as to the part that was to be conveyed, it must be concluded that only the part occupied by the improvements was to be conveyed, and it was upon this that he was entitled to a lien for improvements.

2. Same—Right of homestead—Appellant set up the right of homestead in the land, and assuming that these allegations were sufficient, she was not entitled to it against appellee, because having improved the land as he claimed upon her promise to convey, she can not defeat his lien for the enhanced value by her claim of homestead.

3. Same—Transfer to law side of docket—The court did not err in refusing to transfer this action to the ordinary side of the docket. The whole claim being an equitable one, there was no reason to separate it and try it before different tribunals.

Rawlins & Voris and C. R. McDowell for appellant.

Breckinridge & Breckinridge for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Barker.

Appellee, N. F. Robards, instituted this action in equity in the Boyle Circuit Court against his mother, Mrs. Belle M. Robards, alleging in substance that she was the owner and in possession of seventy acres of land in Boyle county, Kentucky; that in consideration that he would erect a dwelling house and stable on, and build a fence around, a part of her land she would convey it to him; that in pursuance of this verbal agreement he

erected a house, stable and fence at a cost to him of \$500; that under and in accordance with the contract between him and his mother she placed him in possession, and he occupied the land some four years; thereafter she retook possession, and refused either to restore it or to convey the land to him; wherefore, he prayed a judgment for the sum of \$500, and that he be given a lien on the seventy-acre tract to secure the payment of his debt.

Appellant denied the contract as alleged by appellee, and then affirmatively stated the contract between her and her son, as she understood it, differing materially from that stated in the petition. She also set up a homestead right in the seventy acres as against the claim of her son, and alleged that she had furnished him \$78.25 in money with which in part to make the improvements; that he had occupied the land for four years under the verbal contract, and its use was reasonably worth \$40 per year. Upon motion the court struck from the answer all of its allegations, except the traverse of the contract as alleged by appellee, and so much as placed in issue the value of the improvements made by him. Appellant then moved the court to transfer the case to the common-law side of the docket for the purpose of a trial by jury as to whether or not the contract, as alleged in the petition, was made, and the value of the improvements of appellee. The court overruled the motion as to the first, sustained it as to the second, and a trial of this latter issue resulted in a verdict fixing the value of the improvements at \$200, for which the court entered judgment awarding appellee a lien on the seventy acres of land, of which appellant is now complaining.

Only a portion of the record has been brought up, but we think enough appears to show that the case should be reversed. Appellee in his petition alleged that his mother contracted, in consideration of his making the improvements mentioned, to convey to him a part of the seventy-acre tract, not the whole. It was, therefore, error to have awarded him a lien upon the whole tract. In the absence of any specific allegation as to what part of the tract she agreed to convey him, under the rule that every intendment is taken against the pleader, we must conclude that she agreed to convey him only so much of the land as was occupied by the improvements, and it was upon this that he was entitled to a lien for the value of his improvements.

The court did not err in striking out so much of the answer as contains appellant's construction of the contract between her and her son. Appellee could only recover under the contract alleged by him. This having been denied by appellant, it was not proper for her to allege what she understood the contract to be, the effect of this being only to plead affirmatively that which the traverse had pleaded negatively. (*Burke v. Shannon*, 19 Ky. Law Rep., 1170; *Simpson v. Carr & Parrington*, 25 Ky. Law Rep., 849.)

Assuming that the allegations of appellant in regard to her claim of homestead were sufficient, we do not think she was entitled to it as against the claim of appellee. Having induced him to improve the land, and then (as he contended) violated the contract to convey, she can not defeat his lien for the enhanced value of the land by her claim of homestead. The counterclaim for money loaned was not sufficiently pleaded to entitle appellant to a judgment on it. A counterclaim must contain every allegation necessary to constitute an original cause of action for the same matter. Appellant was not entitled to recover rent during the four years appellee occu-

plied the premises under the verbal contract to convey. (Taylor v. Johnson, 8 Ky. Law Rep., 615; Fox's Heirs v. Longley, 1 Mar., 388.)

The court did not err in refusing to transfer the case to the common-law docket for the trial of the question of contract or no contract; the whole claim is an equitable one, and there was no reason for its being separated and tried in parts in different tribunals. Upon the return of the case appellee should be allowed to amend his petition, and set up what part of the seventy acres was embraced in the verbal contract, and appellant, if she desires, to amend her answer as to the counterclaim for money loaned.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

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COURT OF APPEALS OF KENTUCKY.

COMMONWEALTH v. LOUISVILLE & NASHVILLE R. R. CO., &c.

(Filed March 9, 1905.)

1. Railroads—Insufficient traffic facilities—Power of courts to enforce—It is shown by this record that the Louisville & Nashville R. R. Co. owns and operates a line of railroad from Louisville to Lexington, a part of which runs through Shelby county, from Anchorage to Christiansburg, a distance of 27.60 miles, one of the most prosperous, fertile and thickly settled portions of the State; only 19.10 miles of this distance is operated for local public traffic, the remaining 8½ miles being entirely without such accommodation; that the public along said line has applied to said company for such local accommodation for its traffic, both passenger and freight, which has been refused, and that the railroad commission of this State, upon proper application to it, has directed and ordered that additional facilities be afforded to the public, which have also been refused and ignored by said company. In an action by the Commonwealth of Kentucky v. L. & N. R. R. Co. to compel it to grant such additional facilities, Held—that the citizens of Shelbyville and Christiansburg, and those of the communities contiguous thereto, are entitled to better facilities for the transportation of passengers and freight between the places named than have been afforded them, and that the powers of the court were properly invoked in their behalf.

2. Leasing road to another company—Effect—The fact that the appellee, L. & N. R. R. Co., has made a contract with the C. & O. R. R. Co., leasing its road to said company under certain restrictions and privileges as to running of trains over that part of the line in controversy, does not relieve it from affording the facilities necessary for the needs of the public.

3. Daily trains—The fact that the C. & O. R. R. Co., as lessee of the L. & N. R. R., runs a train daily over said line of railroad, does not meet the requirements of the law and of the public, when such trains do not stop at the way stations or afford local accommodations. It is to accommodate the entire public that both through and local trains are operated by railroad companies.

4. Public duties—Jurisdiction of courts—Railroads are creatures of the law, invested with certain powers, to promote the public interest, for which reason they may be required to conduct their affairs in furtherance of the

public objects of their creation, and it is because of this public character that courts assume jurisdiction to enforce the public duties required of them.

5. Escaping public duty—A railroad company can not be permitted to escape the performance of any duty or obligation imposed by its charter or by the general laws of the State by transferring its road, or any part thereof, to a lessee, or upon the ground that its own operation thereof will occasion loss to it.

R. F. Peak, Clifton J. Pratt and McKenzie R. Todd for appellant.

Willis & Todd and Benjamin D. Warfield for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted in the Shelby Circuit Court by the appellant, Commonwealth of Kentucky, against the appellees, Louisville & Nashville R. R. Co. and the Chesapeake & Ohio Ry. Co., to compel them, through the mandatory process of the court, to furnish for the use of the public greater facilities for the transportation of passengers and freight over the line of railroad operated by them in and through Shelby county, particularly between Shelbyville and Christiansburg.

It appears from the averments of the petition that the appellee, Louisville & Nashville R. R. Co., owns and operates a line of railroad running from Louisville, via Frankfort, to Lexington and other points east thereof, which originally had its terminus at the latter city, and was formerly known as the Louisville, Cincinnati & Lexington railroad. This railroad passes through a section of Shelby county, though at a distance of several miles from Shelbyville, its county seat, and it has stations or depots at Pleasureville, Christiansburg, Bagdad and Hatton, all in Shelby county.

Some years ago the appellee, Louisville & Nashville R. R. Co., also acquired the ownership and control of a line of railroad from Shelbyville to Anchorage where it connects with its main line from Louisville to Lexington. In 1895 the appellee, Louisville & Nashville R. R. Co., constructed a railroad from Shelbyville to Christiansburg, a distance of $8\frac{1}{2}$ miles, connecting at the latter place with its main line from Louisville to Lexington. By the building of the railroad between Shelbyville and Christiansburg appellee became the owner of a line of railroad running entirely through Shelby county, one end of which connected with its main line at Christiansburg and the other at Anchorage. Upon the completion of the road between Shelbyville and Christiansburg it was leased to the Chesapeake & Ohio Ry. Co. for its exclusive use, and in addition the latter road also acquired the right to run its trains over that part of the railroad owned by the appellee, Louisville & Nashville R. R. Co., connecting Shelbyville with its main line at Anchorage. By this arrangement all the trains, both passenger and freight, of the Chesapeake & Ohio Ry. Co. that had theretofore run from Lexington to Louisville altogether upon and over the old or main line of the Louisville & Nashville R. R. Co. between those points, were enabled to leave the main line at Christiansburg and reconnect with it at Anchorage, thereby relieving, in some sort, the congestion upon the main line, and securing a lessening of the distance between Christiansburg and Louisville of about twelve miles, which was and is a matter of considerable

importance to the Chesapeake & Ohio Ry. Co. in operating its fast through passenger and freight trains, and maintaining proper connections.

The contract between the railroad companies prohibits the Chesapeake & Ohio Ry. Co. from doing any local passenger or freight business from points between Lexington and Louisville, that is to say, by the terms of the contract the Chesapeake & Ohio Ry. Co. acquired the right to run its through trains only over the road in question, and all business originating upon the lines between Lexington and Louisville, not including either of those points to the other, was to belong to the Louisville & Nashville R. R. Co. exclusively, except passenger fares from points where the Chesapeake & Ohio trains might be obliged to stop on account of railway crossings, train orders, water, etc., in which event that company was to receive 25 per cent. of such fares, and the Louisville & Nashville R. R. Co. 75 per cent. thereof.

It further appears that though the Louisville & Nashville R. R. Co. continued to operate, and is yet operating, daily its trains, both passenger and freight, the former twice and the latter at least once, each way between Shelbyville and Louisville, it has never run its trains, either passenger or freight, upon or over that part of its railroad extending from Shelbyville to Christiansburg, and though the Chesapeake & Ohio Ry. Co. daily runs its through passenger and freight trains over appellee's railroad in Shelby county in going to and from Louisville, it will not sell tickets or carry passengers or freight from Shelbyville to Christiansburg, or from Christiansburg to Shelbyville; that one of its passenger trains which passes Shelbyville at 10 o'clock a. m. each day going west will carry passengers from Bagdad to Shelbyville, but refuses to sell them tickets, or accept fares from Bagdad to Louisville, or any other point except Shelbyville, and its train arriving at Shelbyville from Louisville about 7 p. m. each day will carry passengers from Shelbyville to Bagdad, but will not sell tickets to, or carry passengers from, Shelbyville to any other station in Shelby county on its evening train.

It is further averred in the petition that appellant, by proper proceeding and due notice to the two railroad companies, carried before the board of railroad commissioners of the State its complaint set forth in the petition, and after receiving the evidence and duly considering the questions of law and fact presented, decided that the public has a right to the use of local passenger and freight train service over the appellee's railroad from Shelbyville to Christiansburg, as demanded; that a copy of the findings of the railroad commissioners was delivered to each of the railroad companies, but that notwithstanding the action of the railroad commissioners, they failed and refused to comply with its findings and order, and have not yet done so.

A demurrer was filed to the petition by each of the railroad companies. The court overruled the demurrer of appellee, Louisville & Nashville R. R. Co., but sustained that of the Chesapeake & Ohio Ry. Co., and the petition as to it was dismissed. The judgment was excepted to by appellant and an appeal prayed, but as no appeal has been taken therefrom that judgment is not before us for review.

After its demurrer to the petition was overruled the appellee, Louisville & Nashville R. R. Co., filed answer, in which it admitted its failure and refusal to operate either passenger or freight trains on its line of railroad be-

tween Shelbyville and Christiansburg, but denied that either of these places, or the public elsewhere, were needing or asking for additional railroad facilities between those points.

As a further defense it was alleged in the answer that the railroad between those points was constructed by appellee solely for the use of the Chesapeake & Ohio Ry. Co., to enable it to make fast time between the east and west, and without purpose on appellee's part, or expectation upon the part of the public, that it would be used for the transportation of local passengers or freight; that the road is being used by the Chesapeake & Ohio Ry. Co. exclusively for the running of its fast through passenger and freight trains, and that its use by appellee's trains for the transportation of passengers or freight would cause a violation of its contract with the Chesapeake & Ohio Ry. Co.; that the business or traffic between Shelbyville and Christiansburg would not justify the operating of either passenger or freight trains by appellee from one to the other, and that if compelled to do so the expense thereof would entail upon appellee a heavy and continuous loss.

It is also averred in the answer that the statutes of Kentucky only require a railroad company "to run at least one passenger train each way on every day of the year, Sundays excepted, over said line;" that the Chesapeake & Ohio R. R. Co. is running one passenger train each way on every day of the year over the line of railroad in question, and has done so ever since the right to operate its trains thereon was obtained of appellee, which relieved the latter of the duty to run additional trains over the same road, and is, besides, a literal compliance with the law. The reply filed by appellant contained a traverse of the affirmative matter of the answer as amended, thereby completing the issues, and in the trial which followed the court rendered judgment dismissing the petition, of which appellant complains.

Section 772a, Kentucky Statutes, provides: "That all corporations, companies, persons or associations owning and operating a railroad line in this Commonwealth, or any branch of any railroad in this Commonwealth, the length of which exceeds five miles, shall be required, and they are hereby directed, to run at least one passenger train each way on every day of the year, Sundays excepted, over said line." * * *

Section 792 provides: "When two railroad companies use the same line of roadway in the operation of their trains they shall afford along such roadway reasonable and proper facilities for the receiving, forwarding and delivering of passengers and property without discrimination in their rates and charges. All contracts made between such companies, in so far as the same shall conflict with the provisions of this section, are hereby declared to be null and void and contrary to public policy. The railroad commissioners shall enforce the provisions of this section by imposing the same penalties for violations thereof as is provided in section 220 of this act for violation of said section."

It is disclosed by the record that some time before the institution of this action another was brought in the name of the Commonwealth under section 772a, supra, to recover of the Chesapeake & Ohio Ry. Co. the penalties therein provided for their alleged failure to furnish adequate passenger accommodations to the local traveling public upon and over their line of railroad between Shelbyville and Christiansburg. In that action the fol-

Following instruction seems to have been given by the trial court to the jury: "The jury are instructed that the failure to stop trains at Christiansburg, or sell tickets, or transport passengers thereto and therefrom, over said Shelby cutoff, is immaterial, as that failure can not be considered in this action, but is a matter within the control of the railroad commissioners of Kentucky."

Under this instruction the jury returned a verdict for the defendants, and judgment was entered in accordance therewith, dismissing the petition. Upon appeal to this court the instruction referred to was approved and the judgment affirmed, but in the opinion the court said: "Some reference is made to the power of the railroad commission in regard to the operation of railroads. It is also argued that under the law railroads, being common carriers, are bound to furnish reasonable facilities for passengers and traffic thereon, but neither of these questions is before us for decision, and we expressly decline to give any opinion thereon. It is, however, clear to us that the appellees have not violated the letter of the statute aforesaid, and it, therefore, follows that the judgment appealed from must be and is affirmed." (Commonwealth v. L. & N. R. R. Co., 23 Ky. Law Rep., 1986.)

Following the decision of the case *supra* the complaint set forth by the petition in the case at bar was presented by petition from the judge of the Shelby Circuit Court and others to the railroad commissioners, urging them to take such action in the premises as would give the public the relief sought. Thereupon the commissioners, after due notice to the two railroad companies concerned, and considering the evidence offered by all the parties, rendered in writing their finding and opinion, from which we quote the following: "Here we have an improved modern public highway, a continuous line of railroad running from Anchorage to Christiansburg 27.60 miles in length, running through one of the most prosperous, fertile and thickly settled portions of the State, and only 19.10 miles of which is operated for local public traffic; the remaining 8½ miles are entirely without such accommodations. In the opinion of the commission the relative rights and duties of these parties are plain. The public has the right to the use of the local passenger and freight train service over this line from Shelbyville to Christiansburg, and it is the duty of the L. & N. (Louisville & Nashville R. R. Co.) to either furnish this accommodation by the operation of its own trains, or to so reform its contract with the Chesapeake & Ohio R. R. Co. that the latter company may perform this service. * * * The commission does hereby refuse to exonerate said company from the performance of its said duties and from the requirements of sections 772a, 792 and 820, Kentucky Statutes."

A copy of the opinion and finding of the railroad commissioners was delivered to each of the railroad companies concerned, and a copy also furnished the judge of the Shelby Circuit Court, but as no steps were taken by either company to comply with the findings of the commissioners, this action was brought to enforce their compliance therewith.

An examination of the record leads us to the conclusion that the findings of fact reported by the railroad commissioners are supported by the evidence introduced before the trial court. It is an admitted fact that only the trains of the Chesapeake & Ohio Ry. Co. are operated over that part of ap-

appellee's road extending from Shelbyville to Christiansburg. It is likewise admitted that that company will not sell tickets, or carry passengers or freight, from Shelbyville to Christiansburg, or from the latter place to Shelbyville, yet there is both a railroad depot and telegraph office at Christiansburg as at Shelbyville.

Although this part of appellee's road runs through the most fertile section of Shelby county, where great quantities of wheat, corn, tobacco and hemp are grown, and a large number of horses, mules and shipping cattle are produced, if a resident of that community desires to ship his stock or produce to Lexington, Cincinnati, or further east upon the trains of the Chesapeake & Ohio Ry. Co., he must either haul it to some station on the Louisville and Lexington division, or haul it to Shelbyville and ship it to Louisville, and there rebill it over the Chesapeake & Ohio, by which means it will return upon the cars of that company through Shelby county and by is home on its way east, all of which entails upon the shipper unreasonable and unnecessary delay and cost.

We are of opinion that the citizens of Shelbyville and Christiansburg, and those of the communities contiguous to each, are entitled to better facilities for the transportation of passengers and freight between the two places named than have been afforded them, and that the powers of the court were properly invoked in their behalf. There is no merit in the contention of the appellee that its contract with the Chesapeake & Ohio Ry. Co. prevents it from affording the public the railroad facilities demanded. Section 792 of the statute, which requires two railroad companies using the same line of railway to afford reasonable facilities for passenger and freight traffic, expressly declares that "all contracts made between such companies, in so far as the same shall conflict with the provisions of this section, are hereby declared to be null and void, and contrary to public policy." Under the letter of the statute, therefore, appellee had no power to make such a contract as would relieve it of the performance of duties it owed to the public as a common carrier.

In *Washington A. & L. R. R. Co. v. Brown*, 17 Wallace, 445, the Supreme Court of the United States said: "It is the accepted doctrine in this country that a railroad corporation can not escape the performance of any duty or obligation imposed by its charter or the general laws of the State, by a voluntary surrender of its road into the hands of lessees. The operation of its road by the lessee does not change the relation of the original company to the public."

Equally untenable is appellee's contention that the running of a train daily each way by the Chesapeake & Ohio Ry. Co. is a sufficient compliance with the law. Of what benefit to local passengers and traffic would be the running of daily trains if they never stop at way stations or afford local accommodation? It is to accommodate the entire public that both through and local trains are operated by railroad companies.

"A railroad company is a public highway, and none the less so because conducted and maintained through the agencies of a corporation deriving its existence and powers from the State. Such corporation was created for a public purpose; it performs functions of the State; it has authority to exercise the right of eminent domain and to charge tolls, though given

primarily for the benefit of the public good. * * * It can not be assumed that any railroad corporation accepting franchise rights and privileges at the hands of the public ever supposed that it acquired, or it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit." (Smyth v. Ames, 169 U. S., 545.)

Railroads are creatures of the law, invested with certain powers to promote the public interest, for which reason they may be required to conduct their affairs in furtherance of the public objects of their creation, and it is because of this public character that courts assume jurisdiction to enforce the public duties required of them.

The following excellent statement of the law on this subject may be found in Gladson v. State of Minnesota, 166 U. S., 435: "The principles of law which govern this case are familiar, and have often been affirmed by this court. A railroad corporation created by a State is for all purposes of local government a domestic corporation, and its railroad within the State is a matter of domestic concern, even when its road connects, as most railroads do, with railroads in other States, and the State which created the corporation may make all needful regulations of a police character for the government of the corporation while operating its road in that jurisdiction. It may prescribe the location and the plans of construction of the road, the rate of speed at which trains shall run, and the places at which they shall stop, and may make any other reasonable regulation for their management in order to secure the objects of the corporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State." * * * (Lake Shore and M. S. Ry. Co. v. State of Ohio, 178 U. S., 2-5.)

The power to regulate the relative rights and duties of the railroads and the public in this State has, in large measure, been delegated by the legislature to the Railroad Commission, and the provisions of the statute under which the commissioners acted in this case being reasonable, we can but conclude from the facts disclosed by the record that their determination of the questions presented by the complaint upon which they acted was proper, and for the convenience of the public. Therefore, the recommendation made by them should have been obeyed by railroad companies, but they having failed to do so, appellant could but resort to the courts for relief. It is strongly insisted for appellee that the income that would be derived from operating trains for local passengers and freight traffic on that part of the road where it does not now afford such accommodation would be insufficient to maintain such accommodation. On this point there is some conflict of evidence, but it was made to appear on the hearing before the railroad commissioners that appellee's net income upon its entire railroad system is about \$4,000,000 per annum, and on the Shelbyville branch, from Shelbyville to Anchorage, \$31,000 per annum. We do not find these facts successfully contradicted in the record. But in any event appellee can not be permitted to escape the performance of any duty or obligation imposed by its charter or the general laws of the State, by transferring its road, or any part thereof, to a lessee, or upon the ground that its own operation thereof will occasion loss to it.

Being of the opinion that the appellant is entitled to a mandatory injunc-

tion to compel appellee to furnish the facilities for local passenger and freight traffic asked in the petition, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Whole court sitting.

SUTTON v. DICKERSON.

(Filed March 10, 1905—Not to be reported.)

Lands—Wills—Executory devise—H. O. Sutton devised to his son a farm, describing it, with the provision that if the son should not live until his youngest child should reach the age of sixteen years, it should become a home for his wife and children until that period arrived. Held—The son could not have disposed of the farm in the lifetime of his wife so as to have affected her interest, or that of the children, and her death did not cause the children to lose their interest. All that the appellant can do is to convey subject to the interest of the children which the testator intended they should enjoy upon the happening of a contingency.

Wm. Herndon for appellant.

R. L. Davidson and J. M. Rothwell for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Paynter.

H. O. Sutton died testate in May, 1894. He devised to his son, F. K. Sutton, a farm in Garrard county, Kentucky. F. K. Sutton and several of his children are also living, some of whom are under sixteen years of age, but his wife, Sallie Sutton, who was living at the time the will was probated, is now dead. F. K. Sutton claims that he has a right to sell the land and convey the fee-simple title thereto. The clause of the will in question reads as follows: "I will to my son, F. K. Sutton, the farm on which he is now living, containing ninety-eight and a fraction acres, valued at \$5,000. Now if my son, F. K. Sutton, should not live until his youngest child living shall arrive at the age of sixteen years, I desire that the farm above shall be a home for his wife, Sallie Sutton, and children until that period arrives."

It is perfectly manifest from the language employed that it was the intention of the testator that if his son, F. K. Sutton, died before his youngest child living shall have arrived at the age of sixteen years, the farm was to be a home for Sallie Sutton and children until the youngest child living should arrive at the age of sixteen years. Sallie Sutton and children were given the right to occupy the farm and enjoy the fruits of it upon a contingency that might or might never happen. The fee was devised to the son, with limitations over upon a condition of an uncertain character. The limitation over was executory in character. It is unlike a case where the party is given the fee-simple title with simply a restriction upon alienation, but it is a devise of the fee-simple estate with a condition annexed to it. The son, F. K. Sutton, could not in the lifetime of his wife, Sallie Sutton, have disposed of the farm so as to have affected her interest or that of the children. The children were given the same right to the use and occupancy of the land that was given to his wife, Sallie Sutton. Her death did not

cause the children to lose their interest which had been given them in the land. All the appellant can do is to convey the land subject to the interest of those of the children which the testator intended should enjoy it upon the happening of a contingency.

The judgment is affirmed.

GARTH v. DAVIS & JOHNSON, &O.

(Filed March 10, 1905.)

1. Auction sale of lots—Purchase by partners—Verbal agreement—Written memorandum by auctioneer—Enforcement of contract—Where two persons verbally agreed to form a copartnership and to attend an auction sale of town lots and each was to buy in his own name certain lots, and both were thereafter to pay for and own all of them as copartners, and in pursuance thereof each of them did attend said sale and bid in certain lots, of each of which bids a memorandum was kept and signed by the auctioneer, such agreement constituted a copartnership, and the owner of the lots having tendered them a joint deed for said lots and demanded a compliance on their part with the terms of the sale, which they refused, was entitled in a joint action against them to enforce a specific execution of the contract.

2. Statute of frauds—Dealing in real estate—An agreement to become partners in dealing in real estate is not a contract to buy nor a contract to sell real estate as between the parties to it, and is not within the statute of frauds, and, therefore, need not be in writing if to be begun, and may not end within a year, although as a fact it may not be terminated for more than a year.

3. Auctioneers—Agency—The auctioneer's memorandum, signed by him, describing the lots sold and stating the terms of the sale, was sufficient to bind both seller and buyer, and was a compliance with the statute.

Wright & McElroy and W. E. Garth for appellant.

Samuel D. Hines and Nerge Clark for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant owned a tract of land in the city of Bowling Green, Ky., which he caused to be divided into town lots. A plat was recorded. He advertised the lots by descriptions as indicated in the recorded plats for sale at public auction. The advertisements were printed, and stated the terms of the sale, which were that part of the purchase price was to be cash, and balance in notes due at stated intervals. At the sale appellee, John D. Davis, became the purchaser of some of the lots, being the highest bidder, and appellee, Henry J. Johnson, became the purchaser of others of the lots. The auctioneer at the time entered a memorandum of each of the sales upon his book, and signed it. Appellant tendered a joint deed to appellees, conveying to them jointly all the lots bought by them respectively, and demanded a compliance on their part with the terms of the sale. They refused to accept the deed tendered. This suit against them is for the specific execution of the contract of sale. The petition avers that appellees, Davis & Johnson, by parol agreement between themselves, entered into a copartnership to buy, own and use all the lots bought by them respectively; that it was part

of the agreement between them that each was to buy in his own name for the partnership of certain of the lots, which they each did buy, and that both were thereafter to pay for and own all of them as copartners.

A demurrer was sustained to the petition and it was dismissed because the circuit court conceived that the transaction and agreement were within the statute of frauds and perjuries, and were, therefore, void. There was not a tender of deeds to each of the appellees for the several lots bid in by each. So, unless the alleged parol agreement to enter into a partnership to buy the lots, and to hold them for the joint account of the partners, is enforceable, the judgment will have to be affirmed. The auctioneer's memorandum, signed by him, describing the lots sold and stating the terms of the sale, is sufficient to bind both seller and buyer, and is a compliance with the statute. (*McBrayer v. Cohen*, 92 Ky., 482; *Gill v. Hewitt*, 7 Bush, 11.)

The question is, who was the buyer? Nominally Davis bought certain lots, and Johnson certain others. So far as the auctioneer's memorandum goes, none of the lots were sold to both Davis and Johnson. However, if, as a matter of fact, they were purchased by each of them in their individual names for the partnership, they became partnership assets, liable for the debts of the firm, and to be treated as other partnership assets, for it can not be material how the title appears if it in fact belongs to the partnership. An agreement to become partners in trafficking in real estate is not within the statute of frauds and perjuries. That statute, as re-enacted in this State, reads: "No action shall be brought to charge any person * * * upon any contract for the sale of real estate, or any lease thereof, for longer term than one year, * * * unless the * * * contract * * * or some memorandum or note thereof be in writing, and signed by the party to be charged therewith, or by his authorized agent." * * * (Section 470, Kentucky Statutes. 1903)

An agreement to become partners in dealing in real estate is neither a contract to buy nor a contract to sell real estate as between the parties to it. So far as the formation of the copartnership is concerned the title to real estate is nowise affected by the making of the agreement. The terms of the agreement, the mutual undertakings by the partners as between themselves as to what each will contribute, and the interests of each in the profits of their undertaking, are matters not necessarily affected by the statute. The most numerous, and what seems to us the best reasoned authorities, hold that such contract need not be in writing if to be begun and may end within a year, although as a fact it may not be terminated for more than a year. We cite the following among many cases holding these views: *Browne* Statute of Frauds, sections 364-7; *Reed v. Meagher*, Colo., 9 L. R. A., 455; *Dale v. Hamilton*, 5 Hare, 369; *Jones v. Davies*, 60 Kan., 309, 72 Am. St. Rep., 354; *Bates v. Babcock*, 95 Cal., 479, 29 Am. St. Rep., 138, 16 L. R. A., 745; *Holmes v. McCray*, 51 Ind., 358, 19 Am. Rep., 735; *Richards v. Grinnell*, 63 Ia., 44, 50 Am. Rep., 727; *Chester v. Dickerson*, 52 Barb., N. Y., 349, 13 Am. Rep., 550.

In this State the doctrine prevails that partnership real estate is deemed personalty for the purposes of the partnership (*Spalding v. Wilson*, 50 Ky., 589; *Caskey v. Caskey*, 5 Ky. Law Rep., 775; *Flanagan v. Shuck*, 83 Ky., 617) which is sometimes given as one of the reasons for the rule that agreements

to become partners in dealing in lands is not within the statute. (*Flower v. Barnekoff*, 20 Oregon, 132.)

When the partnership is formed, though by parol, and the status of the copartners has become thereby fixed, the firm's transactions as between it and others concerning lands are subject to the same terms under the statute as any individuals are. The firm, if it proposes to buy or sell land, will be bound or not in the transaction precisely as an individual would be under the same circumstances. (*Duncan v. Duncan*, 98 Ky., 37.) It may buy or sell by its agent, whose authority need not be in writing. (*Tewksbury v. Howard*, 138 Ind., 103; *Brown v. Eaton*, 21 Minn., 409.)

The memorandum or contract, though signed by the agent alone, his principals not being named, is sufficient under the statute to charge the principals. (*Salmon Falls Mfg. Co. v. Goddard*, 14 How., U. S., 446.)

As copartners are deemed agents for each other in the transactions of the firm (*Ferguson v. Sims*, 3 Ky. Law Rep., 684; *Davis v. Wiley*, 3 Ky. Law Rep., 815, 755; *Scott v. Colmesnil*, 7 J. J. Mar., 423), a memorandum signed by a partner, or authorized by him and in his name, but made for the firm, will bind the partners.

The case of *Parker's Heirs v. Bodley*, 4 Bibb., 102, can not be deemed in conflict with what is herein adjudged. That case ought to turn upon the fact that the agreement between Bodley and Parker to become copartners in the purchase of the Byers' estate was not consummated until after Parker had bought the land. It was then held that his agreement, subsequently entered into, to sell a part of it to Bodley in the way of a partnership enterprise, was within the statutes of frauds. But if the opinion be not susceptible of this construction, it is not in harmony with the later decisions of this court, nor with the trend of the decisions on this subject generally.

It follows that if either of the appellees was in fact acting for his firm in buying the lots bid in by him at the sale, and was acting in pursuance to the partnership agreement alleged, his act in that matter was the firm's act. He had the power to bind his firm by employing an agent to act for it in signing a sufficient memorandum to comply with the statute. So that the signature of the auctioneer to his memorandum became the binding act of the firm in that transaction. As the sale was to appellees as partners, which gave them joint interests in the lots and made them jointly liable therefor (assuming the allegations of the petition to be true), the tender of one deed to them conveying the lots to them jointly was a full compliance with appellant's obligation under the terms of the sale to convey the title as a condition precedent to demanding the money and the execution of the notes. In our opinion the petition stated a cause of action and the court erred in sustaining the demurrer to it.

Judgment reversed and cause remanded for proceedings consistent herewith.

OBERDORFER v. LOUISVILLE SCHOOL BOARD.

(Filed March 10, 1905.)

1. School boards—Salaries of employes—Payment—The Louisville School Board, under Kentucky Statutes, section 2949, is a corporation, with power to contract, sue and be sued, and under section 2956 it had a right to employ a janitor and fix his salary, and by section 2954 it is its duty to pay such salary out of the fund which annually comes into its hands for educational purposes.

2. Duty of board—Suit against—Public policy—The payment of the salaries of teachers and employes is one of the duties imposed upon the school board, and a suit against it for the employe's salary relates to the business for which such board was organized, and such suit is not against public policy.

3. Assignment of salary—Rights of assignee—A janitor of a school, appointed by the school board, has the right to assign his salary after it is earned, and such assignee has the right to enforce its collection by suit.

Caruth, Chatterson & Blitz for appellant.

Randolph H. Blain for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Paynter.

From the averments of the petition the Louisville School Board employed John T. Bell as a janitor, and was indebted to him for wages which were past due. Bell assigned the claims to appellant, who instituted this action against the school board to recover them. The court sustained the demurrer to the petition.

By section 2949, Kentucky Statutes, the Louisville School Board is a corporation with the power to contract, sue and be sued. It had the right to employ a janitor and fix his compensation, under section 2956, Kentucky Statutes, for it is there provided that it may elect principals, teachers and employes, and fix their salaries. This being true, it was the school board's duty to pay the salaries thus fixed out of the funds which annually come into its hands for educational purposes. (Section 2954, Kentucky Statutes.)

The objections to the right to maintain the suit will appear in order. It is insisted that the school board is an agent of the State, and can only be sued for school purposes. Under the law the board of education has control of funds to pay the expenses of the public schools, which includes principals, teachers and employes. The payment of any of these salaries is one of the duties imposed upon the school board. A suit against a school board for an employe's salary relates to the business for which the school board was organized.

It is insisted that the school board as an agent of the State is not subject to be sued on the grounds of public policy. This is answered by the statement that the legislature has given its consent that the school board may be sued. Counsel for appellee again says that funds in the hands of the school board "can not be diverted by the legislature, processes of court or individual assignment." The purpose of this action is not to divert funds in the hands of the school board, but to enforce the payment of it for school

purposes. If it had been paid to the janitor, or his assignee, it is quite certain that it would have been paid for school purposes, because the law imposes that duty upon it. If it was the duty of the school board to pay the janitor, as we have found it to be, he had the right to enforce the payment of it by suit upon the board's refusal to pay it. If he had the right to do it, then his assignee had the same right, unless it was against public policy for the janitor to have made the assignment of his claim against the school board. If it were conceded that a janitor is a public officer, then he had the right to make an assignment of his salary after he had earned it. (Holt v. Thurman, 28 Ky. Law Rep., 92.)

The judgment is reversed for proceedings consistent with this opinion.

SIMONS v. GREGORY, &c.

(Filed March 14, 1905.)

1. Counties—County officials—Defective courthouse elevator—Injury to passenger—Liability—In an action by one injured by the falling of an elevator in use in the courthouse in Louisville, Ky., against Jefferson county, the officers of the fiscal court of Jefferson county, the jailer, county judge and justices of the county, personally, the Geiger, Fiske & Koop Co., who constructed the elevator, and the Fidelity and Casualty Co., who guaranteed its safety, alleging gross negligence in all the defendants in the building, acceptance, use of and operation thereof, and also alleging that all the defendants knew, or could by ordinary care have known, of its defective and dangerous condition, Held—As to Jefferson county, the fiscal court, the county judge and justices of the peace and jailer, the rule is that neither the county judge, the fiscal court, nor county officers are liable to a person injured from defects in the county highway, bridges or other structures which the county is, by law, required to maintain; that an elevator is a necessity in a five-story building, and the fiscal court had jurisdiction to have it built for the comfort and convenience of holding the courts.

2. Indemnity company—As the contract of the Fidelity and Casualty Co. was only to indemnify the county and fiscal court against loss, no action can be maintained against it by the plaintiff where neither the county nor the fiscal court are liable.

3. Builder—Liability—As to the Geiger, Fiske & Koop Co., who built the elevator, it is not averred that it knew the elevator was in a dangerous condition, but that it knew, or by the exercise of ordinary care could have known, this. Where a defendant sells a thing which he knows is dangerous and conceals the danger from the purchaser, a different question is presented. But this doctrine is not to be applied to the fall of an elevator which is charged to be due concurrently to its defectiveness and the unskillfulness and gross negligence of the operator in using it.

B. H. Young, M. W. Rippe, F. T. Fox, S. W. Greene, T. R. McBeath and J. C. Poston for appellant.

Kohn, Baird & Spindle and S. E. Sloss for appellee, J. R. Pflanz.

Gibson, Marshall & Gibson for appellees, Geiger, Fiske & Koop Co.

Forcht & Field and O'Neal & O'Neal for appellee Jefferson County and the Fidelity and Cas. Co. of N. Y.

M. A., D. A. & J. G. Sachs for appellee, J. P. Shively.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

Appellant was painfully injured by the fall of an elevator in the courthouse at Louisville while she was in the elevator as a passenger and being carried from the fifth floor to the first. She instituted this action against the fiscal court of Jefferson county, Jefferson county, the Geiger, Fiske & Koop Co., the Fidelity and Casualty Co., the jailer of Jefferson county, and the county judge and justices personally. She alleged that the fiscal court had the elevator installed in the courthouse voluntarily, and without any legal duty on their part to do so; that they failed to have it constructed safely, and by gross negligence permitted it to be operated when out of order and controlled by inexperienced persons; that the Geiger, Fiske & Koop Co. put in the elevator under contract with the fiscal court, and by gross negligence failed to make it safe; that the dangerous condition of the elevator was well known to the company, or could have been to it by the exercise of ordinary care upon its part, but was unknown to her; that the Fidelity and Casualty Co. of New York had entered into a certain contract with the fiscal court of Jefferson county, which was in force at the time she was injured, by which it bound itself to the fiscal court to indemnify it and the county of Jefferson against any loss which it might sustain by reason of any accident or injury which might be sustained by any person on account of the elevator. The court sustained a demurrer to the petition. Thereupon the plaintiff amended her petition, reiterating her charges of gross negligence, alleging that for some time before she was hurt the elevator was in a dangerous condition, and that the members of the fiscal court and the jailer knew this, or by the exercise of ordinary care could have known it; that the fiscal court received the elevator by gross negligence from the Geiger, Fiske & Koop Co. when it was in a dangerous condition; that the fiscal court was without authority to put an elevator in the courthouse, and that for some time before her injury the elevator, in its dangerous condition, was perilous to all persons having occasion to use it, and that this was known to the defendants, or could, by the exercise of ordinary care, have been known to them; that the operator of the elevator was grossly negligent and careless in its operation, and that the officers of Jefferson county referred to knew that he was an unfit person to have charge of it. The court sustained a demurrer to the petition as amended, and the plaintiff appeals.

1st. As to Jefferson county, the fiscal court, the county judge, justices of the peace and jailer, the ruling of the circuit court followed a long line of decisions of this court, the rule being in this State that neither the county, the fiscal court, nor county officers are liable to a person injured from defects in the county highways, bridges or other structures which the county is, by law, required to maintain. (*Wheatley v. Mercer County*, 72 Ky., 704; *Mobley v. Carter County*, 5 Ky. Law Rep., 694; *Hite v. Whitley County Court*, 91 Ky., 168; *Shepard v. Pulaski County*, 13 Ky. Law Rep., 672; *Dowing v. Mason County*, 87 Ky., 203; *Sinkhorn v. Lexington, &c., Co.*,

28 Ky. Law Rep., 1479; *Hardwick v. Franklin*, 27 Ky. Law Rep., 484.) The jailer is merely the custodian of the courthouse, and can no more be held responsible than the county judge or justices. We are earnestly asked to overrule the decision referred to, but this we can not do. The rule thus declared has been acquiesced in by the legislature in two revisions of the statutes. By section 1840, Kentucky Statutes, the fiscal court has jurisdiction "to erect and keep in repair public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat." The court must take judicial notice that the circuit court of Jefferson county is composed of six judges, and that Louisville is a city of the first class. It is alleged in the petition that the elevator fell from the fifth floor of the building to the basement. Some means of getting the people to the upper floors of such a building must be provided by the fiscal court in the discharge of its duty to secure a comfortable and convenient place for holding court. In buildings as high as this elevators are now in common use, and it was undoubtedly within the jurisdiction of the fiscal court to supply the courthouse with such conveniences as are used in this class of buildings. The demurrer to the petition admits as true its allegations of fact, but not its conclusions of law. On the facts admitted the law must be determined by the court.

2d. As to the Fidelity and Casualty Co., as its contract was only to indemnify the county and fiscal court against loss, no action can be maintained against it by the plaintiff where neither the county nor the fiscal court are liable to her.

3d. As to the Gelger, Fiske & Koop Co., it is earnestly argued that it should be held responsible because "it is alleged in the petition that the elevator was in a dangerous condition when accepted from the contractor by the fiscal court. It is not averred that it knew that it was in a dangerous condition, but that it knew, or by the exercise of ordinary care could have known, this. Substantially the same question was presented in *King v. Creekmore*, 25 Ky. Law Rep., 1292. In that case the defendant leased to another a steam engine, which exploded while operated by the lessee, injuring the plaintiff, and it was averred that the boiler was defective, and that the defendant so knew, or could have known by ordinary care. It was held that the defendant was not liable. That case approved *Loose v. Clute*, 51 N. Y., 494; *Curtin v. Somerset*, 140 Pa. St., 70; *Necker v. Harvey*, 49 Mich., 917, and *Lewis v. Terry*, 111 Cal., 39. The leading case on this subject is *Winterbottom v. Wright*, 10 M. & W., 109, which was followed in *Longneld v. Holladay*, 6 Ex. Ch., 761; *Hessen v. Pindar*, L. R., 9 Q. B. Div., 302; *Zieman v. Kieckhefer Elevator Manufacturing Co.*, Minn., 63 N. W., 102; *Collis v. Selden*, L. R., 3 C. P., 495; *Bank v. Ward*, 100 U. S., 93; *Goodlander v. Standard Oil Co.*, 27 L. R. A., 793; *Brangdon v. Perkins-Campbell Co.*, 30 C. C. A., 567; *Daugherty v. Herzog*, 145 Ind., 255; *Carter v. Harden*, 78 Me., 528; *McCaffrey v. Manufacturing Co.*, 55 L. R. A., 822; *Marvin Safe Co. v. Ward*, 46 N. J. L., 19; *Burdick v. Cheadle*, 26 Ohio State, 893.)

Where the defendant sells a thing which he knows is dangerous, and conceals the danger from the purchaser, a different question is presented. (*Hurst v. J. I. Case Co.*, 120 Fed., 865; *Heizer v. Kingsland Manufacturing*

Co., 110 Mo., 617; Lewis v. Terry, 111 Cal., 89.) There are authorities to the effect that the seller of a deadly poison or other thing imminently dangerous to human life is liable to a third person who may suffer injury by reason of his negligence. (Hurst v. J. I. Case Co., 120 Fed., 865, and cases cited.) But the doctrine of these cases is not to be applied to the fall of an elevator which is charged to be due concurrently to its defectiveness, the unskillfulness of the operator and his gross neglect in using it, for an elevator which, after being run for months, breaks down by reason of its being operated by an inexperienced and unfit person, and by reason of his gross negligence, can not be said to be imminently dangerous to human life. Such an elevator can not be distinguished from a defective steamboiler, a defective coach for the carriage of passengers, a defective wall, defective shelving in a storeroom, or a defective chandelier in a hotel, or the other things for which the maker was held not to be responsible to third persons injured thereby in the cases above cited. The case of Stowell v. Standard Oil Co., 102 N. W., 227, recognizes the soundness of these cases, and rests upon the idea that the oil sold there was such as could not be lawfully sold under the statute of the State.

Judgment affirmed.

PERRY v. COMMONWEALTH.

(Filed March 14, 1905—Not to be reported.)

Robbery—Evidence—The indictment in this case containing all the necessary allegations to constitute the crime of robbery, and the evidence showing that appellant snatched from the person of Crowder his watch, while the latter was walking along a street with two companions, pulling the watch with sufficient force to break the chain, and taking it from the possession of its owner, the evidence bringing it within the rule announced in Roscoe's Criminal Evidence, page 834, the judgment of conviction will not be disturbed.

B. C. Seay for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

The appellant was indicted by the grand jury of Graves county, charged with the offense of robbery, committed by taking from the person of J. S. Crowder his watch, against his will, by force and violence. A general demurrer was interposed to the indictment, and overruled by the court. A trial resulted in finding the appellant guilty as charged, and his punishment fixed at confinement in the penitentiary for two years. Of this he is now complaining.

The indictment contains all the necessary allegations to constitute the crime of robbery, and the trial court correctly overruled the demurrer. The evidence shows that as J. S. Crowder was walking along a street in Mayfield, Ky., with one or two companions, the accused and another joined them, and while thus moving along the accused snatched from the person of Crowder his watch, which was in his pocket, and attached to his clothing:

by a chain. The watch was pulled from the fob, and then, with sufficient force to break the chain, it was taken from the person of its owner. The instructions of the court correctly state the rule of law applicable to the case, and it only remains to determine whether or not the evidence was sufficient to go to the jury.

In the case of *Williams v. Commonwealth*, 22 Ky. Law Rep., 1850, where one snatched a pocketbook which a lady was holding in her hand, with sufficient force and violence to wrest it from her grasp, this constituted robbery, although she was not put in fear, nor was any injury done her person.

In *Roscoe's Criminal Evidence*, star page 834, the rule is thus stated: "The prisoner coming up to the prosecutor in the street, laid violent hold of the seals and chains of his watch, and succeeded in pulling it out of his fob. The watch was fastened with a steel chain, which went round his neck, and which prevented the prisoner from immediately taking the watch; but by pulling, and two or three jerks, he broke the steel chain and made off with the watch. It was objected that this came within the cases as to snatching; but the judges on a case reserved were unanimously of opinion that the conviction was right, for that the prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made, and actual force was used for that purpose." (*Mason's Case*, Russ. and Ry., 419.)

The evidence in the case at bar brings it within the principle contained in the authority above cited, and the judgment is, therefore, affirmed.

ILLINOIS CENTRAL R. R. CO. v. HOWARD.

(Filed March 14, 1905—Not to be reported.)

1. Bill of exceptions—Order filing—Section 4639, Kentucky Statutes, provides that the official stenographer's transcript of the evidence "shall be filed among the papers to be used in making up the bill of exceptions to the Court of Appeals, but the transcript in this case not having been filed by order of court, the record is here without a bill of exceptions.

2. Pleadings—Support of judgment by—The pleadings support the judgment in this case, and as no other question is raised by the record as presented the judgment will not be disturbed.

J. D. Atchison, C. S. Walker, J. M. Dickinson and Pirtle & Trabue for appellant.

La Vega Clements for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee, Martha A. Howard, fell from the platform of one of appellant's passenger coaches when she was getting on the train as a passenger, by reason, as she alleged, of the station's not being sufficiently lighted, and got a judgment in the sum of \$270 for her injuries. When the defendant's motion for a new trial was overruled it prayed an appeal to this court, which

was granted, but no order was made filing a bill of exceptions, or giving time to file one, and the record is here without a bill of exceptions. There is attached to the record the stenographer's transcript of the evidence heard on the trial, but there was no order of the court filing it as a bill of exceptions, or filing it as part of the record, although it is certified as correct by the judge who presided at the trial.

By section 4369, Kentucky Statutes, the official stenographer's transcript of the evidence "shall be filed among the papers to be used in making up the bill of exceptions to the Court of Appeals," but it does not become a part of the record for the purposes of a bill of exceptions without some order of the court filing it as a bill of exceptions, and can not be considered. The order heretofore made overruling the motion to strike the transcript from the record was due to a misunderstanding of the record. The pleadings support the judgment, and as no other question is raised by the record as presented the judgment appealed from can not be disturbed.

Judgment affirmed.

BURTON V. CITY OF LOUISVILLE.

(Filed March 14, 1905—Not to be reported.)

1. Taxes—Sale of land to pay—Provision of judgment—Three suits were pending by appellee against the owners of a certain lot, the object being to enforce its lien for taxes. A judgment was rendered in one and appellant at the sale thereunder purchased the property. Afterwards the city amended its petition in the other two cases making appellant a party and praying for a judgment for the enforcement of the lien. Held—The provision in the judgment that "said sale shall be made subject to the liens for unpaid State taxes, and unpaid taxes due or to become due the city of Louisville, on said property, and not recovered by this judgment, rendered the property subject to the lien for unpaid taxes.

2. Same—Construction of statutes—Section 3005, Kentucky Statutes, which provides that "when an action heretofore or hereafter brought under this or the following sections is still pending or undetermined, a new action upon subsequent accruing taxes may be brought, and either action may, in the discretion of the court, be carried to judgment separately, and a sale may be had under the judgment therein of sufficient property to satisfy the same, giving the purchaser a title free from tax liens set up in other causes," will not relieve appellant of the liens in the other actions in which he was made a party because he can not claim both under and against the judgment at the same time, and having made his purchase subject to the lien of the city he can not afterwards claim that he holds free of that lien.

Lane & Harrison for appellant.

Henry L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

In 1896 the city of Louisville instituted in the Jefferson Circuit Court, Chancery Division, an action against the owners to enforce its lien for taxes for the years 1891, 1892, 1893 and 1894, on a lot of ground lying on the east side of Fifth street, between Walnut and Chestnut streets, having a front of

forty-five feet on Fifth street, and running back the same width two hundred and four feet, being designated on the maps of the assessor as lot No. 10, block 82. On January 10, 1899, the city instituted a second action in the same court against the same defendants to enforce its lien on the same property for city taxes for the year 1897, and on the 17th day of July, 1899, it instituted a third action in the same court against the same parties to enforce a lien upon the same property for municipal taxes for the years 1895, 1896 and 1898.

While these three actions were pending the second one was set down for judgment, and no answer having been filed, the court rendered a judgment by default as prayed for in the petition. In pursuance of, and in accordance with, this judgment the property, after having been advertised as required by law, was sold at public outcry, and bid in by Hardy Burton for the sum of \$187.65, that being the amount of the judgment, interest and cost up to and including the sale. This sale was afterwards reported by the commissioner to the court, and no exceptions having been filed thereto, was approved; whereupon the purchaser paid into court the amount of his bid, and it was withdrawn by the city. Afterwards, the city amended its petition in the other two cases, making Hardy Burton, the purchaser, a party defendant thereto, and prayed for a judgment for the taxes involved therein and for an enforcement of its lien against the property hereinbefore described. The appellant thereupon filed his answer, setting up his purchase at the former sale, and claiming that by it he acquired the property free of lien for any other taxes due the city. A reply by the city placed in issue the allegations of the answer, and the case having been submitted to the chancellor he rendered a judgment subjecting the property in the hands of Burton to the lien of the city for its taxes for the years hereinbefore enumerated other than 1897.

Section 3005 of the Kentucky Statutes, which has relation to the enforcement by action of payment of taxes by cities of the first class, among other things contains the following: "When an action heretofore or hereafter brought under this or the following sections is still pending or undetermined, a new action upon subsequently accruing taxes may be brought and either action may, in the discretion of the court, be carried to judgment separately, and a sale may be had under the judgment therein of sufficient property to satisfy the same, giving the purchaser a title free from tax liens set up in other causes."

This, it is insisted, secured to appellant Burton by his purchase at judicial sale the title to the property free of any lien which the city might then have for other taxes. We think this is untenable. The judgment under which the purchase was had provided as follows: "Said sale shall be made subject to the liens for unpaid State taxes, and unpaid taxes due, or to become due, the city of Louisville of said property, and not recovered by this judgment."

Assuming that, without this provision in the judgment under which the sale was had, the purchaser would have obtained the property free of liens as against the city for taxes for the other years, we think it clear that the purchaser by his bid obtained the property subject to the city's lien for unpaid taxes by the express language of the judgment. He can not claim

both under and against the judgment at the same time, and having made his purchase subject to the lien of the city, he can not afterwards claim that he holds free of that lien. Even if the judgment was erroneous as being contrary to the provisions of the statute cited, it was not void, and never having been reversed, vacated or modified, it is binding on all the parties of which the court had jurisdiction. Nor was the default judgment void even if it afforded relief not specifically prayed for in the petition. This defect, if it existed (and that is not conceded), rendered it erroneous, not void. (*Handford v. Holdman*, 14 Bush, 210.) The case of *Allsmiller v. Freutchenicht*, 86 Ky. 198, does not support appellant's position in this regard. In that case the judgment was void as to the infants because they were not before the court on the pleading under which it was rendered, not because relief not specifically prayed for was granted. But we do not think the language of the statute susceptible of the construction given to it by appellant. The city had the right to bring several actions for taxes of different years. To the taxes for some of the years in the several suits valid defenses might be interposed, which would greatly delay the litigation, and to enable the city to obtain judgments in the other actions to which there might be no defense the statute permits the chancellor, in his discretion, to allow such to be prosecuted to judgment, and to sell thereunder sufficient property free of lien to pay off the judgment. But this statute was enacted for the benefit of the city, and not to restrict its rights. It does not forbid the chancellor to enter judgment in one of the cases decreeing a sale of the property subject to the lien depending in the others. The language of the statute enlarges the remedy, instead of denying or restricting it. And where the property is thus sold subject to lien for unpaid taxes not involved in the particular action in which the sale is had, the purchaser under this judgment can not complain that he does not get the property free of lien.

Judgment affirmed.

THOMPSON v. THOMPSON.

(Filed March 14, 1905—Not to be reported.)

Divorce and alimony—While the action of the chancellor in granting the divorce in this case can not be revised, he should have adjudged appellant alimony. She was turned out without anything and without sufficient excuse. The appellee is worth \$3,500 after the payment of his debts and had capacity to earn money, while she has little or no such capacity. From the circumstances an allowance to her of \$1,000 would be reasonable, and this should be adjudged her.

C. E. Denny and Robt. L. Greene for appellant.

S. Walton Forgy for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant and appellee were married on January 2, 1901. They lived together as man and wife until December 1, 1902, or about twenty-three months, they then separated, and she filed suit against him for divorce and

alimony. On final hearing the circuit court adjudged her a divorce, but refused to allow her any alimony, and she appeals.

At the time of their marriage she was eighteen years old, and he about forty. She was without means, and her father was poor; his family was better off, and he had a farm and some stock. He was slightly deaf and of a quiet disposition; she was more full of life, and fond of company. For the first year they lived happily together. During the second year the wife's health became bad from indigestion and some feminine disorder. Unhappiness grew up between them, which finally culminated in their separation. They had no children, and lived on a farm, no one living with them. The weight of the evidence shows that the wife was fond of going to dances, picnics and the like, or of visiting the neighbors, though it does not show that she neglected her household duties. The husband during the first year of their married life went with her, but the second year did not do so, evidently discouraging her going. He became jealous of her, charged her with receiving notes from young men clandestinely, and on one occasion, when he found a little negro boy under the table at dinner time, kicked or ran the boy out, refusing to credit her statement that she had the boy there to bring in stove wood for her, charging that the boy was there to bring her notes, and calling her a bitch and a liar. After this she was seen at home in tears, but does not seem to have told any one of her troubles. Still, evidently, it went on from bad to worse, until in the fall he drove her up to her father's one day in a buggy, and when she got out, handed her a note, telling her to read it and saying to her in effect that she need not go home unless she would promise that. The sum of the note was that she must not go any more to a neighbor's named Russell, who had three daughters, nice girls, to whom, for some reason, the husband had taken an objection. She answered that she would agree to it, after reading the note, and did return home, but some weeks afterwards she went with her brother over to Mr. Russell's one day, and when they came back the defendant had locked her out. She then went to her father's, and they did not live together any more. The defendant charged that she had been unfaithful to her marriage vows, and while in his answer he alleged that he wished her to return home and seems to have expressed this wish to her and her people about the time of the separation, or some time thereafter, still when he came to cross examine the witnesses which were introduced on behalf of his wife he undertook to prove by them that she was sending and receiving notes from young men and other conduct on her part which, if he believed to be true, would certainly destroy all chances of domestic happiness between them. He spoke of her as a low-down woman, and not only did not withdraw the charges he had made of infidelity, but attempted to substantiate them. The proof wholly fails to show any misconduct on the part of the wife, or any ground for the husband's suspicions, and while it is insisted for him that the witness is not to be believed who testifies to his calling his wife a liar and a bitch when he found the little boy under the table, there is no question that he doubted his wife's fidelity and that his jealousy of her was the cause of the trouble. For her to have returned to his home under such circumstances would have been to make marriage a mockery. No true woman could have maintained her self-respect as a wife doubted and dishonored as she was.

We can not revise the action of the circuit judge in granting the divorce, we can only revise his action in refusing the wife alimony. The wife was turned out without anything, her father being a poor man. The husband had a farm for which he refused \$3,100; he had four or five horses and other personal property. He owned a one-third interest in his father's estate, subject to his mother's life estate, and she was seventy-five years old. The father's estate was of value about \$4,000. He had borrowed from his mother \$650 and from his brother \$200. He was a thrifty, money-making man, in good health and prospering. Under all the evidence we are satisfied that he was worth not less than \$3,500 after the payment of his debts. Considering his interest in his father's estate, and considering the fact that he had capacity to earn money, while his wife had little or none, and the circumstances of his separation from the plaintiff, we conclude that a reasonable allowance to the wife for alimony is \$1,000, and that this should be adjudged her. We see no reason for increasing the allowance to her attorney.

Judgment reversed and cause remanded for a judgment as herein indicated.

KENTUCKY LIVE STOCK BREEDERS' ASSOCIATION v. HAGER, AUDITOR.

(Filed March 15, 1905.)

1. Appropriations—State fair—Title to act—Special legislation—Constitutionality—The Kentucky Live Stock Breeders' Association is a corporation created by the laws of this State for encouraging and promoting interest in breeding, management and general improvement and development of pure bred live stock, and holding annual exhibitions and sales of live stock. The Kentucky Legislature, on March 29, 1902, passed an act under the following title: "An act to provide for the improvement and development of the live stock, agricultural and kindred interests, by the establishment and maintenance of a State fair," and providing for the holding of an annual State fair for the exhibition of agricultural, mechanical, horticultural, dairy, forestry, poultry and live stock, to be known as the "Kentucky State Fair," and placed the same under the management and control of the board of directors of the Kentucky Live Stock Breeders' Association, and appropriated \$15,000 annually, to be used as premiums alone, in the holding of said State fair, to be paid by the State Treasurer to the treasurer of said Breeders' Association for the purposes named, who is required to give bond to the State for the faithful disbursement of said appropriation. In determining whether such appropriation is in conflict with section 59 of the Kentucky Constitution and subsections 17 and 29 thereof, which are as follows: "Section 59. The general assembly shall not pass any local or special acts concerning any of the following subjects, or for any of the following reasons, viz: " * * * "Subsection 17. To grant a charter to any corporation or to amend the charter of any existing corporation." * * * "Subsection 29. In all other cases where a general law can be made applicable no special law shall be enacted." Held—The act does not create the Kentucky Live Stock Breeders' Association. That corporation was already in existence. The act in effect makes an appropriation, and directs that a State fair be held. The Breeders' Association is simply an agency selected by the legislature to carry out its purposes, nor does the act relate to more than

one subject. The creation of the State fair, and the naming of the agency to carry out the legislative purpose, are germane to the subject expressed in the title, and are not foreign to it. The treasurer of the Breeders' Association is simply made the disbursing agent of the money instead of the State Treasurer, for the convenience of the public service, and no money is placed in the hands of any one not subject to State control.

J. Embry Allen for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hobson.

The following act became a law without the signature of the governor on March 29, 1902:

"An act to provide for the improvement and development of the live stock, agricultural and kindred interests by the establishment and maintenance of a State fair.

"Whereas, the State of Kentucky has fallen behind her sister States in the development of her live stock and her agricultural products, and has lost the prestige and high standing her live stock once gave her; and

"Whereas, in former times breeders from all parts of the United States and even foreign countries looked to Kentucky for pure bred stock to improve their herds and flocks; and,

"Whereas, as our neighboring States, viz.: Ohio, Indiana, Illinois and Missouri, are rapidly forging ahead of us as breeders of live stock by the annual appropriations of large sums to equip and maintain State fairs for the exhibition of the products of their respective States, and the payment of premiums of such exhibits, we deem it necessary to establish and maintain a State fair in Kentucky for the exhibition of live stock and the products of the farm, orchard, dairy, poultry, and such other interests as may be helpful to all the people of our State; therefore,

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. That an annual State fair for the exhibition of agricultural, mechanical, horticultural, dairy, forestry, poultry and live stock, be, and the same is hereby, created, to be known as the Kentucky State Fair.

"Section 2. That in order to relieve the said State fair of any political appearance the same is to under the management and control of the board of directors of the Kentucky Live Stock Breeders' Association, a corporation organized and existing under the laws of the State of Kentucky (having its principal office in the city of Louisville), and their successors in office, which board of directors are elected annually by the stockholders of the said association.

"Section 3. The sum of \$15,000 is hereby appropriated, which appropriations are to be used as premiums alone; the said fair to be held at such time and place as the board of directors of the Kentucky Live Stock Breeders' Association may determine, and the said Kentucky Live Stock Breeders' Association are to pay all other expenses incurred.

"Section 4. The sum of \$15,000 is to be paid annually, on the first day of July, at which time the auditor shall draw his warrant on the State treas-

urer in favor of the treasurer of the Kentucky Live Stock Breeders' Association.

"Section 5. The treasurer of the said Kentucky Live Stock Breeders' Association shall execute bond with the State of Kentucky, in the sum of \$15,000, for the faithful disbursement of such money, according to the provisions of this act.

"Section 6. The treasurer of the Kentucky Live Stock Breeders' Association, shall, within sixty days after holding such annual State fair, render to the auditor of the State of Kentucky an itemized statement showing the disbursement of such appropriation, which itemized statement shall be embodied in the State auditor's annual report.

"Section 7. Any part of the money unexpended shall be refunded by the treasurer of the said association to the State of Kentucky.

"Section 8. Any profits derived from the fair shall go into a sinking fund to be used for succeeding fairs of the association."

The Kentucky Live Stock Breeders' Association is a corporation created under the laws of this State, with its principal office in the city of Louisville. The nature of the business of the corporation is thus stated in its original articles of incorporation:

"The nature of the business to be carried on by the corporation shall be encouraging and promoting interest in breeding, management and general improvement and development of pure bred live stock and holding annual exhibitions and sales of live stock at Louisville, Kentucky."

This was amended on January 13, 1903, so as to read as follows:

"The nature of the business to be carried on by the corporation shall be encouraging and promoting interest in breeding, management and general improvement and development of pure bred live stock and holding annual exhibitions and sales of live stock."

The auditor of the State in the year 1904 declined to draw his warrant on the treasurer in favor of the treasurer of the Kentucky Live Stock Breeders' Association for \$15,000 as provided in the act, on the ground that the statute was unconstitutional, and this action was filed to obtain a mandamus directing him to do so. The circuit court dismissed the petition, and the plaintiff appeals. The only question to be determined on the appeal is the constitutionality of the statute. It is insisted that it is in conflict with subsections 17 and 29 of section 59 of the Constitution:

"Section 59. The general assembly shall not pass any local or special acts concerning any of the following subjects, or for any of the following reasons, namely: * * *

"Subsection 17. To grant a charter to any corporation, or to amend the charter of any existing corporation. * * *

"Subsection 29. In all other cases where a general law can be made applicable, no special law shall be enacted."

It is urged that the purpose expressed in the title of the act is the establishment and maintenance of a State fair, and that the legislature had no power to speak into existence a State fair.

The act does not create the Kentucky Live Stock Breeders' Association. That corporation is already in existence. The act in effect makes an appropriation, and directs that a State fair shall be held. The Kentucky Live

Stock Breeders' Association is simply an agency selected by the legislature to carry out its purposes. The prohibition of special legislation was not intended to prevent the legislature from legislating on a special subject, and we are unable to see how a general law could be passed providing for a State fair in substantially any other way. The act passed in the aid of the World's Fair at Chicago and the World's Fair at St. Louis were not less special legislation than the act before us, nor does the act relate to more than one subject. The creation of the fair and the naming of the agency which was to carry out the legislative purposes are germane to the subject expressed in the title of the act, and not foreign to it. The entire act relates to one subject. It is also insisted that a State fair is not a public purpose for which the money of the State may be appropriated by the legislature, and that the act merely gives a bounty of \$15,000 to appellant. The appropriation to the World's Fair was sustained by this court (*Norman v. Board of Managers*, 93 Ky., 537), and if the legislature may appropriate money in aid of a fair held in another State to properly represent the State in such a fair, it is hard to see how a fair held within the State to make an exhibit of the products of the State is not equally a public purpose. Such legislation has been sustained by the current of authority in the other States of the Union having constitutions substantially the same as ours. (*Daggett v. Colgan*, 92 Cal., 53; *State v. Cornell*, Neb., 74 N. W., 61; *Sharpless v. Mayor of Philadelphia*, 21 Pa. State, 147; *City of Minneapolis v. Janney*, 90 N. W., 312; *Downing v. Indiana State Board of Agriculture*, 129 Ind., 448; *Shelby County v. Tennessee Centennial Exposition*, 26 S. W., 694; *Bennington v. Park*, 50 Vt., 173.)

In *House of Reform v. City of Lexington*, 23 Ky. Law Rep., 1470, and *Children's Home Society v. Hager, Auditor*, 26 Ky. Law Rep., 1135, we held that the State might appropriate money to a public purpose, and make an existing corporation its agent for the disbursement of the appropriation just as it may appoint other agencies for this purpose. We adhere to the rule laid down in those cases for the reasons there given.

The learned attorney general has not referred us to any case holding an act making an appropriation for a State fair unconstitutional. He relies mainly on *Michigan Sugar Company v. Auditor General*, 83 Am. St. Rep., 351. In that case the Supreme Court of Michigan held that an act paying a bounty of one cent a pound to the manufacturers of beet sugar was unconstitutional on the ground that to use the public money to build up a private business was to take private property not for public but for private purposes by act of the legislature. We do not doubt the soundness of the decision, but it has no application to an appropriation for a State fair which is a public purpose. He also referred us to several cases in which it was said that the money of the people belongs in the custody of the agents of the people, and can not by the legislative act be put into the hands of those over whom the State has no control. Such expressions must be confined to the State of case presented to the court when they were used. The legislature of a State has all power not prohibited by the Constitution. There is in our Constitution no limitation on the power of the legislature to create agencies for the execution of its purposes or to select such as it deems fit. The power has often been exercised. It will be observed that by the act in question

the treasurer of the Breeders' Association is required to execute bond with the State of Kentucky in the sum of \$15,000 for the faithful disbursement of the money according to the provisions of the act; that any part of the money unexpended must be refunded to the State; and that within sixty days after the holding of the annual fair the treasurer shall render to the auditor of the State an itemized account of the disbursement of the money, and that this itemized statement shall be embodied in the auditor's annual report. It will thus be seen that the treasurer of the Breeders' Association holds the \$15,000 by virtue of the act and under his bond. He can not apply the money for any other purpose except the payment of premiums as directed in the act, and any surplus left is to be returned to the treasury. He is, therefore, under the control of the State; his powers are defined by the statute, and the legislature may at any time, by repealing the act, have any amount left in his hands unexpended returned to the treasury. The effect of the act would not be different if the legislature had provided that the premiums awarded at the fair should, to the extent of \$15,000, be paid directly from the State treasury to the person to whom the premium was awarded. The treasurer of the Breeders' Association is simply made the disbursing agent of the money, instead of the State treasurer, for the convenience of the public service, and no money of the State is placed in the hands of any one not subject to State control.

Judgment reversed and cause remanded for a judgment as herein indicated.

Whole court sitting, Judge Nunn dissenting.

PERKINS v. APPLGATE, &c.

(Filed March 15, 1905—Not to be reported.)

1. Stock certificates—Sale of—Contract to sell—Where a power of attorney appended to each of certain notes which were secured by lien upon certificates authorized a private sale of the stock certificates without advertisement or notice, but by clear implication precluded the holder of the notes from becoming the purchaser at such sale, the purchaser should be required to show that the sale was fairly made according to the terms of the contract at "public sale."

2. Same—It being evident that appellant made no effort to dispose of the stock with a view to benefit the appellees, but that his purpose was to obtain the property for himself at the lowest possible price regardless of the interest of those whom it was his duty to protect, the sale to him was contrary to law.

3. Same—It was improper for the court below to require so large a sum (\$65,000) to be placed in the hands of its commissioner at the expense of the parties, and there held until the exchange of stock and notes were made or the litigation ended. The court should have fixed a day within a reasonable time for the exchange of money and stocks to take place.

S. D. Rouse and Judson Harmon for appellant.

Myers & Howard for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

The appellee, acting for himself and as trustee for several associates, on the first day of March, 1895, purchased from appellant 825 shares of stock, the same being a controlling interest in the Latonia Agricultural Association (hereinafter referred to as Latonia), at the price of \$200,000. Of this sum \$50,000 was paid in cash, and the residue in various deferred payments, for which promissory notes were executed and delivered to Perkins, secured by pledge of 800 shares of this stock. To each of the notes for the deferred payments the following language was appended: "And hereby give to the holder thereof full power and authority to sell, or collect at our expense, all or any portion thereof, at any place, either in Covington, Ky., or elsewhere, at public or private sale, at holder's option, on the nonperformance of the above promise and at any time thereafter, and without advertising the same or otherwise giving to us any notice. In case of public sale the holder may purchase without being liable for more than the net proceeds of such sale."

After maturity of the notes and the payment thereon by Applegate and his associates of \$85,000, in addition to the \$50,000 cash payment, they failed to pay when due the remaining \$65,000 of the purchase price.

Appellant, on the 2d of November, 1899, notified Applegate and advertised that he would cause the stock to be sold at public auction on the Cincinnati Stock Exchange, on the 1st of December, 1899, between 11 and 12 o'clock, Perkins at that time being in New York and Applegate in San Francisco. This sale was postponed until the 11th of December. On that day Irwin, Ballman & Co., managers of the stock exchange in Cincinnati, reported that they had sold this stock at the price of \$25,000.

Some time prior to November 12, 1902, the appellees tendered to the appellant \$85,000 in cash, the balance due, with its interest on the original purchase price, as appellees claimed. Appellant refused to accept the same, claiming that he was the owner of the stock by reason of his purchase of same at the sale on the stock exchange. On the last-named date appellees instituted this action, in effect alleging that the sale of the stock by Irwin, Ballman & Co. and the purchase by appellant was fraudulent and void; that in fact there had been no sale or purchase by appellant at that time, or at any time. The appellant answered and controverted the material allegations of the petition and pleaded the special contract and authority to sell under the power of attorney attached to each note and a fair public sale after notice to Applegate, without fraud or improper advantage, and that he became the purchaser and acquired a perfect title to the stock; that the association at the date of Applegate's purchase was a prosperous enterprise and the stock valuable, but that Applegate and associates, by introducing new and improper methods, notably the so-called "foreign books," destroyed the prestige of the association, failed to pay its debts, and thereby depreciated the value of the stock, and that after appellant again acquired control under his purchase of the stock, by proper management, it had again become a successful enterprise, and the stock very valuable, and that it would be inequitable, under the circumstances, to require him to surrender the stock and control of the property, and that appellee's long delay, laches, acquiescence and implied ratification of the sale of stock should estop him from the recovery thereof or any equitable relief whatever.

Appellant replied and controverted the affirmative allegations of the answer, and alleged that the cause of the depreciation of the value of the stock, while the association was under their management and control, was due to the general depression of the finances of the country at that time, the lagging interest in racing and to two competing race tracks in the immediate vicinity which were put in operation shortly after their purchase of Latonia; that the increase in the value of the stock, after appellant's pretended purchase, was because of the improvement of the financial interests of the country, the revival of interest in racing and the collapse of the two competing race tracks.

On the trial below the court adjudged the 800 shares of stock to be the property of appellee and his associates, and directed appellees, within sixty days from that date, to pay to the master commissioner of the court the balance due appellant on the purchase price of the 825 shares of stock, and directed appellant, within ten days thereafter, to deliver to the master commissioner the 800 shares of stock, and thereupon the commissioner was ordered to turn over to appellant the money so received from appellees and the stock to appellees.

The real questions to be determined on this appeal are: First, whether or not the sale and purchase of the stock by appellant, at the stock exchange on the 11th of December, 1899, was a valid sale, and passed the legal title thereto to the appellant; and, second, if the title did not pass to the appellant by that purchase, then whether or not his long delay in the institution of this action to recover the stocks, his laches, acquiescence and implied ratification of the alleged sale should now preclude appellees from a recovery of the stocks.

The proof shows that appellant elected to sell the property at public sale and selected December 1, 1899, as the time, and that this sale was duly advertised. There was no advertisement of the sale for December 11th, but this was not necessary, provided there had been made a public announcement of the postponement to that day on December 1st. Upon this question the proof was very conflicting. This question is not material, for the reason that we have arrived at the conclusion from the evidence that there was in fact no public sale of the stocks made December 11, 1899, as claimed by appellant.

It appears from the record that appellee telegraphed W. C. Pierce, his attorney in Cincinnati, and one Simonton to attend the sale and protect his interest by purchasing the stock at the amount of appellant's debt and interest; that they made preparations to do so, and sent one Gordon Durrell to the stock exchange to ascertain whether the stocks would be sold on that day. Durrell testified that he went in obedience to this request to the stock exchange on the 11th of December, 1899, between the hours of 11 and 12 o'clock, nearer 12, and inquired of Mr. Irwin whether or not there would be a sale of the stock on that day, who informed him that there would be no sale; that the stock had been withdrawn and no future day fixed for the sale. This Durrell reported to Pierce and Simonton, and they by telegram so reported to appellee. Mr. Irwin, as a witness for appellant, denied the statements of Durrell, and stated he was the auctioneer and sold the property at public auction at the hour of 12 m., and Mr. Lee, the cashier of the

First National Bank of Covington, was present, and made the purchase. When it was shown by Mr. Lee's testimony that he was not present, Irwin then stated that the purchase was made by his partner, Mr. Ballman. Mr. Ballman testified that he was not present, and knew nothing of the sale. Irwin also stated that Mr. Hartlieb, a clerk in the office, was present. Mr. Hartlieb testified that he knew nothing of the sale. This leaves Mr. Irwin making a sale with no one present, and acting as the agent of Perkins as trustee in selling, and as the agent of Perkins individually in buying. This was the same as if Perkins as trustee had sold to himself individually with no one else present. It will be noted that the power of attorney appended to each of the notes authorized a private sale of the stock without advertisement or notice, but by clear implication precluded the holder of the notes, the appellant, from becoming the purchaser at such sale, by expressly providing "that in case of public sale the holder may purchase without being liable for more than the net proceeds of the sale." Unquestionably if appellant had sold the stock at private sale to some bona fide third person as purchaser, the sale would have been good under this special contract. But having elected to sell at public sale, and holding the stock as pledgee and trustee, before he could acquire a valid title by purchase at his own sale (contrary to the general rule that no one can be seller and buyer at the same sale), he should be required to show that the sale was fairly made according to the terms of the contract at "public sale."

It further appears that appellant caused Mr. Lee, above referred to as his agent, to place this stock on the stock market in this exchange for sale, and gave him special instructions to buy it for him at the price of \$25,000, if there were no other bidders, but if there were, to make it bring \$80,000. From the foregoing facts and circumstances, and others proven in the case, it is evident that appellant made no effort to dispose of this property with a view to benefit the appellees, but his purpose was to obtain the property for himself at the lowest possible price, regardless of the interest of those whom it was his duty to protect. This is contrary to law. It places a salutary restraint upon the pledgee to secure his fidelity and good faith, and he is held at his peril to deal fairly and justly with the pledgor. (2 Kent., 576-582; Benj. on Sales, 35; 22 Am. & Eng. En., 885, and authorities there cited.)

Until the fall of the hammer an auctioneer is the agent of the seller alone, and as such can not act inconsistently with the interest of his principal. To sell for one person and buy for another are inconsistent acts. Hence he can not buy for himself; nor indeed will he be permitted to purchase for another. (3 Am. & Eng. Enc. of Law, 2d edition, 493, and the many authorities there cited.) From this it appears that the attempted sale was void and passed no title to appellant, and, therefore, the stock is still in his hands as pledgee under the original contract. Having arrived at this conclusion the other question is of easy solution.

If this sale had been voidable instead of void, appellant's contention of appellees' long delay, laches, acquiescence and implied ratification of the sale of the stock would have some force. But as the sale was void, these questions have no application. The appellees by cross appeal complain of the action of the lower court in requiring them to deposit the money with the master commissioner, and then giving ten days thereafter for the appellant

to produce the stocks for the exchange. It was improper for the court to require so large an amount of money to be placed in the hands of its commissioner at an expense to the parties, and there to be held until the exchange was made or the litigation ended. The court should have fixed a day, within a reasonable time, for the exchange of money and stocks to take place. In all other respects the judgment of the lower court is correct.

Wherefore, the judgment is affirmed on the appeal and reversed on the cross appeal.

Whole court sitting, except Judge Cantrill absent.

DAVIESS v. DOVEY, EX'TX, &c.

(Filed March 15, 1905—Not to be reported.)

Wills—Construction of—Period of distribution—The will in controversy is silent as to the period of distribution except it is provided that "when the eldest child attains the age of 21 years, or, being a daughter, marries, I authorize the trustees for the time being, acting under this will, to appoint three competent persons to appraise and value the whole of my property, and to partition and divide the same among such of my children as may be then living," the trust will endure until it has been terminated by act of the parties, or a court of competent jurisdiction, and, therefore, the contract and deed for the mining property sold appellant by the trustees was not beyond the power conferred upon them by the will.

W. B. Dixon and Humphrey, Hines & Humphrey for appellant.

Jonson, Wickliffe & Jonson for appellees.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge O'Rear.

John J. Dovey's will, probated in 1878, appointed appellees as trustees of his estate for the benefit of his widow and children, giving to the trustees the power to sell and convey, lease or otherwise dispose of his lands and leaseholds, to give discharges for purchase money, and to make such disposition of it as to them seem proper. The trustees were to receive the rents, profits and income, and after paying the necessary expenses of administering the trust, "then in trust to pay one-third of the net income to testator's wife, Catherine J. Dovey, for life, and, subject thereto, to apply so much of the income as may be necessary in the maintenance and education of the testator's infant children, until they shall severally attain the age of 21 years, or, in case of a daughter, shall marry, each child to be charged in the distribution of the principal with his or her share of such expenses."

While the will is silent as to the period of division, except that it is provided: "When the eldest child attains the age of twenty-one years, or, being a daughter, marries, I authorize the trustee, for the time being acting under this will, to appoint three competent persons to appraise and value the whole of my property, and to partition and divide the same among such of my children as may be then living." In allowing this partition, however, the testator required that it should be subject to the income of one-third secured

to his widow, and that a lien therefor be retained on each child's share or portion or otherwise as the trustees might see fit.

A part of the estate consists of certain mining properties in Muhlenberg county, this State. The trustees sold this property to appellant and tendered him a deed, conveying the title of the testator. Appellant declined to accept the deed, and refused to pay the balance of the purchase money upon the ground that the power of the trustees had terminated, and that they were, therefore, unable to convey him a good title. Before the making of the contract with appellant testator's children had all passed the age of twenty-one years, yet there had never been a partition of his estate among the devisees, nor, so far as the record shows, was there a demand for it. The question for decision is whether the trust is terminated, or whether it continues over the property. It is to be noted that the will does not provide the time at which the trust will end absolutely. Instead it is provided that it may be ended when the testator's eldest child comes to 21 years of age, or, being a daughter, is married. But the use of the term "may be" implies necessarily that it may or may not. Until it has been terminated by the act of the parties, or of a court of competent jurisdiction, the trust will endure so as to conserve the title and interest devised to the ends intended by the settler. In this case the trust imposed upon the testator's estate was to the end first of providing an income to his widow. Though a partition should be had as allowed by the will, still the whole estate was first liable to her support, which was placed at one-third of the income. As every part of the estate was thus impressed, and as the trustees were specifically charged with the duty to collect and pay over this support in any event, until a partition was had and security given by the devisees to pay to the widow their ratable portions of the one-third, it was incumbent upon the trustees to manage the whole estate as an entity. Deriving their authority from the provisions of the will, their power is to be measured by the terms of that instrument. The contract and deed made by the appellees as trustees are not beyond the power and estate conferred upon them by the will.

The judgment is affirmed.

MESSER v. COMMONWEALTH.

(Filed March 15, 1905—Not to be reported.)

Criminal law—Instructions—Appellant's defense upon this prosecution was that the pistol with which deceased was killed was discharged accidentally and without knowledge upon his part that it was loaded, and it was error for the court to omit the giving of an instruction submitting the plea of self defense.

F. D. Sampson and Jas. A. Scott for appellant.

N. B. Hays for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge O'Rear.

The theory of the Commonwealth in this prosecution seems to be that appellant killed deceased while carelessly and recklessly handling a pistol,

with knowledge of its danger to those about him. On the other hand, appellant's defense is that the pistol was discharged accidentally, and without knowledge upon his part that it was loaded, or otherwise dangerous in its then condition.

We see no objection to the instructions that were given to the jury, but the court omitted to give an instruction submitting appellant's defense, that is, accidental killing. On a former trial this instruction, No. 4, was given, and it should have been given on this trial.

Consequently the judgment is reversed and cause remanded for a new trial under proceedings consistent herewith.

KING v. HUNI, &c.

(Filed March 15, 1905—Not to be reported.)

Brown & Vance and R. D. Vance for appellant.

Drury & Drury and R. L. Greene for appellee Huni.

Montgomery & Merritt for appellee Gallus.

Appeal from Henderson Circuit Court.

Judge Settle delivered the following extension of opinion:

Our attention is directed by the petition for rehearing to the fact that the judgment of the lower court allows appellee, John Gallus, credit upon the lien debt of the appellant, King, against him by the sums paid by Bertha Gallus, the wife of the former, upon the consideration she undertook to pay King for the land when he sold and conveyed it to her after his purchase of it at the commissioner's sale, and that Bertha Gallus is also allowed by the judgment to recover of King the sums thus credited to her husband. In other words, the judgment in question charges King twice with these payments. This was improper. John Gallus was properly credited on the original purchase money lien of King by the sums paid by his wife on her pretended purchase of the land from King, but she should not have been given judgment against King for the sums she paid him, and the judgment to that extent was and is erroneous.

We are of opinion that the facts and circumstances connected with the conveyance from King to Bertha Gallus show that the transaction was not in good faith, but that it was a scheme to defeat the lien debt of appellee Huni, and that the money paid King by Mrs. Gallus belonged to her husband. The judgment of the lower court is, therefore, reversed in so far as it permits Bertha Gallus to recover of King the several amounts she paid him, but affirmed in all other respects. The petition for rehearing, except to the extent herein indicated, is overruled, and the cause is remanded for further proceedings consistent with this and the original opinion. But no cost shall result to the appellee, Huni, by reason of the reversal of the judgment as between King and Bertha Gallus.

HOSKINS' ADM'X v. MORTON.

(Filed March 15, 1905—Not to be reported.)

1. Errors in settlement—This case is reversed for errors made by the commissioner in his settlement between the parties, in not allowing appellant credit for a \$500 note, with its interest, and in charging him with \$180.82, with its interest, making a total error of \$710.50, which will reduce appellee's judgment to \$473.05 instead of \$1,182.56, shown by the settlement, which was confirmed by the lower court.

2. Costs—Discretion of Court of Appeals—Under Kentucky Statutes, section 891, which provides that "on reversal of a judgment in the Court of Appeals the appellant shall recover of the appellee such costs as the judges in their discretion shall award," in view of this statute and the apparent unnecessary volume of the record, containing more than 1,000 pages, and the peculiar facts of the case, it is ordered that appellant pay one half of the costs incurred in this appeal to the clerks of the lower court and this court, for the transcript and copy of the record, and that he recover of appellee the remainder.

Lane & Harrison for appellant.

Geo. L. Burton for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

This is the second appeal in this case, the former opinion being in 25 Ky. Law Rep., 1008. In that case the questions at issue between the parties were settled, and the only thing that remained was a final settlement of accounts. The case was referred to the commissioner to take proof and report the existing state of accounts between the parties. He reported that appellant was indebted to appellee in the sum of \$1,182.56. Many exceptions were filed to this report, which the court overruled, and rendered judgment against appellant for that sum, from which judgment appellant appeals.

While appellant contends that the judgment should be reversed for many reasons, we do not deem it necessary to notice more than two: First, that the court failed to allow him credit on the settlement of a \$500 note against one Kruiger, purchased by him from the appellee in the year 1889, the same being a lien on the twenty-four acres of land sold to Kruiger and by Kruiger to appellant, November, 1895; second, the refusal of the court to allow him any compensation for his loss of time and trouble and expense in transacting the business of the appellee as her agent for more than twenty years. As to the latter contention we deem it sufficient to say, without going into details, that the action of the lower court was correct, as the proof in the case authorized it. We have given the first proposition a very careful consideration, and are of the opinion that the lower court erred in failing to allow the appellant a credit for the \$500 note referred to with its interest.

Appellee contends that this note, with its interest, was paid to appellant at the date of the conveyance of the twenty-four acres of land by Kruiger to appellant in the month of November, 1895. This is true so far as Kruiger was concerned, as this note was used by appellant as a part of the purchase price paid to Kruiger for the conveyance of the land, and if the title to this

twenty-four acres had been permitted to remain in appellant, the note would have been settled. But when the court adjudged that the title to this land was improperly in the appellant, and directed him to convey the same to appellee, then she became debtor to him for the amount of this note with interest which he had used in the purchase of the land from Krulger. Appellee also contends that on the date he purchased the land from Krulger and took the title in himself he, as agent, had funds in his hands belonging to her sufficient to pay the amount of this note with its interest. The proof fails to sustain this contention. Her own testimony shows the fallacy of it. She testified that on May 31, 1895, there was a balance due her from appellant of \$301.67, as shown by a paper which she filed, given her by appellant on the day named. She also testifies that on March 19, 1896, there was a balance in the hands of appellant to her credit of \$277.28. She also proves that between the two last named dates she drew from the hands of the appellant, her agent, the amount of \$220 in cash, and made deposits with him within that time, giving the exact amount, something less than \$200. The commissioner, in auditing the accounts between the parties, commenced it by charging the appellant as of March 19, 1896, with this balance of \$277.28, assuming that this \$500 note, with its interest, had been settled out of funds in appellant's hands belonging to appellee in the month of November, 1895, the date of the deed from Krulger to appellant. Under the facts as proven it was impossible for that assumption to be true, and the court, in sustaining the report of the commissioner, erred to that extent.

We find that the court erred against appellee to the extent of \$130.32, the difference between the amount the appellant charged himself with and the actual value of the Hamilton judgment, with its interest, as of the date of August 3, 1880. The amount he charged himself with on that judgment was \$564.33, when he should have collected and charged himself with \$694.65, and he failed to give any satisfactory explanation for this discrepancy, and should, therefore, be charged with the difference. Giving appellant credit for the \$500 note with its interest, and charging him with the \$130.32, with interest, both calculated to June 1, 1903, the date of the commissioner's report, shows that appellant should have been allowed by the commissioner and the court an additional credit of \$710.51, and the judgment of the lower court in favor of the appellee should have been for the sum of \$473.05, instead of \$1,182.56.

Section 891, Kentucky Statutes, provides "on a reversal of a judgment in the Court of Appeals the appellant shall recover of the appellee such costs as the judges in their discretion shall award." In view of this statute, and the apparent unnecessary volume of this record, containing more than 1,000 pages, and the peculiar facts of this case, we are of the opinion that it would be inequitable to adjudge the whole cost of this appeal against the appellee. It is, therefore, ordered that appellant pay one-half of the cost incurred on this appeal to the clerks of the lower court and this court for the transcript and copy of the record, and that he recover of appellee the remainder.

The judgment of the lower court is reversed and remanded, with directions to the lower court to enter judgment in favor of the appellee for the sum of \$473.05, with interest from the 1st day of June, 1903, and her cost in that court expended.

DILLS v. AUXIER, &c.

(Filed March 15, 1905—Not to be reported.)

Action to settle an estate—Allowance to attorneys—In an action to settle an estate valued at \$75,000, consisting almost wholly of lands lying in different tracts, in several counties, for the payment of the indebtedness of the estate amounting to over \$10,000, and requiring of the attorneys engaged a great deal of labor in ascertaining the quantity, quality, value and location of these various tracts, and in the examination of titles and also in investigating the claims of the various creditors of the estate, an allowance in the aggregate for the services of the several attorneys so employed in such settlement of \$1,250, which was fixed by the lower court upon a "hearing" of the value of such services, can not be held to be excessive or unreasonable.

James Goble for appellant.

J. F. Hager, A. J. Auxier and N. J. Auxier for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Settle.

The judgment from which this appeal is prosecuted was rendered in an action brought by appellant as the executrix of the will of John Dills, deceased, against certain of his devisees and creditors, for the settlement of his estate.

By the judgment in question certain fees were allowed her attorneys, which it is insisted were unreasonable and excessive in amount. It appears from the record that the testator, John Dills, left at his death an estate valued at about \$75,000, consisting almost wholly of lands, some of which were valuable for farming purposes, but much more of it because of its fine timber and rich mineral deposits. He was, however, considerably in debt, and as there was no money or personal property with which to pay the debts it became necessary to obtain a decree for the sale of some of the lands for that purpose, and this was the principal object of the action.

The judgment complained of is on page 169 of the record, and the fees allowed thereby are as follows: To Auxier & Auxier "\$420.16, balance of \$500, after deducting \$69.85 and \$10 for legal services rendered in this and other causes appertaining to Col. John Dills' estate." To R. T. Burns, \$250; James Stewart, \$150; W. O. B. Ratliffe, administrator of W. M. Connolly, deceased, and T. N. Huffman, administrator of W. H. Connolly, deceased, \$250, to be equally divided between them. W. S. Harkins, \$250, and J. C. Bowles, administrator of O. C. Bowles, deceased, \$100, the last-named sum to be credited upon the indebtedness of the decedent to the estate of John Dills. Only the fees allowed by the above judgment to Auxier & Auxier and the administrators of the Connollys were for services rendered in the suit to settle the estate.

The language of the judgment as to the fee allowed Auxier & Auxier is so ambiguous that it is difficult to determine whether the \$500, less \$69.85 and \$10, was for professional services rendered in the action to settle the estate and other cases, or whether it was meant to be allowed for the one case, but to be credited by \$69.85 and \$10, they had been paid for services rendered in other cases for John Dills, or his estate. But assuming that the entire \$500 was for legal services in the one case, the action to settle the estate, we find

in the record an order entered at a previous term which also allowed Auxier & Auxier for similar services in the same case \$250. They received, therefore, \$750. In addition, by the previous order mentioned, W. S. Harkins was also allowed \$250 for professional services rendered in the same case, and we have already seen that by the judgment appealed from the administrators of W. M. and W. H. Connolly were likewise allowed \$250 for similar services rendered by the Connollys in the same case; so it is shown by the record that a total of \$1,250 was allowed the attorneys of the executrix for legal services rendered in the case to settle the estate of John Dills.

Viewing this sum as one allowance to one attorney, or one firm of attorneys, for legal services rendered in the case, was it so unreasonable or excessive as to authorize a reversal of the judgment? As already stated, the estate of the testator consisted mainly of lands. These lands were in many different tracts, situated in several counties. The labor of the attorneys in ascertaining the quantity, quality, value and location of these many tracts of land, and investigating the title of each tract before instituting the action, was great; in addition, it was their duty to ascertain the indebtedness of the testator, the names of his creditors, and what debts were due the estate, in order to determine whether the bringing of the action was necessary. An examination of the record will show that the indebtedness of the estate, as presented by the several reports of the commissioner to whom the case was referred, was \$10,172.98. The payment of a large part of this indebtedness was resisted for the executrix, by numerous exceptions and pleadings filed by her attorneys, and a great deal of proof was taken by the commissioner in support of and against many of the claims filed, to which her attorneys gave their attention. It also appears that a receiver was more than once appointed to take charge and dispose of saw logs and other property belonging to the estate, or in which it had an interest. Sales of land had to be and were made and reported, these reports and others made by the commissioner and receivers had to lie over for exceptions and be confirmed, deeds had to be made to purchasers of lands, and moneys collected and disbursed. To all such matters the attorneys representing the executrix seem to have given the necessary and customary attention, and if no other evidence had been presented as to the character and extent of their services than is furnished by the pleadings, reports, orders and other papers found in the record, we would be unable to say that the total of the fees allowed by the lower court for legal services in the action to settle the estate was unreasonable as compensation to one attorney or firm of attorneys, and if reasonable, it did not injure appellant to divide the sum allowed among all her attorneys.

We find, however, that the special judge in fixing the fees of the attorneys did not limit his inquiry as to the value of their services to a mere inspection of the record, for the judgment states that "upon hearing" they were allowed. It must, therefore, be presumed that proof was heard by the court, and that the sums allowed were authorized by the proof. The propriety of the allowances to Burns, Stewart, Harkins and Bowles made in the judgment appealed from, we think, free from doubt. The judgment itself shows that the services for which \$250 each to the three first, and \$100 to the administrator of the latter was allowed, were not rendered in the suit to settle

the estate, but in the action brought by Georgia A. Adams, a daughter and devisee of John Dills, against appellant as his executrix, the object of which was to obtain a construction of the will. It was contended by Mrs. Adams, in the action against the executrix, that the first clause of her father's will limited the estate of appellant as his widow as one for life only, and that at most the power of sale and disposition of proceeds allowed the widow by the will were restricted to her support and maintenance and the payment of the testator's debts. The court below practically sustained this construction of the will, but upon appeal this court held that the widow took under the will the absolute fee to all the land, except certain tracts specifically devised her children. (Dills v. Adams, 19 Ky. Law Rep., 1169.)

It appears from the record that the appellant, Ann Dills, as widow and executrix, was represented in that case in both the circuit court and Court of Appeals, by R. T. Burns, James E. Stewart, W. S. Harkins, and that O. C. Bowles, R. T. Burns and James E. Stewart were employed by her at the same time, as the following writing found in the record will show:

"As executrix of the will of John Dills, deceased, I hereby employ J. E. Stewart, R. T. Burns and O. C. Bowles to defend the action of Georgia Ann Adams against myself as executrix, and others defendants, in the Pike Circuit Court, and I promise and bind the said estate to pay them a reasonable fee for their services. This October 31, 1895.

"ANN DILLS."

An order of the court shows that this writing was "filed and read as evidence on the trial and allowance of their claim." "Upon hearing," therefore, Burns and Stewart were each allowed \$250, and the administrator of O. C. Bowles \$100, for the services rendered by them under the employment evidenced by the writing mentioned, the court being satisfied from the evidence that these sums were reasonable and proper. It does not fully appear from the record how much service was rendered by Bowles, but obviously not as much as was performed by either Burns or Stewart, hence the fee allowed him was much smaller than theirs.

As the allowance of \$250 to W. S. Harkins was made at the same time the fees of Burns, Stewart and Bowles were allowed, and he was associated with them in the case of Georgia A. Adams against Ann Dills, executrix, &c., it must be presumed that the value of his services was established by the same evidence that established theirs. In the absence of a bill of exceptions showing all the evidence heard by the court in arriving at the value of the legal services of the several attorneys to whom fees were allowed by the judgment appealed from, we can not undertake to say that the allowances are not reasonable, or that they were not supported by competent proof.

Judgment affirmed.

BAKER v. BAKER.

(Filed March 15, 1905—Not to be reported.)

Divorce and alimony—Divorcing husband—Allowance to wife—Custody of children—In an action divorcing the husband, on the ground of abandonment by the wife for one year, it appearing that the husband was in fault,

the wife was entitled to alimony, and the husband having sold a part of his property and carried away the proceeds, leaving his wife in possession of real estate worth from \$4,500 to \$5,000, of the rental value of \$40 to \$45 per month for the support of herself and two minor children, the use of which the court adjudged to the wife as well as the custody and control of their two infant children, on appeal by the husband on the ground of excessive alimony and the custody of the children, the judgment of the lower court is affirmed, the court having reserved the right to modify the judgment as to care, custody and support of the children, and as to the title, use and control of the property.

Hobbs & Farmer for appellant.

John T. Shelby for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from so much of the judgment of the circuit court as allowed appellee alimony, and the custody of the two infant children born of her marriage with appellant.

It is contended by appellant that appellee was in fault in respect of the grounds upon which she was divorced from him by the judgment of the lower court, for which reason she should not have been allowed alimony, and that she was improperly allowed the custody of their infant children because unable to support them and unfitted to have charge of their mental and moral training. The divorce granted appellee was upon the ground of abandonment of her by appellant for the statutory period, and an examination of the record furnishes us no reason for disagreeing with the action of the lower court in decreeing the divorce, as the weight of the evidence conducted to prove that appellant was the party in fault. Indeed his improper relations with a young woman appear to have been at the bottom of his separation from appellee, and to have caused her great unhappiness, besides bringing him into disrepute.

We are without power to disturb the judgment of divorce, and what we have said in regard to its being authorized by the proof only bears upon the question of appellee's right to alimony, and is intended as a response to the contention of appellant's counsel that his abandonment of appellee was caused by misconduct on her part. As it appears from the record that appellee was not in fault, it follows that she was entitled to alimony, and it only remains to be determined whether the provision made for her in that respect by the judgment of the chancellor was unreasonable, or otherwise improper. It further appears from the evidence that when appellant abandoned appellee he took up his residence in Cincinnati, O., and that before leaving Lexington to go to that city he sold a stock of groceries, also certain real estate he owned in Lexington, in the conveyance of which appellee joined, and that he took away with him the proceeds of the stock of groceries, and real estate, together with a cash balance he had in bank, but left in the possession of appellee certain other real estate on the corner of Fifth and Broadway streets, Lexington, worth about \$4,500 or \$5,000, upon which is situated a two-story grocery store, in the upper rooms of which the family reside, and a small tenement house, the rental value of the entire property

being from \$40 to \$45 per month. These rents of the property were turned over to appellee by appellant for the support of herself and her two children when he left them, and nothing further was ever contributed by him to their maintenance.

The use of this property and the rents thereof were by the judgment of divorce given appellee for the support of herself and children, the language of the judgment on that point being as follows: "And the use of said property and the rents received therefor are hereafter adjudged to the plaintiff (appellee) for the present in lieu of alimony, and also for the support of herself and her said two sons. And the defendant (appellant) is hereby enjoined and restrained from interfering with the plaintiff in the peaceable and continuous possession and use of said property and in the renting thereof, and in the collection of the rents from the tenants to whom plaintiff may rent any part of said property. And he is also enjoined from selling, conveying, encumbering or alienating said property, or attempting to create any incumbrance of any sort thereon."

The judgment contains the further provision: "The court reserved the power to modify this judgment as to the care, custody and support of the children, and as to the title, use and control of said property."

It will be observed that the use of the property and its rents are not given appellee for life, or any fixed time, by the judgment; her right to the use and rents thereof may, for sufficient cause, be revoked by the court at any time. Manifestly it can not be contended that the provision thus made for the support of appellee and her children is unreasonable, and certainly appellant has no just ground of complaint, for the chancellor in giving appellee the use and rents of the property in question for the support of herself and children only followed his example, accepted his judgment, and confirmed his previous action. According to the evidence appellant is an active, vigorous man, of industrious and acquisitive habits; with the means retained by him from the sale of his stock of groceries and real estate, and in view of his being relieved of the burden of further supporting a wife and children, there is no doubt of his being far more advantageously situated than are appellee and his children.

We do not think the chancellor erred in giving appellee the custody of the children; they are yet of tender years and need the care and guidance of an affectionate mother; and, besides, she stands in need of their assistance in earning a support for her and themselves. From the record in this case, and having in mind the good of the children, we are not prepared to say that appellant is as suitable a person as the mother to have the care and custody of them. The further contention of appellant, that the judgment of the lower court makes no provision for his seeing or being with his children, will not authorize its reversal. Under the law, as well as the power reserved in the judgment, the chancellor may make such further orders in the case as will afford appellant opportunities for visiting the children, and we do not doubt the willingness of the chancellor to grant any reasonable request from him in that behalf.

Judgment affirmed.

PARKER v. CATRON.

(Filed March 16, 1905.)

1. Land—Execution sale—Purchase by one for another—Consideration paid by purchaser—Conveyance to purchaser—Relief sought by equitable owner—Where appellee and his brother jointly owned a tract of land and upon his brother's death his undivided interest was ordered sold to pay his debts, and at the request of appellee was bought by appellant at said sale for appellee's benefit, and after the time for redemption had expired appellant, against the objection of appellee, caused a deed to be made to himself for the land, in an action by appellee against appellant to set aside said deed, alleging that appellant held the title in trust for him, he having all the time been in the actual possession thereof, the court properly decreed the relief sought upon the repayment by appellee to appellant of the money he had paid in the purchase thereof.

2. Constructive trust—Estoppel—Statute of frauds—In such a case a constructive trust results by implication in favor of the equitable owner, which rests upon the idea that the purchaser holds the land in trust for his principal. Constructive trusts are held not to be within the statute because they rest in the end on the doctrine of estoppel, and the operation of an estoppel is never affected by the statute of frauds.

3. Same—The fact that the purchaser of the land paid the consideration himself does not destroy the trust, where the purchase was made for another, who offered to pay it, and was kept from paying it by the act of the purchaser, who refused to accept it, and had the deed made to himself.

J. Smith Hays and J. M. Hays for appellant.

J. H. Wilson, P. D. Black and J. D. Black for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justice Hobson.

The father of appellee, John H. Catron, conveyed to him and his brother, Isaac Catron, a tract of land in Knox county. Thereafter a creditor of the father levied an execution upon the land for a debt due him from the father, and the land was sold under the execution. John and Isaac Catron, the two sons, got appellant, William Parker, to bid in the land for them at the execution sale. The amount of the debt was between \$500 and \$600. John E. Catron afterwards redeemed the land from Parker and subsequently Isaac Catron died with the title in this condition. Suit was filed to settle the estate of Isaac Catron, and his half was ordered sold in that suit for the payment of his debts. John Catron procured Parker again to buy in the land for him, which Parker did in his own name at the price of \$25. The equity of redemption was then sold and Parker bought this for \$5. The land was not redeemed, and at the end of the year Parker, over Catron's objection, caused a deed to be made to himself for the land, that is, Isaac Catron's half of the tract. John Catron then filed this suit in equity against Parker, setting up the facts and alleging that Parker held the title in trust for him and praying that he be required to convey the land to him, he having been all the time in the actual possession of it. The court decreed him the relief sought, and the defendant appeals.

Parker denied that he bought the land for John Catron, and denied that Catron made any arrangement with him by which he was to buy it for him,

but the weight of the evidence sustains the chancellor's conclusion. Parker was a relative as well as a near neighbor and close friend. Catron had had some trouble with his wife, and was living at home alone, boarding with Parker. Parker had gone on his bond in a suit which his wife had brought against him. Parker allowed Catron after the sale to treat the land as his own. He sold timber from the place. He made an oil lease, Parker telling the lessee that Catron's title was all right, and he told several persons that he had bought the land for John, and was going to stand by him. Catron was not apprised of Parker's change of mind until after or about the time the year had expired in which the land might be redeemed. Parker then declined to receive from Catron the \$30 which he had paid. On the question of fact, while the evidence is somewhat conflicting, we can not disturb the chancellor's finding.

It is earnestly maintained that the agreement of Catron, being in parol, is within the statute of frauds. In *Stark's Heirs v. Cannady*, 3 Littell, 399, it was held that where an agent verbally employed to purchase land for his principal does so with the money of the principal, but makes the contract in his own name, a trust for the principal will result by implication which is not affected by the statute of frauds. The reason given by the court for its conclusion is as follows: "For the statute only forbids the enforcement of a trust or equity created by contract and not such as results from the nature of the transaction by implication of law."

The doctrine of this case was followed in *Lisle v. Lisle's Adm'r*, 4 Ky. Law Rep., 990, where the purchase was made at a judicial sale by one for another who paid the consideration. Appellant insists that these cases are not in point because here appellee did not pay the consideration. Still he offered to pay it, and was kept from paying it by the act of appellee, who refused to accept it, and insisted on having the deed made to himself. The payment of the consideration by the principal is not the only state of case in which the rule applies. The rule rests upon the idea that the purchaser holds the land in trust for his principal. It is the constructive trust which underlies the rule. In *Pomeroy's Equity*, section 1480, it is said: "All trusts by operation of law consist, therefore, in a separation of the legal and equitable estates, one person holding the legal title for the benefit of the equitable owner, who is regarded by equity as the real owner, and who is entitled to be clothed with the legal title by a conveyance. Certain instances of this class are trusts sub modo; they are termed trusts, because the beneficial owner is entitled to the same remedies against the holder of the legal title, which are given to the beneficiary under a true trust. All trusts which arise by operation of law, are, as the name indicates, excepted from the requirements of the statute of frauds."

Again, in section 1044, it is said: "Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal declaration of the trust. They arise when the legal title to the property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled,

and when the property thus obtained is held in hostility of his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed trusts in invitum; and this phrase furnishes a criterion, generally accurate and sufficient, for determining what trusts are truly 'constructive.' "

Constructive trusts are held not within the statute because they rest in the end on the doctrine of estoppel; and the operation of an estoppel is never affected by the statute of frauds. (*Morris v. Shannon*, 75 Ky., 89.) If Parker had not misled Catron he might have gotten some one else to buy in the land for him, and if Parker had not let him deal with the land as his own and held himself out as having bought it in for him, he might still have protected himself. To permit Parker to shield himself behind the statute of frauds and keep the land would be to sanction a fraud, and deny effect to familiar principles of estoppel. In *Martin v. Martin*, 55 Ky., 7, Driffin bought in Martin's land at a commissioner's sale for him under a verbal agreement to this effect, when there was no right of redemption at such sales. It was held that Driffin held the land in trust for Martin, and that the trust was not affected by the statute of frauds. The same conclusion was reached in *Miller v. Antle*, 65 Ky., 407, and *Green v. Ball*, 67 Ky., 586. It is insisted that these cases are not in point, for the reason that Catron here did not own the land. But he had it in possession and was living upon it. He had a lien on it for the money which he had paid to redeem it from the execution sale. The arrangement with Parker was made to protect his interest, and created no less a constructive trust when his interest in the land was equitable than if he had held the legal title. It would be no less a fraud on Catron to permit Parker to keep the land in the one case than the other. The estoppel arises equally in either case.

An agency to sell land may be created by parol. (*Talbot v. Bowen*, 8 Ky., 487; *Isaacs v. Gearhart*, 51 Ky., 231.) A verbal partnership to buy land is also not within the statute. (*Garth v. Davis & Johnson*, 27 Ky. Law Rep., 505.)

Catron was allowed to testify to certain transactions with his brother Isaac, who was dead, and to prove in his own behalf statements made by him not in the presence of Parker. This was error. He could not testify for himself as to matters occurring with his dead brother, nor could he make evidence for himself. But if we eliminate all this, and regard only the testimony admittedly competent, the clear weight of the evidence sustains the chancellor's conclusion. So the error in the admission of evidence was harmless.

Judgment affirmed.

KISSBERGER v. BROWN AND THE CITY OF LOUISVILLE.

(Filed March 16, 1905.)

Real estate—Mortgage and tax liens—Sale—Life tenant—Remaindermen—Proceeds of sale—Agreement—Priorities—In an action to enforce a mortgage lien on the land of a married woman executed by her and her husband, in which the land was sold after the death of the wife under a judgment

against her surviving husband and children, who were all served with process, at which sale one of her sons became the purchaser at the price of \$2,730, which he paid into court under a written agreement with the city of Louisville that it would look to the fund in court for all unpaid city taxes, which order was entered and a deed made to the purchaser free of lien, and in a subsequent actions by the city against the husband, who alone was served with process, to enforce a lien for taxes due the city on said lot, which were consolidated with the original action of appellant to foreclose the mortgage aforesaid, a judgment was entered against the husband for the taxes and interest, amounting to \$1,490.64, and awarding the city a first lien on the fund in court for said judgment. Held—That said judgment was erroneous. The fund in court is the proceeds of the sale of the fee-simple title of the lot under the judgment of foreclosure where all the owners were parties, and before the court. The city had properly assessed the property for taxation against the husband who was the life tenant, but as he alone was before the court in the actions for taxes, no interest of the remaindermen could be subjected to the payment of the taxes, and the city was entitled out of the fund in court only to the interest of the life tenant therein.

R. T. Colston for appellant.

Henry L. Stone for city.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

Eli H. Brown, Sr., and his wife, Nancy W. Brown, in 1881, mortgaged a lot of ground and the improvements thereon, in Louisville, to the appellant, Philip Rissberger, to secure the payment of a note, of even date with the mortgage, for the sum of \$2,000. In 1895 Nancy W. Brown, the owner of the property, died, leaving her husband and four children surviving her. Afterwards one of these died. Eli H. Brown, Sr., who, upon the death of his wife became the life tenant of the estate, seems to have kept the interest upon the debt to Rissberger paid up until 1898, when he made default, but wholly failed to pay either the State or city taxes on the property.

In 1899 the appellant instituted this action for a judgment for his debt and an enforcement of his lien upon the property. To this action Eli H. Brown, Sr., and Elizabeth Brown, his second wife, Eli H. Brown, Jr., W. Dorsey Brown and Sarah E. Brown, children and heirs at law of Nancy W. Brown, the first wife, were made parties defendant, and properly brought before the court.

On May 4, 1901, a judgment of foreclosure was duly entered, and on June 8, of the same year, a sale of the property was had in pursuance of the terms of the judgment. At this sale Eli H. Brown, Jr., became the purchaser of the property for the sum of \$2,730, which he afterwards paid into court under a written agreement with the city of Louisville that it would look to the fund in court for the payment of all unpaid municipal taxes. This order was entered, and a deed made to the purchaser free of lien, and all questions of priority of lien between appellant Rissberger and the city of Louisville attached to the fund in court in lieu of the property sold.

In 1891 the city of Louisville instituted an action, No. 44,441, against Eli H. Brown, Sr., and Nancy W. Brown, his wife, to recover its taxes on the property in question for the years 1885, 1886, 1887, 1889 and 1890. The hus-

band was properly served with process, the wife being dead, as before stated. In 1896 the city instituted another action, No. 10,091, for the taxes for the year 1891. In 1898 it instituted a third action, No. 19,419, to recover the taxes for the year 1894, and in 1899 it instituted a fourth action, No. 21,730, to recover taxes for the years 1895, 1897 and 1898. In none of these cases were the children and heirs of Nancy W. Brown made parties defendant. On the 7th day of March, 1903, the chancellor entered an order consolidating all of the tax suits with appellant's action to foreclose his mortgage, and required the consolidated litigation to be thereafter prosecuted under the name and style of Philip Rissberger v. Eli H. Brown, Sr., No. 21,611.

On the 23d day of May, 1903, the chancellor entered a judgment against Eli H. Brown, Sr., for the taxes for all the years sued for, with lawful interest, making a total of \$1,490.64; awarded the city of Louisville a first lien on the fund in court for its judgment, and granted it leave to withdraw the amount adjudged to it. From this judgment in favor of the city, which leaves him with more than half of his debt unpaid. Rissberger has appealed. The judgment of the chancellor is clearly erroneous. The fund in court is the proceeds of the sale of the fee simple title under the judgment of foreclosure, where all the owners were parties defendant and properly before the court. The city had properly assessed the property for taxation against Eli H. Brown, Sr., who was the life tenant, but, as he alone was before the court in its actions for taxes, no interest of the remaindermen could be subjected to their payment. (Woolley v. City of Louisville, 26 Ky. Law Rep., 872; Fenley v. City of Louisville, 27 Ky. Law Rep., 204.) Appellee was entitled, of the fund in court, only to the interest of Eli H. Brown, Sr.

As a good deal of confusion seems to have arisen by reason of the consolidation of the five actions, from the fact that appellant in his action ignored the city, and the latter in its actions ignored appellant, justice requires upon the return of the case that both parties should be allowed to amend their pleadings so as to protect their respective rights to the fund in court.

For the reasons indicated the judgment is reversed for proceedings consistent herewith.

JOHNSON, SHERIFF, &c. v. BRADLEY-WATKINS TIE CO.

(Filed March 16, 1905.)

Taxation—Nonresident—Personal property in this State—Under Kentucky Statutes, section 4020, providing that "all real and personal estate within this State, and all personal estate of persons residing in this State, * * * shall be subject to taxation, unless the same be exempt by the Constitution," railroad cross ties owned by a foreign corporation which were piled on a river bank in this State for the purpose, when a boat was secured, of being shipped by the owner out of the State, are liable to taxation in this State, both for State and county purposes, and there is no constitutional provision, State or Federal, which forbids it.

W. H. Barnes, Glenn & Ringo and S. A. Anderson for appellants.

N. W. Gore, Speed Guffy and Robt. L. Greene for appellee.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Butler Circuit Court by the appellee to enjoin the sheriffs of Butler and Ohio counties from collecting \$84 State and county taxes for the year 1903 assessed against a lot of railroad cross-ties owned by the corporation, which were piled on the river bank in Kentucky for the purpose, when a boatload was secured, of being shipped by the owner out of the State. The appellee is a Minnesota corporation, assessed for all its personal property in its home State, and the ties were its property on assessment day. The question presented by this record is whether or not this personal estate, so owned and situated, is liable for State and county taxation here.

Section 4020 of the Kentucky Statutes is as follows: "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

This language is not open to construction; It says plainly that all real and personal estate within this State is subject to taxation. It means precisely what it says. And the next sentence, "all personal estate of persons residing in this State," shows that the legislature had in mind the situs of personal property for taxation, and that they determined that personal estate situated in this State, whether belonging to nonresidents or residents, should be liable for taxation, and that personal estate of persons residing in this State should be liable for taxation, whether the property be in or out of the State. There is no rule of fiscal law better settled than that it is within the power of the State to tax all property of which it has jurisdiction, whether the owner resides in the State or is a nonresident; that whether such property is taxed or not is a question of legislative intent, and when the intent to tax is clear, the power to do so is unquestionable.

The precise question here involved was decided in the case of *Commonwealth v. Gaines & Co.*, 80 Ky., 489, where it was held that whisky having a situs here, owned by nonresidents, was taxable by the laws of this State.

The case of *Coe v. Errol*, 116 U. S., 524, involved a question similar in all respects to that at bar. The opinion of the court was delivered by Mr. Justice Bradley, holding that where logs owned by a nonresident were piled for shipment in one State, until they were in actual transit they were liable for taxation where situated, without reference to the question of nonresidency of the owner, or that he had paid taxes on them in his home State.

On the point under discussion it was said: "We have no difficulty in disposing of the last condition of the question, namely, the fact (if it be a fact) that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it can not be exempt by reason of being owned by nonresidents of the State. We take it to be a point

settled beyond all contradiction or question that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case, and may be laid out of view."

We conclude, then, that by the terms of the statute the property in question was liable to taxation both for State and county purposes, and that there is no constitutional provision, State or Federal, which forbids it. The fact that the board of supervisors estimated the property at more than its actual value can not be remedied in this proceeding. (*Royer Wheel Co. v. Taylor County*, 104 Ky., 741.)

As the chancellor, upon final hearing, perpetuated the injunction restraining the collection of the tax by the officers having the matter in charge, it follows from the views herein expressed that his judgment must be reversed, with directions to dismiss the petition, and it is so ordered.

**ROUSH, &c. v. VANCEBURG, SALT LICK, TOLESBORO AND
MAYSVILLE TURNPIKE CO.**

(Filed March 17, 1905.)

1. Turnpike roads—Bonds for building—Sale of road to county—Action to subject road to bonds—Limitation—Where parties owning bonds issued by a turnpike company for its construction sued the turnpike company and the county, after a sale of the turnpike to the county under the free turnpike act of March 17, 1896, asking to subject the road to the payment of such bonds, and more than five years after such sale and transfer filed an amended petition, alleging that the turnpike company, while indebted to plaintiffs and insolvent, without valuable consideration and with intent to defraud plaintiffs in the collection of their debt, conveyed to the county, by writing, all the property of the company, which the county has received and has since used and operated, such amendment was an abandonment of the original action, and sets up a new action, which shows on its face that it is barred by the five years' statute of limitation.

2. Pleading—Valuable consideration—An allegation in a petition that a conveyance was made without a valuable consideration states merely the pleaders conclusion of the law, and is bad on demurrer.

3. Selling franchise—Constitutional prohibition—A sale of a turnpike road made under the free turnpike act of March 17, 1896, where a majority of the voters and taxpayers have voted in favor of such sale, is not in violation of Kentucky Constitution, section 203, prohibiting a corporation from selling or leasing its franchise so as to relieve the franchise or property held thereunder from corporate debts.

4. Insufficient allegations—The petition, as amended, having failed to show any bad faith in the turnpike company in disposing of the proceeds of the sale of the road to the county, or that the county had not, in good faith, paid full value for it, or that the consideration paid is not yet on hand, available for the payment of its debts, or that the proceeding by which the county acquired it were not in conformity to the statute, no cause of action was stated against the county, and the lower court properly sustained the demurrer of the county and dismissed it from the case, but it was error to dismiss the petition as against the turnpike company.

A. E. Cole & Son for appellants.

E. L. Worthington and W. C. Halbert for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge O'Rear.

This suit was filed in the Lewis Circuit Court on March 11, 1898, by appellants, who are the administrator and distributees of John Ellison, deceased, to enforce the payment of certain bonds issued about the year 1872 by the Vanceburg, Salt Lick, Tolesboro and Mayesville Turnpike Co. The turnpike company, Lewis county and the Lewis County Fiscal Court were made defendants to the action. The suit was to subject the road to the payment of appellant's debt. The road having been acquired by Lewis county by virtue of the free turnpike act, it was sought by appellants to have a receiver take charge of the road to collect tolls on it until enough was realized to pay their debt.

The answer of the defendants relied, among other defenses, upon the statutes of limitation, both the fifteen-year statute and the five-year statute being pleaded. The case went off on a demurrer to the petition and to a reply to these pleas of limitation. We are of opinion that the fifteen-year's statute of limitation was saved by an order entered by an agreement, dated December 7, 1882, entered into between the turnpike company and the bondholders in a suit then pending in the Lewis Circuit Court, from which the running of the statute began anew, and as fifteen years had not elapsed before this suit, that statute is not applicable. The plea of the five years' statute of limitation applies to Lewis county and the fiscal court, and not to the turnpike company, and is based on this state of facts: The plaintiffs alleged that in January, 1897, in pursuance to the free turnpike act, the Lewis County Fiscal Court regularly accepted and received from the turnpike company its road, franchise, tollgates, etc., for the purpose of the road's being thereafter used as the property of the county, and free from any claim on the part of the turnpike company; that in pursuance of the transfer the pike is now operated by the county as a free turnpike, and that the county can not lawfully operate the road so as to produce any revenue whereby to pay the plaintiff's debt. Appellants alleged in their petition that they had a lien on the property of the turnpike company, but no facts were stated sufficient to sustain this conclusion of law on the part of the pleader.

On September 6, 1902, more than five years after the transfer of the road to the county, the plaintiffs tendered an amended petition, in which they alleged that the money sued for was furnished the corporation to enable it to construct, equip, and repair its road, and operate it; that while it was

indebted to the plaintiffs and insolvent, the turnpike company, without valuable consideration, and with intent to hinder and defraud the plaintiffs in the collection of their debt, conveyed to Lewis county, by writing, which had never been recorded, all the property of the turnpike company of every kind and description, which the county thereupon regularly received, and has since used and operated. The court allowed the amended petition to be filed as to the turnpike company, but refused to allow it to be filed as to Lewis county, and dismissed the petition as to both of the defendants. The petition, as originally drawn, was evidently intended to reach the turnpike in the hands of the county, and when the court sustained the county's demurrer to the petition the amendment referred to was tendered. This was after the lapse of five years from the time of the transfer. Appellees insist that it was too late for the plaintiffs to set up that the transfer was fraudulent.

The amended petition abandons the cause of action set up in the original petition, and proceeds upon an entirely distinct one, that is, the alleged fraudulent transfer of the turnpike company's property to the county. In this amendment it is alleged that the county acquired the turnpike in question "without valuable consideration." What the consideration was is not stated. A valuable consideration might consist of anything of any value, and it may be the assumption of an obligation, the mere altering of the condition of the party to be affected. The statute against fraudulent conveyances does not require that the consideration to uphold the transaction against creditors must be adequate. It is merely that it shall be valuable. (Section 1906, Kentucky Statutes.) Its inadequacy, if it was shown to be inadequate, would only be evidence of notice to the purchaser of the fraudulent purposes of the debtor. What is a valuable consideration is a pure question of law. Therefore, an allegation that a transfer was made without a valuable consideration states merely the pleader's conclusion of the law, and is bad on demurrer. (Section 119, Civil Code; Gregory v. McFarland, 1 Duv., 59; Coleman v. Harper, 1 Mar., 602; Jasper v. Hamilton, 3 Dana, 283; Davis v. James' Ex'or, 4 J. J. Mar., 9; Newman's Pleading and Practice, 261.)

Good pleading requires that appellant should have stated what the consideration was, and then the court could decide whether it was a valuable consideration in law. A traverse of the allegation as made will put no fact in issue. There is no fact stated to be admitted or denied. It could not be the basis of a prosecution for false swearing if the pleading be verified, because it states only the pleader's opinion of a matter of law. The allegation that the conveyance was made to cheat, hinder or delay the creditors of the turnpike company does not aid the pleading, because under the statute such purpose of the debtor can not affect the title to the property in the hands of a holder for valuable consideration, unless the latter had notice of the fraud. That is not charged in this case. All the previous allegations of the petition and its various amendments admit the good faith of the transaction, but attack it on the ground of the lack of power of the turnpike company to make, and of the county to take, the conveyance of the road while its owner was indebted. The constitutionality of the free turnpike act was expressly attacked. Therefore, even if the amended petition,

attempting to charge a fraudulent conveyance, had been sufficient in form, it showed on its face that the cause of action, if any, was barred by limitation, when the amendment first setting up that cause was tendered, and the action of the court in refusing to permit it to be filed over the objection of the county can not be harmful error, if it was error.

The question might arise here, even if the allegations of the amendment were ordinarily sufficient, whether a county, an integral part of the State government, can be made liable to a suit for tort in the absence of a statutory provision making it so. But passing that question. Appellants contend that section 203 of the Constitution applies. That section prohibits a corporation from selling or leasing its franchise so as to relieve the franchise or property held thereunder from corporate debts. This does not mean, however, that a corporation may not voluntarily sell its property so long as it remains a corporation, just like other persons are permitted to sell their property. We are of opinion that the facts do not bring the case within that section. Lewis county bought this road because it was compelled to. For the same reason the turnpike company sold the road to the county. This was owing to the vote of the taxpayers of the county, held under the mandatory provisions of the free turnpike act. The only thing that was then left open to the parties, the turnpike company and the county, was the terms of the contract. The act of March 17, 1896, being section 4748b and its subsections of Kentucky Statutes, called the free turnpike act, provides for taking the sense of the voters and taxpayers of any county upon the question whether turnpike and gravel roads in that county should be free. It is a fact of such general and common knowledge that the court takes judicial notice of it, that in many of the counties of this Commonwealth the most important of their highways were toll roads, built largely by private capital. The vote in Lewis county, under this act, was in favor of the free turnpike system. Section 5 of the act provides: "If it shall appear that a majority of all the votes cast for and against said proposition are in favor of said proposition, then the fiscal court may acquire by gift, lease, purchase or contract any or all of the turnpike roads, or parts of such, as lie within the county on the best terms consistent with public interest, in the discretion of said court." * * *

By section 6 it is provided: "All turnpike and gravel roads thus acquired or constructed shall become public roads."

Section 7 provides for the conveyance of the title of such roads as follows: "The directors of any turnpike or gravel road are hereby authorized and empowered, through their president, to convey to the fiscal court purchasing same the title to such road." * * *

As to the effect of the sale of the road, or any part of it, section 8, complete, declares: "When the entire turnpike purchased by a fiscal court lies wholly within the county by which the same is purchased, the transfer of title shall be made as provided in section 7, and thereupon, the charter, franchises, and so forth, of any such turnpike or gravel road shall be at once dissolved and terminated, but when any portion of any turnpike shall lie in more than one county, is purchased as herein authorized, the title to

such part so purchased shall be conveyed to the county purchasing it in the manner before recited, and such transfer shall in nowise affect the charter or privileges or franchises of any turnpike road company so selling such portion as to the remainder of the turnpike of such company. But as to the part so sold the charter shall be and become terminated, and the company shall be at once released from any and all responsibility concerning such portion under its charter or the laws of the State."

By section 12 of the act, if the owner of the road and the fiscal court are unable to agree upon the terms of acquiring that part of the road in that county, it is made the duty of the fiscal court to institute condemnation proceedings "to condemn the turnpike road desired to be obtained." The result of the condemnation is to compel an involuntary sale of the road desired, with the same legal effect as to its title as if done voluntarily by the owner. From this act it is seen that upon a vote in favor of the proposition the county is bound to acquire, and the road company is compelled to sell, the toll road. It is in the exercise by the State of her right of eminent domain that she may and does thus acquire, through the agency of the several counties, the title to the highways within her borders for the free travel of the public. Private rights are respected in the provision for making compensation to such private owners by agreement or by condemnation. In this case it appears that the directors of the road, a majority of the stockholders concurring, agreed with Lewis county upon the terms by which the road in that county was transferred to the county. Whether it was by sale, lease, gift or other contract does not appear, nor does it appear that the whole of the road owned by the corporation was within Lewis county. It is merely charged by plaintiffs (appellants), who are general creditors, that they have an unsatisfied debt against the company, created about thirty years ago, and which the company is unable to pay unless it continues to operate the road indefinitely as a toll road. It is not alleged, and it can not be assumed, that the consideration received by the road company from the county was not a fair, full equivalent of its value. The value of the road is nowhere stated, nor is it alleged that such consideration is not on hand now in the treasury of the company and available to be applied to the company's creditors upon a proper application. But that is not this proceeding. This is an attack upon the right of the county to acquire the road at all without paying appellants' debt of \$8,000 odd in full. The purpose of the suit is to have the court appoint a receiver for the road, and to operate it as a toll road till the debt is paid, in spite of the vote of the people of the county and in spite of the legislative will expressed in the statute, compelling all toll roads upon such favorable vote to be acquired by the counties, and made free for travel. The contention followed to its logical conclusion is that a toll road indebted can not be sold to the counties for its real value, if that value is less than its debts. Even if it should be conceded that the entire road owned by this company lay in Lewis county and was acquired by the fiscal court as a free turnpike road, then the effect, as expressly provided in section 8 of the act supra, is to dissolve the corporation—as if its charter had been repealed by an act of the legislature—leaving its assets to be distributed among those entitled thereto. That would not be "an alienation of its franchise" by the corporation. The section of the

Constitution applies to all corporations. If a corporation in good faith undertakes to close up its affairs in contemplation of dissolution, and to that end sells all its property for fair value to innocent purchasers, manifestly it could not thereafter exercise its franchise to be a corporation.

It is well known that since 1896 nearly every toll road in this State, at least the great majority of them, representing in the aggregate an enormous value, have been acquired by the counties under the act of March, 1896, and previous special acts of same import. To now hold that every road so acquired, where it was indebted, was conveyed in violation of section 203 of the Constitution, might operate most disastrously, not only to the counties, but upon many innocent holders of securities and obligations of the counties executed in payment for such roads, for if the sales were void, they were void in toto. To sustain appellants' contention would be to hold the free turnpike act (the act of March 17, 1896) to be unconstitutional wherein it permits the counties to acquire these toll roads by gift, or lease, or purchase, without making all creditors of the turnpike companies parties to the condemnation proceedings. That is the exact contention made by appellants in the original petition. A construction that makes a statute unconstitutional is not to be favored when the act is susceptible of any other.

The petition, as amended in this case, having failed to show any bad faith on the part of the turnpike company in disposing of the proceeds of the sale of the road to Lewis county; having failed to show that Lewis county has not in perfect good faith paid full value for it; having failed to show that the consideration received is not yet on hands in the company's treasury, and available to the payment of its debts; having failed to show that the proceedings by which the road was acquired were not in conformity to the statute, no cause of action was stated against the county in any event, and the circuit court properly sustained the demurrers of the county and dismissed it from the case. But it was error to dismiss the petition against the turnpike company.

The judgment is affirmed as to Lewis county and the Lewis County Fiscal Court, and reversed as to the Vanceburg, Salt Lick, Tolesboro and Maysville Turnpike Co., and as against the latter the cause is remanded for further proceedings not inconsistent herewith.

O'NEAL v. COMMONWEALTH.

(Filed March 17, 1905—Not to be reported.)

1. Criminal law—Instructions—The practical issue, sharply presented, upon this appeal of appellant, who went to Brown's house and when ordered away shot and killed the latter, was whether the appellant acted in his necessary, or apparently necessary, self defense, and under the evidence appellant's right of self-defense, even if his life was in peril, as he claimed when shot, depends upon the principle that if he brought about the peril by his own felonious act, he can not justify the taking of human life to extricate himself from it. The language of the instruction complained of got before the jury the idea that one himself beginning a felonious attack upon another, if bested in the fight, can not, when the battle turns against him, strike to save his own life so jeopardized. Appellant makes no claim to

having withdrawn in good faith, nor is it true that his belief that he was about to be assaulted was by the instruction allowed to justify the shooting of appellant.

2. Same—The jury must understand, if they comprehend any part of their duty, that the law of the case was for their guidance, and the whole of it was contained in the court's written instructions, and that none of these instructions was paramount to the other, but must be read and considered as a consistent whole.

3. Same—The criticism of an instruction authorizing decedent's right to protect himself if he believed, and had reasonable grounds to believe, that appellant was then and there about to assault him, is not substantial. The pointing of a loaded gun at deceased, with threatening attitude by appellant, who was an intruder, was more than a simple assault, and deceased's belief was a proper element of his action if he did undertake to protect himself.

Lewis McQuown for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was convicted of the murder of Martin Brown. The killing occurred in Brown's home. Appellant, who had separated from his wife, but was not divorced, went to Brown's house, uninvited, and slightly intoxicated. He took a seat near Brown's daughter, aged sixteen years, and began a conversation with her, which evidently looked to a courtship. Brown came into the room and expostulated with appellant; told him his daughter was too young for such attentions, and asked him to leave. Denying that he was paying attention to the daughter, appellant left. He met his father a few moments later, who told appellant that he would rather see the moss on his grave than for him to be bluffed by old man Brown. Appellant told some girls who had been present at Brown's when he was ordered to leave that Martin Brown thought he had bluffed him, but he would remember it as long as he lived. Appellant then went to a neighbor's and got a shot gun he had left there earlier in the evening, loaded it, returned to Brown's house, and again entered unbidden. Brown was seated with his family about the stove. Appellant opened the conversation by saying that he came to apologize for his previous conduct. Brown responded that no apology was needed, and for him to go away. Appellant did not go, but insisted on making what he termed an apology. Brown arose to close the door (appellant was standing just outside the door in the hallway), when appellant drew up his gun and fired, mortally wounding Brown. There is some evidence that Brown, after appellant left the first time, had loaded his gun and set it in the corner, and that when he got up to close the door on appellant, just before the shooting, that he took up his gun and started to shoot appellant, and did shoot at him. That is appellant's theory, who testified that he saw Brown starting to raise his gun, whereupon he quickly fired his gun without raising it; that the two guns fired simultaneously.

It will be seen that the case presents these questions: The right of Brown to shoot at appellant under the circumstances, if he did so; and the right

of appellant to shoot Brown when he did. Obviously both could not be right. One only was acting in his legal self-defense. The determination of that question was the controlling one before the jury. The court undertook to submit the questions by the instructions. While not as clear as they might have been expressed, we think their necessary construction is, and indeed the only reasonable or probable construction that could have been placed upon them by the jury was, that if appellant went to Brown's house with the felonious intent to inflict upon Brown death or great bodily harm, and attempted to do so, it was Brown's privilege to use such force as was necessary, or as reasonably appeared to him to be necessary, to avert the impending danger, real or apparent. The instruction on this point told the jury that if they believed from the evidence, beyond a reasonable doubt, that appellant went to Brown's house to inflict upon him death or great bodily harm, or to assault him, he had the right to use such force as was necessary, or reasonably appeared to him to be necessary, to repel such danger, or apparent danger, from the accused. While a mere assault does not of itself necessarily justify the taking of the life of the assailant, yet it may do so, if it be accompanied by other acts to reasonably justify the belief that it would be carried so far as to inflict death upon the person assaulted. The pointing of a loaded gun at Brown by accused in range and shooting distance would have been an assault, if nothing more followed. But clearly the pointing of a loaded gun, with threatening attitude, at one a few feet away, by an intruder in one's home, who persistently refuses to leave when requested to by the occupant, is more than a simple assault. As the word was used in the instruction, and under the circumstances shown, it could not have been applied by the jury to any act other than that of pointing the loaded gun at deceased, and in that sense its use was not harmful, for it was clearly covered by the other expressions used in the instruction.

That part of the instruction which submitted the question of appellant's right to shoot in his self-defense reads: "The court instructs the jury that if they believe from the evidence that when the accused shot Martin Brown, if he did so, he believed, and had reasonable grounds to believe, that he was then and there in immediate danger of losing his life or receiving great bodily harm at the hands of said Brown, and that he had no other apparently safe means of avoiding such impending danger, or apparent danger, he had the right to use such means or force as were necessary to protect himself from such danger, or apparent danger, and if they believe that he used no more force than was reasonably necessary to protect himself from such immediate impending danger, or apparent danger to his life, or receiving great bodily harm, they shall acquit him, unless, etc."

The objection to this part of the instruction is that it seems to restrict accused in his self-defense to such means as were actually necessary to protect himself from the threatened or apparent danger to himself, and did not allow him to use such means as appeared to him, in the exercise of an honest belief, based upon the appearances, to be necessary. Appellant's theory is, that he shot Brown because Brown was attempting to then shoot him. If the jury believed that, there was no room whatever for supposing that appellant in shooting when he did acted too hastily, or used more force than was actually necessary in his own defense. Admitting it to be true that

appellant had the right to act on the reasonable appearances of the situation, both as to the danger threatening him and the means necessary to avert it, it was clearly submitted to the jury whether his danger, real or to him reasonably apparent, was a fact, in which event his act in shooting when he did became the only available mode of saving his life. The omission from the instruction of the words "or as reasonably appeared to the defendant to be necessary," in qualifying his right to act in his self-defense, though abstractly incorrect, could not possibly have affected the verdict. It would be trivial for an appellate court to reverse a judgment of conviction upon such an unsubstantial ground. If it were possible that the matter complained of could have altered the result, we would not hesitate to give appellant the benefit of it, by awarding him a new trial.

Nor is the criticism of the remainder of the instruction more substantial. The court, in defining to the jury Brown's right to act in his defense, told them that "if he, Brown, believed, and had reasonable grounds to believe, that O'Neal was then about to assault him, Brown, or take his life, or do him great bodily harm, then said Brown had the right to protect himself, and to use such means or force as reasonably appeared to him necessary from being then and there assaulted or killed, or receive great bodily harm at the hands of the accused."

Of this instruction appellant argues that it not only allowed Brown to take appellant's life to avert a mere assault, but even allowed it upon Brown's belief of a mere assault. We have already discussed the use of the word "assault" as used in the instruction. Brown's belief was a proper element of his action. But it must have been a reasonable belief, based upon circumstances of the situation of which the jury were to judge. Nor is it true that his belief that he was about to be inflicted with "a mere assault" was by the instruction allowed to justify his shooting at appellant. He must have believed upon such facts of the situation as would reasonably induce the belief that appellant was then and there about to take his life or do him great bodily harm. This belief could not, under the instruction, have been justified at all except there was some overt, threatening act of appellant indicating his hostile purpose, and the grave extent of it. This instruction must also be read in connection with another, the 7th, of which also appellant complains. It reads: "The court instructs the jury that if they believe from the evidence, to the exclusion of a reasonable doubt, that the accused, by his own willful and felonious act, or acts, toward the deceased, Martin Brown, made any impending danger, or apparent danger, to himself necessary or excusable on the part of said Brown, then the accused had no right to rely upon any such danger, or apparent danger, as an excuse for taking the life of said Brown, or doing him great bodily harm, and he can not excuse himself under the law of self-defense as to such act or acts."

The willful and felonious act or acts toward deceased, referred to in the last instruction, were those in evidence, and adverted to in the previous instructions, that is, the assault with a loaded gun, with intent to kill Brown and to do him great bodily harm with it. The jury must have understood, if they comprehended any part of their duty as jurors, that the law of the case for their guidance, and the whole of it, was contained in the court's written instructions, and that none of these instructions was paramount to

the others; that they should, naturally, be read as a consistent whole; that they were given to aid the jury in properly applying their conclusion of guilt or innocence to the facts admitted before them in evidence. The practical issue, sharply presented, was whether the accused acted in his necessary, or apparently necessary, self-defense. That he shot Brown and killed him in his own house were facts not at all disputed. It was, as to appellant, then a matter of justification or guilt. The court told the jury, in substance, that if appellant, when he shot was in danger of loss of life or of great bodily harm at the hands of deceased, then about to be inflicted upon him, appellant was excusable. But under the circumstances shown in evidence appellant's right of self-defense, even if he was in the peril claimed when he shot, depended upon another principle of law no less clear, which is, that if he himself brought about his own peril by his own felonious act, he can not justify the taking of human life to extricate himself from it. That would be to make one wrong justify another. The principle is not denied. The court was undertaking to define it to the jury, as was proper. The language employed, as seems from the criticism of able counsel, is subject to grammatical criticism. The idea might have been more clearly expressed. Still it was stated so as to leave no room for it being misunderstood by a juror except by one too irrational to have been controlled by a clearer one. It got before the jury the principle that one himself beginning a felonious attack upon another, if bested in the fight, can not when the battle turns against him, or when his adversary, put into action by the assailant's wrongful attack, has obtained the advantage, then strike to the death to save his own life so jeopardized. Nor was there a question of appellant's withdrawal in good faith. He does not claim it in his testimony. His shot was as soon as it could have been after Brown got to the door. The retreat, if there was one even as claimed by appellant, was not so evinced to Brown as to indicate that appellant had in good faith abandoned his assault.

The jury could not have been misled by the form of the instructions. They would have been compelled to leave the record for their facts to have been so misled. We see no error in the record prejudicial to any substantial right of the accused.

Judgment affirmed.

Whole court sitting.

NAIRIN v. THE KENTUCKY HEATING CO.

(Filed December 21, 1900—Not to be reported.)

Appeal from Jefferson Circuit Court, Chancery Division.

Judge DuRelle delivered the following opinion upon application to dissolve injunction:

This motion to dissolve the injunction granted by the chancery division in this case was heard before the whole Court of Appeals, in connection with certain proceedings in the appeal of the Kentucky Heating Co. against the Louisville Gas Co.

After consultation, the conclusion has been reached that the decision of

this motion does not, in any way, involve a consideration of the merits of the controversy in the case last mentioned, and the merits of that case, will, therefore, not be considered or discussed in this opinion, which will be confined to a brief statement of the issues in this case, and of the conclusions reached upon this motion.

Plaintiff brought suit, praying for a judgment enjoining and restraining defendant from turning off its natural gas from plaintiff's premises, or depriving him of the use of same during the pendency of his action. The averments are that the heating company is the successor and owner of the rights and franchises of the Kentucky Rock Gas Co., which by its charter, enacted March 26, 1888, was given "power and authority to conduct natural gas from the lands and property it might own to any of the cities, towns or manufacturing or business places in the State of Kentucky, wanting the same and assenting to its introduction upon the terms and conditions agreed upon." * * * On August 11, 1888, by ordinance of the city of Louisville, the Rock Gas Co. was given the right, privilege and authority to lay its mains in the streets of that city, and make such connections "as might be necessary or needful for the supply of natural gas to the citizens of said city for heating purposes only, for the period of twenty years from the date of the passage of said ordinance." It was further provided in the ordinance that the company should furnish natural gas for fuel and heating to the citizens of the city by contract made between the parties, and as soon as practicable establish its works and lay down its mains so as to be prepared to supply the city within two years. It was further alleged that the company did comply with the ordinance by erecting its works and laying its mains, and has supplied the citizens of Louisville until its franchises were sold under judgment of court to the defendant, the Kentucky Heating Co., which has exercised the franchises of the Rock Gas Co. since that date; has extended its mains through many of the streets and alleys of the city, one of which passes in front of plaintiff's place of business; that plaintiff heretofore made application to the defendant for the use of its natural gas and for connection with its said main, which application was accepted by the said defendant; that he has, at considerable expense, prepared his place for the use of natural gas, and for a long time past has used the gas supplied by defendant, and has complied with all its reasonable rules and regulations, paid its bills, and has always been ready and willing to pay all reasonable charges and to obey all reasonable rules, and willing that defendant should inspect all pipes running from its main into his premises, and its meter, and has always permitted this, but that defendant now claims not only the right to inspect the pipes running from its mains into its meter, and its meter, but also the right to inspect all pipes running from the meter to any part of his house. There are further averments as to the inconvenience and uselessness of such inspection, and that the regulation requiring permission of plaintiff to inspect such pipes is unreasonable, unwarranted and unnecessary. There is a further averment that he has refused to allow such inspection, and that the defendant has threatened to turn off the gas from his premises, and if that is done it will result in great and irreparable damage and injury to him.

An affidavit of defendant's president was filed, reciting the proceedings

against defendant for contempt of the injunction of the law and equity division of the circuit court in the case of the Kentucky Heating Co. against Louisville Gas Co., now pending in the Court of Appeals, and the opinion of the Court of Appeals adjudging the defendant in contempt; that the plaintiff was using defendant's gas for illuminating purposes, and that affiant knew no way of effectively carrying out the judgment of the law and equity division except by turning off the total supply of gas when the consumer refused to cease using it for illuminating purposes.

By an amended petition the plaintiff alleged that there were large numbers of consumers of natural gas in the same condition as plaintiff, resisting the right of search and threatening injunction suits similar to this one; "that the questions here presented involve a common and general interest of many persons, who are so numerous that it is impracticable to bring all of them before the court," and praying to be allowed to prosecute this action for the benefit of all such persons. By a second paragraph the amendment admitted that it was true, as stated in the affidavit of Mr. McDonald, "that defendant has been in effect required by the Court of Appeals of Kentucky to turn off its gas from the premises of such of its customers as persist in using said gas for lighting purposes, but plaintiff states that said order was made by said court in a case to which neither the plaintiff nor any of the parties for whom he sues were made parties, and that he is in nowise bound thereby." The third, fourth and fifth paragraphs of the amendment undertake to plead, as against the heating company, the claims of the heating company in the gas company's suit against it—that is to say, set up the heating company's claims upon the merits in its controversy with the gas company.

An answer was filed, which is, in substance, the affidavit of Mr. McDonald, above referred to.

Upon these proceedings the law and equity division of the circuit court held the view that Nairin, not having been a party to the case in which the proceedings in contempt were had, was not bound thereby, and "for the purpose of enabling the question to be raised before the Court of Appeals," granted an injunction "restraining the Kentucky Heating Co. from turning off its gas from the premises of plaintiff, or of any other of its customers on the ground that such customers are using said gas for lighting purposes, or are refusing to permit their premises to be inspected in order to determine whether said gas is being used by them, until further order of the court."

It will be observed that the only grounds urged in the pleadings in this case for relief by injunction are, stated briefly, the facts that the defendant had natural gas which it was furnishing for heating purposes, and that plaintiff desired the gas for lighting purposes; that defendant had been restrained from furnishing gas for lighting, but that plaintiff was not a party to the proceeding, and that while defendant was forbidden by the ordinance under which it was permitted to do business to sell gas for lighting purposes, the city which passed the ordinance was not complaining. It might be sufficient to stop here and say, that here is no ground stated for relief by injunction. No contract is averred, a violation of which is sought to be prevented—no suggestion of a contract, except the averment that plaintiff

applied for a gas connection and got it. There is not even an averment that he made application for a gas connection for lighting purposes. Obviously, unless the defendant be shown to be exercising a public franchise in the vending of gas for lighting purposes, there is no more ground for injunction shown here than if he had sought one to restrain Peaslee, Gaulbert & Co. from refusing to vend oil to him. But the petition on its face shows that as to the sale of gas for lighting purposes the defendant was not only not exercising a public franchise, but was, by the ordinance which permitted it to do business in Louisville at all, expressly forbidden to sell gas for any other than heating purposes. The plaintiff is, therefore, in the position of asking an injunction requiring the defendant to violate an ordinance of the city.

Moreover, the injunction must at least be modified upon another ground. The parties whom the plaintiff attempts to represent, and in favor of all of whom the injunction was granted, have no "common or general interest." They have no joint right. They have only a question of law of common or general interest. But "it is not sufficient that the matters presented by the pleading raise a question of law of common or general interest; but if it were, defenses of varying character might be presented." * * * (Oswald v. Morris, 92 Ky., 52; Newman on Pleading, page 465.)

But there is higher ground upon which to base the decision of this motion. This is a proceeding in the chancery division to enjoin proceedings on a judgment in the law and equity division of the circuit court. Section 285 of the Code provides: "An injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered."

This section has received full construction by the Court of Appeals. In C. & O. S. W. R. R. Co. v. Reasor, 84 Ky., 369, it was held, in an opinion by Judge Lewis, that the circuit court has no jurisdiction to enjoin the sale of property under an execution issued upon a judgment rendered in the court of a justice of the peace. The opinion cites Kelley v. Kelley, 2 Duvall, 263; Davis v. Davis, 10 Bush, 274; Neeters v. Clement, 12 Bush, 359, and McConnell v. Rowe, opinion delivered October 9, 1886, and says: "Nevertheless the effect of the injunction would be to indirectly invalidate the judgment, and, to some extent, impair its efficacy. But as the mode by which a judgment may be vacated, reversed or modified is elsewhere in the Code provided, the inhibition contained in section 285 was manifestly intended, as it does in terms, apply not to the judgment itself, but to proceedings thereon." (Jacobson v. Wernert, 19 Ky. Law Rep., 682)

This provision of the Code applies to third parties.

Said Judge Pryor, in Mallory v. Dauber's Ex'or, 83 Ky., 244: "This is a comprehensive provision, and applies not only to the party against whom the judgment was rendered, but to all parties who seek to stay proceedings on the judgment." * * *

And in Stahl v. Brown, 84 Ky., 339, in a proceeding in the circuit court to enjoin the operation of a ferry established by the county court, the Court of Appeals, in an opinion by Judge Lewis, said: "Moreover, being a judicial act (the establishment of the ferry), it can not, according to the Civil Code, be vacated, nor the exercise of the privilege conferred by it prevented

or restrained by an order of injunction issued by another court in an independent and distinct action or proceeding."

And this was a suit by persons who were not parties to the proceeding to establish the ferry.

In this State we have the Code provision which goes further than the general rule, and prevents courts of superior jurisdiction from interfering by injunction with proceedings upon judgments of courts of inferior jurisdiction. But the general rule, independent of statute, is equally broad as to courts of concurrent or co-ordinate jurisdiction. In an admirable collation, of the authorities upon this subject in 16 A. & E. Ency. of Law, 2d edition, page 398, it is said: "No court has the power to interfere by injunction with the judgments or decrees of a court of concurrent or co-ordinate jurisdiction having equal power to grant the relief sought by injunction. The fact that the parties to the injunction proceeding are not the same as the parties to the judgment or decree which it is sought to enjoin does not relieve the case from the operation of the rule, nor can the consent of the parties change the rule or relax its binding force in any particular case; it is not established and enforced so much to protect the rights of the parties as to protect the rights of courts of co-ordinate jurisdiction to avoid conflict of jurisdiction, confusion and delay in the administration of justice."

The rule, as it exists, independent of statute, seems based, as said by Judge Taft, upon an enlightened comity of courts to prevent unseemly conflict of jurisdiction.

The injunction must be dissolved.

The other judges of the Court of Appeals concur in this opinion, with the exception of Judge Paynter, and with the exception of Judge Guffy, who was not present at the hearing.

STEPHENS v. STEPHENS.

(Filed March 16, 1905—Not to be reported.)

1. Husband and wife—Desertion of wife—Creditors of husband—Defense by wife—Homestead—Under Civil Code, section 84, subsection 4, which provides that "if a husband deserts his wife she may bring or defend for him any action which he might bring or defend," in an action by the judgment creditors of a nonresident husband to subject his homestead to the payment of their judgments the wife may intervene, alleging that the land was the home of her husband, who had deserted her and her children, and will be allowed to defend for him and establish her homestead.

2. Constructive service—Judgment—Refunding bond—Under Civil Code, section 410, providing that before judgment is rendered against a defendant constructively summoned, and who has not appeared, a bond shall be executed with good security, approved by the court, to the effect that if the defendant shall procure a vacation or modification of the judgment * * * restoration shall be adjudged," it was error to sell the homestead of the husband, who was before the court only by constructive process, without the execution of the refunding bond.

Rardin & Rardin and Applegate & Clark for appellant.

M. L. Harbeson for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

Austin Stephens and his wife, Jennie, resided on a small farm of fifty-three acres in Kenton county, Kentucky, which was their homestead. In order to obtain money with which to build the house he mortgaged the homestead to George Williams for \$400. He also borrowed some sums of money from his father, Watson Stephens, aggregating \$801.53, for which he executed and delivered his note on the 7th day of January, 1896. The son failing to pay his note when due, the father instituted an action against him in the Kenton Circuit Court, and obtained judgment upon which he caused to be issued an execution that was levied on the homestead, and under it the property was sold and bought in by the judgment creditor; after the expiration of one year, without redemption, the sheriff conveyed it to the purchaser.

B. F. Finnell, the father of Jennie Stephens, also sued Austin in the Kenton Circuit Court, and obtained a judgment against him for \$650, with interest from February 9, 1899, until paid. Upon this judgment he caused execution to be issued and levied on the homestead, and the sheriff was proceeding to sell when Watson Stephens instituted this action against him and the sheriff to enjoin the sale, claiming the property to be his under his purchase at sheriff's sale. Prior to this Watson Stephens had paid off the mortgage debt to Williams, the note and mortgage at the time of payment having been assigned to John W. Bryant.

Becoming convinced that he only obtained a lien by the levy of his execution and the sale and purchase thereunder on the encumbered land of his son, Watson Stephens amended his petition, making his son a party defendant, alleging that he had paid off the mortgage by mistake, believing the property to be his, and asking to be subrogated to the rights of the mortgagee to the amount he had paid, and for an enforcement of his lien for his debt of \$801.53, with interest and costs, and to be adjudged a first lien on the property. B. F. Finnell, by appropriate pleading, set up his debt and lien, and prayed for an enforcement thereof against his son-in-law.

In the meantime Austin Stephens had deserted his wife, and left the State. He was proceeded against in the foregoing actions as a nonresident, and was before the court by constructive service only. Pending the litigation B. F. Finnell died, and the action was revived in the name of his wife, Maria Finnell, as administratrix of his estate. The appellant, Jennie Stephens, intervened in the case, alleging that the land in question was the homestead of her husband, Austin; that they had resided on it since 1890; that he had deserted her and her two little children, and asked to be allowed to defend for her husband, and establish her homestead right as against the judgment debts herein before described. Watson Stephens controverted all of the material allegations of her intervening petition, and the issues being thus made up, the evidence was adduced. Watson Stephens was permitted, without objection, to testify against his nonresident son, and, for some reason, Jennie Stephens introduced no evidence whatever to substantiate her claim of homestead as against the debt of her father-in-law. Upon final

submission the chancellor adjudged that Watson Stephens had a first lien on the homestead for the amount paid to the holder of the mortgage, amounting, with interest, to \$430; that he had a second lien for his debt of \$801 53, with interest and costs; that B. F. Finnell's administratrix had a third lien for her debt of \$650, with interest from February 9, 1899, until paid, and her costs, and adjudged the property to be sold for their enforcement. A sale was had and the property purchased by Watson Stephens for the sum of \$1,600, being the amount of his debt, with interest and costs. From this judgment disallowing her claim of homestead Jennie Stephens has appealed. Her right to do so is unquestionable. Section 34, subsection 4 of the Civil Code of Practice, provides: "If a husband deserts his wife, she may bring or defend for him any action which he might bring or defend, and shall have the powers and rights with reference thereto which he would have had but for such desertion."

The case of *Baum v. Turner*, 25 Ky. Law Rep., 600, was in principle identical with the case at bar. After citing the foregoing subsection of the Code, it was said: "This authorized the wife to bring the action for her husband who, it was alleged, had deserted her. They were housekeepers when he left. She remained in the house after he deserted her, continuing to keep house, and the question to be determined is, did the property which was exempt before the husband deserted her become subject to his debts thereafter? The property was his; he might dispose of it as he saw fit, and do as he pleased with the proceeds up to the time of the levy of the attachment as far as appears. The petition does not show a severance of the domestic relations. However protracted the abandonment may have been, the parties constituted 'a family' in law."

The appellant insists that the judgment against her husband ordering a sale of his homestead was erroneous, because, he being before the court only by constructive process, the creditors should have executed a refunding bond before the sale, as provided by section 410 of the Civil Code of Practice, which is as follows: "Before judgment is rendered against a defendant constructively summoned and who has not appeared, a bond shall be executed, with good surety approved by the court, to the effect that if the defendant shall procure a vacation or modification of the judgment, the person in whose favor it was rendered shall restore to the defendant any property or money obtained under such judgment, restoration of which shall be adjudged. If the judgment be in favor of persons having distinct interests, such bond may be executed for each, according to his interest."

Austin Stephens was before the court by constructive notice only; it was, therefore, error to sell his homestead without the refunding bond required by law. (*Morrison v. Beckham*, 96 Ky., 72; *White v. Moyers*, 17 Ky. Law Rep., 402; *Tatum v. Gibbs*, 19 Ky. Law Rep., 696. In *White v. Moyers* it was held that the nonresident himself did not have to appeal to make the error of not giving bond available; that if it appeared on the appeal of a codefendant the court would reverse for the omission.

The position of the appellant is indeed pathetic in its isolation. Deserted by her husband, who left her with two infant children to support, she is sued on the one hand by her father-in-law, and on the other by her own mother and father, whose actions, if successful, will result in turning her

and her children out of her home. While the hardness of her lot does not warrant us in unduly straining the law to uphold an invalid claim in her favor, she is entitled to the benefit of every principle which she can rightfully invoke for the protection of herself and little ones.

The judgment is reversed, with directions that she be permitted to adduce such evidence as she can to uphold her right to homestead as against the liens sought to be enforced upon it, and to file exceptions to such incompetent evidence as may have been produced against her.

JONES, &c. v. FOWLER DRUG CO.

(Filed March 17, 1905.)

Lease—Term of years—Damage by fire—Remodeling—Agreement to re-occupy—Tenable condition—Where premises are leased for a drug store for five years, under a contract providing "that in the event the owner should desire to remodel the building so far as it would necessitate the tenant removing from the building, he is to receive a certain reduction of the rent, with the right to re-occupy the premises after the building is remodeled at the same rental until expiration of the lease," such tenant is entitled to hold the premises where they have been damaged by fire without his fault, where the damage is not such as to render them untenable, and such lessee may elect to retain them unless the lessor will agree that he shall re-occupy them after they are remodeled as specified in the written contract.

Humphrey, Hines & Humphrey for appellants.

Chas. F. Taylor and Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

By lease dated July 1, 1901, appellants rented to C. J. Rosenham & Co., for use as retail drug store, that part of Masonic Temple Building, on the ground floor, which is at the northeast corner of the building, fronting on Jefferson street twenty feet and six inches. In the lease the parties attempted to give the metes and bounds of the room leased. The lease extended from July 1 to January 1, 1905, at an annual rental of \$4,500, payable in monthly installments.

On May 13, 1903, Rosenham & Co. assigned the benefit of their lease to the appellee for a consideration of \$8,000 for the good will of the establishment, and \$10,600 for the stock of drugs then in the store. Appellants consented to this transfer, and on the same day made an extended lease with the appellee for the same premises, carrying the term from January 1, 1905, to January 1, 1910, at an annual rental of \$5,500, payable in monthly installments. The appellee took possession of the store in May, 1903, after putting improvements thereon costing \$12,000, and opened the store to the public about the middle of July, 1903.

The Masonic Temple Building, in which this drug store was located, consisted of a large four-story building fronting 75 feet on Jefferson street and extending back 210 feet to Green street. Besides the Fowler drug store, there were five other store rooms fronting on Fourth street and two others fronting on Jefferson street. The second story of the building consisted of sev-

eral offices fronting on Jefferson street, a large billiard room fronting on Green street, in the rear, and the Masonic Temple Theatre, which occupied the central portion of the second and third stories of the building, the third and fourth stories, except that part occupied by the theater, consisted of lodge rooms and other similar rooms.

On November 20, 1903, a part of the building was destroyed by fire, without the fault or neglect of either party to this suit. The fire originated either in the lodge rooms in the third story or in the theatre proper adjacent thereto. The result of the fire was a total destruction of the theatre portion of the building above the second story; the destruction of some of the lodge rooms, and considerable damage to the rooms in the second story by reason of water thrown in the building by the firemen. The drug store of the appellee was not damaged any by the fire and but little by the water. It had a steel ceiling, over which there was the floor of the second story, and over this the floor of the third story was intact. The floor of the theatre was not damaged by fire; and being a slanting floor, it carried away the water from that portion of the building occupied by the drug store.

The lease provides that the Fowler Drug Co. "shall take good care of the premises and return the same at the expiration of the term in as good order as received, ordinary wear and tear and natural decay excepted, unless the improvements should be destroyed by lightning or other natural causes, or fire not caused by their default. If destruction as aforesaid, total or partial, ensues so as to make the premises untenable for the purposes desired, the lessee may surrender and cancel this lease."

The 12th clause of the lease provides as follows: "In the event that the owners of the property should desire to remodel the building so far that it would necessitate the tenant removing from the premises, the tenants are to receive, should they move within twelve months from date of lease, \$5,000, within two years \$4,000; within three years \$3,000; within four years \$2,000, and at any shorter period previous to the expiration of their lease \$1,000, the tenant to have the right to reoccupy the premises after the building is remodeled at same rental, and continuing occupancy until expiration of lease."

On December 26, 1903, the appellee brought this suit, alleging that there was a mistake in the description of the store rented, in that the third call had been omitted and that appellants were contending that appellee's lease had been terminated by the fire, and that they were about to compel or force the appellee to remove from the premises without recognizing the provisions of the lease. It asks that the error in the description be corrected; that appellants be enjoined and restrained from remodeling the Masonic Temple Building in a manner that would require the appellee to remove from the leased premises, unless they would recognize appellee's right to re-enter under the terms of the lease; that the cloud upon appellee's title to the leased premises, caused by the alleged wrongful and illegal statements and declarations of appellants, be removed, and that the lease be adjudged to be in full force.

The answer consists, first, of a traverse of the material allegations of the petition, and of a second paragraph which pleads in substance that appellee took no interest in the land underlying the storeroom rented to it, and that

the Masonic Temple Building was completely destroyed by fire, which resulted in the dissolution and revocation of the lease.

Section 2997 of the Kentucky Statutes provides as follows: "Unless the contrary be expressly provided for in the writing, no agreement of a lessee that he will repair, or leave the premises in repair, shall have the effect of binding him to erect similar buildings, if without his fault or neglect the same may be destroyed by fire or other casualties; nor shall a tenant, unless he otherwise contracts, be liable for the rent for the remainder of his term of any building leased by him, and destroyed during the term by fire or other casualties without his fault or neglect." The appellants reply upon the alleged total destruction of the Masonic Temple Building by fire as having worked, in law, a dissolution of the lease between the parties. This might be correct if there had been a total destruction of the building. But the proof shows that the room leased by the appellee was not injured and appellee has continued to occupy it for the purposes for which it was leased from that time to the present.

In the case of *Smith v. McLean*, 123 Ill., 219, the court said: "The contention, it will be observed, requires that the part of the building or the rooms or the apartments demised shall be destroyed, and this must mean not merely damaged or injured, but annihilated, for if they remain in but a damaged condition the tenant may still occupy them, repair the damage, and restore them to their former condition, if he will."

The facts in the case of *Nonotuck Silk Co. v. Shay*, 87 Ill. App., 544, were similar to those in the case at bar, except the injuries to the leased premises in that case were greater, and the court there said: "The evidence shows very clearly that the premises were not destroyed. They were damaged, but capable of repair. The walls were standing and the floor substantial, though covered with debris and ice, and in the ceiling a small hole had been burned or broken through. It is said that it should have been left to the jury to say whether there was in fact a destruction of appellant's portion of the building. There was no dispute as to the actual condition of the premises, and a finding that they were destroyed could not stand. If it be admitted that the question was one for the jury, still the fact must have been found, as the court in his instruction assumed it to be, that there was no destruction of, but only a damage to, the premises."

In volume 18 Am. & Eng. Ency. of Law, 2d edition, 308, we find the following language: "Thus when apartments in a building are leased without carrying any interest in the land, the destruction of the apartments or building releases the tenant from liability for further rents. It is necessary, however, that they should have been totally destroyed, so that nothing remains upon which the demisees may continue to operate. It is not enough that by reason of fire or other casualties they are rendered untenable, provided the apartments, as such, still exist." The author cites many authorities to sustain this view, and cites one case, *Helburn & Co. v. Mofford*, &c., 7 Bush, 169, as contra. The opinion in the case last mentioned was written before the enactment of the statute above quoted, which statute enlarged the powers of the lessee by giving him the power to elect to declare the lease at an end when there was a destruction of the leased premises. The trend of the authorities is to the effect that unless the premises de-

misled to the tenant, whatever they be, are destroyed, the lease is not dissolved and the rights of the parties, lessor and lessee, remain unaffected.

We are of the opinion that the appellee is entitled to hold under its lease unless the appellants choose to exercise their right by requiring it to remove under the twelfth clause thereof, and to have a correction of the clerical error in the description of the leased premises, which is conceded by the pleadings. We have been aided to a great extent in the preparation of this opinion by the able opinion of the lower court.

Judgment affirmed.

Whole court sitting.

WHITE v. COMMONWEALTH.

(Filed March 17, 1905.)

1. Homicide—Motion for change of venue—Motion sustained—Withdrawn—Order not made—Mistrial—Subsequent change of venue—Effect—Where defendant was indicted for murder in B. county, and the attorney for the Commonwealth applied for a change of venue, to which the defendant objected, and the court announced from the bench that he would sustain the motion and move the trial to M. county, and before the order was entered permitted the attorney for the Commonwealth to withdraw the motion for a change of venue, and after the case was tried in B. county, resulting in a hung jury, the attorney for the Commonwealth renewed his motion for a change of venue, which the court granted, and removed the trial to H. county, against the objection of the defendant, Held—Under Kentucky Statutes, section 1118, providing that "no more than one change of venue, or application therefor, shall be allowed to any person or to the Commonwealth in the same case," the first application having been withdrawn, the last one should be regarded as the only one made in the case.

2. Jail—Security of prisoner—Discretion of court—Under Kentucky Statutes, section 1113, providing that "upon granting a change of venue in a criminal case the judge of the court shall direct that the defendant be delivered to the jailer of the county where the trial is to be had," and Ib., section 2238, providing "if in any county the jail is insecure, or there is danger, or probable danger, that a person confined therein * * * will be rescued therefrom by violence, the judge of the circuit court * * * shall by an order * * * direct that such person shall be transferred to the jail of the nearest county in which the jail is secure, and it shall be deemed that he shall be safely kept. In the absence of anything appearing in the record to the contrary, it must be presumed that the judge's action in the premises was based upon some of the grounds authorized by the statute.

3. Impeaching witness—Incompetent evidence—Harmless error—Where in an attempt to impeach the character of a witness for the Commonwealth some statements were allowed to be made by witnesses on both sides as to the character of the witness for sobriety, paying his debts, attending church and Sunday-school, etc., while incompetent, was not prejudicial to appellant.

4. Excluded evidence—Admonition to jury—Presumptions—Where a statement was made to the jury by a sister of deceased, "that deceased had information that defendant and others were going to kill him," was imme-

diately excluded from the consideration of the jury by the court, and they were told to disregard it, we have no right to presume that the defendant was prejudiced thereby.

5. Special terms—Calling—Notice—Summoning juries therefor—A special term of the circuit court provided for in Kentucky Statutes, section 964, may be called either by the order of the court made during the last preceding regular term, or by notice signed by the judge and posted at the courthouse door for ten days before the special term is held, and grand and petit juries may be summoned for, and criminal and penal cases tried at, such special terms, nor do we think it material whether the juries for the special term were ordered to be summoned before or after the beginning of the special term.

6. It was not error for the court to permit an attorney other than the regular attorney for the Commonwealth to state to the jury the nature of the charge against the defendant.

7. Evidence—Peremptory instruction—While the evidence showed that another fired the fatal shot that killed deceased, much of it conduced to prove that defendant was aider and abettor in the crime, and as there was some evidence of defendant's participation therein, a peremptory instruction to find him not guilty was unauthorized, and the giving of it would have been error.

J. D. Black, B. F. French, B. B. Golden, J. J. Blanton and Lafferty & King for appellant.

A. F. Byrd and N. B. Hays for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Thomas White, and Curtis Jett were jointly indicted in the Breathitt Circuit Court for the murder of J. B. Maroun. After a mistrial in that court a change of venue was applied for in behalf of the Commonwealth, and was granted by the court, and the case transferred to the Harrison Circuit Court. A joint trial of the accused followed in the latter court, resulting in their conviction at the hands of the jury, and the fixing of the punishment of each of them at confinement in the penitentiary for life. A new trial was refused by the lower court, and a reversal of the judgment of conviction as to the appellant, White, is now asked, the appeal as to Jett having been withdrawn by him since the record was filed in this court.

Numerous errors were assigned for a new trial, but we will only notice such of them as are relied on for a reversal. It is insisted for appellant that the judge of the Breathitt Circuit Court improperly allowed the Commonwealth's attorney to make two applications for a change of venue in the case, and that it was error to grant the change as was done at the time of the making of what appellant claims was the second application. It appears that at the same term of the Breathitt Circuit Court at which the indictment was returned, and before the trial in that court of Jett and appellant, the Commonwealth's attorney filed his affidavit, stating in substance that, in his opinion, there existed such a state of lawlessness in Breathitt county that the officers whose duty it was to summon witnesses would be prevented thereby from doing so, and jurors selected to try the

accused would be deterred from rendering an impartial verdict. Based upon this affidavit, he moved the court to transfer the case for trial to another county outside of the 23d Judicial District. To this motion the accused both objected, but the court announced that the motion would be sustained, and the venue of the prosecution changed to the county of Morgan; whereupon the Commonwealth's attorney, after consultation with his associates in the prosecution, asked to be allowed to withdraw the motion for a change of venue, which the court permitted to be done over the objection of the accused, and the order was not formally entered upon the record.

After the trial of Jett and appellant in that court, in which the jury failed to agree on a verdict, the Commonwealth's attorney renewed his motion for a change of venue in the case, based upon an affidavit similar to the one filed by him on the first motion, and the court then entered an order changing the venue of trial from the Breathitt to the Harrison Circuit Court.

While it is true that section 1118, Kentucky Statutes, provides that "no more than one change of venue, or application therefor, shall be allowed to any person, or the Commonwealth, in the same case," it does not appear from the record that the judge of the court did in fact grant the change of venue first asked by the Commonwealth's attorney, though he stated his purpose to do so, but before entering or directing the entering of an order to that effect the Commonwealth's attorney withdrew the application. This, we think, left the Commonwealth situated as if the application for a change of venue had not been made, and did not interfere with the right of the Commonwealth's attorney to make the application which was granted by the court following the mistrial, and this application should, in our opinion, be regarded as the only one made in the case.

The statute, *supra*, must be given a reasonable construction in order to effectuate the purpose for which it was enacted, and to hold that the motion which was withdrawn by permission of the court before final action was such an application for a change of venue as prevented the Commonwealth's attorney from renewing the motion at a later time is to place too narrow a construction upon the language used, and would tend to destroy its usefulness. Upon the calling of the case for trial in the Harrison Circuit Court Jett and appellant filed a special demurrer to the jurisdiction of the court, which was overruled. The demurrer raised the objection to the right of the judge of the Breathitt Circuit Court to change the venue of the case to the Harrison Circuit Court, and we have already disposed of that question. It is further insisted for appellant that the judge of the Breathitt Circuit Court erred in requiring him to be confined in the jail of Fayette county, instead of the jail of Harrison county, to which county his case was transferred, it being contended that this was prejudicial, as he had the right to be in the county where his trial was to take place that he might properly prepare his case for trial.

Kentucky Statutes, section 1113, provides that upon granting a change of venue in a criminal case the judge of the court shall direct that the defendant be delivered to the jailer of the county where the trial is to be had.

Section 2238 of the statute *supra* provides: "If in any county of this Commonwealth there is no jail, or the same is insecure, or there is danger,

or probable danger, that any person confined therein * * * will be rescued therefrom by violence, the judge of the circuit court * * * shall by an order * * * direct that such person shall be transferred to the jail of the nearest county in which the jail is secure, and it shall be deemed that he can be safely kept." * * *

While the order of the judge of the Breathitt Circuit Court does not set out his reasons for ordering appellant to be confined in the jail of Fayette county, and he was not required by the statute to state his reasons therein, it must be presumed, in the absence of anything appearing in the record to the contrary, that his action in the premises was based upon some one of the grounds authorized by the statute. Besides, it does not in fact appear that appellant was prejudiced by his confinement in the Fayette county jail, as he was not thereby prevented from conferring with his counsel or preparing for trial. Upon the contrary, he seems to have secured the attendance at the trial of every witness whose testimony was desired by him, except the witness, Noble, and he was allowed to read as the deposition of Noble his own affidavit, containing all the facts to which he claimed Noble would testify if present.

It is contended by appellant that incompetent evidence was admitted by the trial court to his prejudice; that is, that certain witnesses were permitted to testify in support of the reputation of B. J. Ewen, the principal witness for the prosecution, that he did not get drunk, or gamble, and that he attended church and Sunday-school. We find from the record that appellant and Jett, through their counsel and witnesses, made a very determined and bitter attack upon the character of Ewen, and great indulgence was shown by the court to both the Commonwealth and defendants in the examination and cross-examination of witnesses as to his character, and the testimony complained of was gotten to the jury in that way. It seems to have commenced with a witness who, having testified that Ewen's moral character was bad, was asked upon cross-examination by counsel for the Commonwealth what he understood to be the meaning of the expression "good moral character," to which he in reply said, in substance, that a man of good moral character was one who pays his debts, remains sober, attends church and Sunday-school. Whereupon he was asked if Ewen did not pay his debts, attend church, etc. Some of the other witnesses were allowed to be cross-questioned in the same way, but we do not think this evidence was prejudicial to the appellant.

It is also complained that it was error to allow Mrs. Johnson, a sister of J. B. Marcum and witness for the prosecution, to testify "that deceased had information that Tom White and others were going to kill him."

It appears from the record that the witness testified in substance that on one occasion previous to the death of her brother she was at his home, when, in her presence, he was given the information in question, and witness, upon being advised that men armed with guns were then at a stone quarry near her brother's house, went out to see who they were. Upon arriving at the quarry she discovered there four men with guns, and that appellant was one of the four; that upon seeing her they left the quarry, and after lingering awhile in sight of the house, went off.

In view of other testimony in the case relied on by the Commonwealth to

Connect appellant with the assassination of Marcum, we think the foregoing testimony of Mrs. Johnson was competent, except what was said to her brother in her presence by others, to the effect that "Tom White and others were going to kill him." That was clearly incompetent, and for that reason it was immediately excluded from the consideration of the jury by the court, and they were told to disregard it. This was done in a way that the jury could not have misunderstood. We have no right to presume that appellant was prejudiced by the testimony in question; to do so we must assume that the jury willfully disregarded what was said to them by the court, and violated their sworn duty to try the appellant according to the evidence. (Pearce v. Commonwealth, 10 Ky. Law Rep., 178; Tully v. Commonwealth, 18 Bush. 142; Allen, &c. v. Commonwealth, 26 Ky. Law Rep., 807.)

It is contended by appellant that the judge of the Harrison Circuit Court was without authority to call a special term of court for the trial of criminal and penal cases, except by an order of court entered at a regular term, and that there was no order of court calling the special term for the trial of this case, but only a notice thereof signed by the judge and posted on the courthouse door in vacation; and further, that no emergency existed for, or required the holding of, the special term. Section 964, Kentucky Statutes, provides: "In each county of said districts, except counties having continuous session, there shall be held each year the number of terms of the circuit court provided by law, and the term in any district may be extended if the business requires so that it does not interfere with any other term in the district; and whenever it is necessary to transact the business a special term may be called in any county, either by an order entered of record at the last preceding regular term in the county, or by notice signed by the judge and posted at the courthouse door of the county for ten days before the special term is held. The order or notice shall specify the day when the special term is to commence, and shall give the style of each case to be tried, or in which any motion, order or judgment may be made or entered at the special term, and no other case shall be tried, or motion, order or judgment entered therein unless by agreement of parties. Grand and petit juries shall be summoned and criminal and penal cases shall be heard at but three terms in each year in any county, to be fixed by order of court, unless in an emergency the court may otherwise direct; and grand or petit juries may be summoned for any special term by direction of the judge."

It will be observed that the special term provided for in the section supra may be called, either by the order of the court, entered during the last preceding regular term or by notice signed by the judge and posted at the courthouse door of the county, for ten days before the special term is held; and, further, that grand and petit juries may be summoned for, and criminal and penal cases tried, at such special term. Section 2244 provides for the summoning of grand and petit juries, or either, for such special terms. Manifestly the calling of the special term by the judge of the Harrison Circuit Court in vacation, by the notice signed and posted as required by the statute, was as valid as if it had been called by an order of the court entered at a regular term. Nor do we think it material whether the jury for the special term were ordered to be summoned before or after the beginning of the special term. Section 2244 provides that if at any special term of a cir-

court grand and petit juries, or either, will be required, the judge of the circuit court may, not more than ten days, nor less than five days, before the special term is to begin, direct the clerk of the court to immediately open the list made and delivered to him at the last regular term of the court, and to deliver a copy thereof to the sheriff, who shall summon the jury as required by law. The judge may, therefore, before the beginning of the special term direct that a jury be summoned therefor, but the statute authorizing him to do so is not mandatory, and there seems to be nothing in its language that precludes him from entering, after the beginning of the special term, the order directing the summoning of the jury either grand or petit, or both.

Considering the fact that the case at bar involves the charge of murder against two persons, who might have been expected to demand separate trials, either of which, in view of the great number of witnesses, would be tedious and expensive, it was but natural that the judge of the Harrison Circuit Court, upon being advised of the transfer of the case to that court from a district other than his own, should have thought it necessary to call a special term in order to give the accused a speedy trial, and at the same time prevent any congestion of the docket during the regular terms of his court. Obviously the circumstances presented such an emergency as under the provisions of the statute *supra* justified the calling of the special term. This court has repeatedly upheld judgments of conviction in criminal cases secured at special terms of the circuit courts called as in the case at bar. And in *Bales v. Commonwealth*, 11 Ky. Law Rep., 297, it was held "that the accused having been properly tried and condemned, it is immaterial whether the order calling a special term at which he was tried was signed by the judge."

In the absence of competent evidence to the contrary, every presumption will be indulged as to the regularity and validity of the order of the trial court, and we have been unable to find in this record anything that conduces to show that there was error in the calling or holding of the special term at which appellant was tried and convicted. It is further insisted for appellant that the trial court erred in allowing counsel employed in the prosecution to make the opening statement of the case to the jury, instead of requiring that duty to be performed by the Commonwealth's attorney.

In *Roberts v. Commonwealth*, 94 Ky., 449, it was held that "it was not error to permit an attorney, other than the regular attorney for the Commonwealth, to state to the jury the nature of the charge against the defendant."

Finally, it is urged that appellant's motion for a peremptory instruction directing the jury to find him not guilty should have been sustained. It would unnecessarily lengthen this opinion to enter upon a detailed statement of the facts relied on by the Commonwealth to show appellant's guilty participation in the murder of Marcum. Suffice it to say that while the evidence showed that Curtis Jett fired the fatal shot which deprived Marcum of his life, much of it also conduces to prove that appellant was an aider and an abettor in the crime, the perpetration of which was unaccompanied with a single extenuating circumstance.

The victim was shot in the back without warning of his impending fate,

or knowledge of the presence of his assassin. As there was some evidence to go to the jury of appellant's participation in the crime, a peremptory instruction was unauthorized, and the giving of it would have been error.

The instructions properly presented all the law of the case to the jury, and as upon the whole record appellant seems to have had a fair trial, the judgment is affirmed.

Whole court sitting.

HILL'S ADM'R v. THE PENN MUTUAL LIFE INSURANCE CO.

(Filed March 21, 1905.)

1. Bill of exceptions—Extension of time for filing—Consent of parties—Legality—Although the Code provides that the time for filing a bill of exceptions shall not be extended beyond a day, in the succeeding term, the parties may by consent extend the time, and where a party has consented to an extension and thus induced his adversary to delay the filing of his bill of exceptions, he will not be allowed to take advantage of the delay which he himself has caused.

2. Alternate terms for civil and criminal cases—Rule of court—Presence of attorney—Knowledge of proceedings—Presumption of consent—In a county having six terms of court a year, and by an order of court alternate terms are set apart for the trial of civil and criminal cases, where at one of the civil terms plaintiff's motion for a new trial was overruled, and in the presence of and without objection of one of the opposing attorneys he was given until the 10th day of the next civil term to file his bill of exceptions, and it was filed on the 9th day of said term against the objection of the defendant, the failure of the attorney to object to the extension of the time when it was made must be held to be an agreement to the extension, and a motion in this court to strike the bill of exceptions from the files will be overruled.

Samuel D. Hines, Sims & Grider and George H. Galloway for appellant.

Wm. Marshall Bullitt for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Hobson.

On June 13, 1904, the plaintiff's motion for a new trial was overruled in the Warren Circuit Court. An appeal was granted to this court, and plaintiff was given until the 10th day of the November term of the court to make up and present a bill of exceptions. On the 9th day of the November term the plaintiff tendered his bill of exceptions, which was signed and filed over the objections of the defendant. The defendant has entered a motion in this court to strike the bill of exceptions from the record on the ground that by section 334 of the Code of Practice time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term; that there was a term of the Warren Circuit Court held in September, and that the court was without authority to extend the time to the 10th day of the November term or to file a bill of exceptions at that term. No objection was made by the defendant to the order giving until the 10th day of the November term to file the bill of exceptions, and it appears that W. B. Gaines, who was one of the attorneys for the appellee, and whose name is signed to the answer,

was present in court when the order was made, and made no objection to it.

There are six terms a year of the Warren Circuit Court. Section 964, Kentucky Statutes, provides: "Grand juries shall be summoned and criminal and penal cases shall be heard at but three terms in each year, in any county, to be fixed by order of court, unless in an emergency the court may otherwise direct."

After this statute was passed the Warren Circuit Court made an order on April 6, 1896, that criminal and penal prosecutions only should be tried at the January, April and September terms, and civil cases only at the other three terms. Since the making of this order under the administration of the judge who made the order, and two other judges who have followed him, only civil cases have been considered at the three civil terms, and only criminal cases at the other three terms. When time was given to make up a bill of exceptions it was always given to the next civil or criminal term, according to the nature of the case. This rule of the court was acquiesced in by the members of the bar. The statement of the judge who made the order in this case is as follows: "By agreement of parties I presided as special judge in the trial of this case. At its May term, 1904, I overrule plaintiff's motion for a new trial, and gave him until the 10th day of its November term, 1904, in which to file bill of exceptions. In ignoring the September term, 1904 (which was a term devoted alone to the trial of criminal and penal prosecutions), I followed the uniform rule observed by the judges of the Warren Circuit Court, since 1896. Since the establishment of six terms of the Warren Circuit Court all civil processes have been returned to its civil term, and all criminal processes have been returned to the criminal terms, and where bills of exception were authorized to be filed at a succeeding term, such term has uniformly been held by the Warren Circuit Court to mean, and apply, to its next civil term. This settled ruling of the court I observed in this case."

The present circuit judge also makes the following statement: "As judge of the 8th Judicial District I have followed the ruling of Judges Settle and Bradburn, that no order or step can be taken in civil or criminal cases except at the terms indicated in the order of 1896 for the trial of cases of the kind. This ruling has been and is made upon the understanding that every member of the Warren county bar agrees to same, and no question has ever before been raised concerning the same."

The former circuit judge says, in effect, the same. It is also shown that there was no reason for extending the time to the November term except the understanding that no motion or step of any kind could be taken in a civil case at the criminal term to be held in September, and that Mr. Gaines, who was present when the order was made, was familiar with this understanding of the bar, and had acquiesced in it since 1896. Although the Code provides that the time for filing a bill of exceptions shall not be extended beyond a day in the succeeding term, the parties may, by consent, extend the time, for where a person has consented to an extension of the time, and thus induced his adversary to delay to file his bill of exceptions, he will not be allowed to take advantage of the delay which he himself thus caused. The defendant's attorney, who was present when the order was made giving time until the 10th day of the November term to file a bill of exceptions,

was familiar with the understanding of the local bar, and when he stood by without objection and allowed the time to be given, knowing that the plaintiff was acting upon the assumption that the bar had agreed to this manner of transacting the business of the court, he must be held to have agreed to the order, for he understood that the other party was acting upon that assumption. A person can not be allowed to remain silent when he knows that the other party is proceeding upon the assumption that he is consenting to what is being done, and afterwards withdraw his consent when the party who has thus been misled will be left without remedy. While it is true that section 964, Kentucky Statutes, merely limiting criminal and penal cases to three terms, civil cases may be heard at any term, and no order or rule of court in conflict with the statute can be enforced over the objection of a party, still there is no reason why the court may not proceed with its business at such terms as it deems best where there is no objection, and the parties consent to this manner of setting the cases for hearing.

The motion in this court is not made by Mr. Gaines, but by another attorney who was not present or cognizant of the local custom. Still, in taking steps in an action, the attorney is the representative of his client, and the latter is bound by his acts, and can not, as to such matters as this, complain of what his counsel has consented to, either expressly or by conduct from which consent would be necessarily inferred.

The motion to strike out the bill of exceptions is, therefore, overruled.

Judge Settle not sitting.

THOMAS v. WESTERN UNION TELEGRAPH CO.

(Filed March 21, 1905.)

Telegrams—Death of father—Delay in delivery—Action for damages—Peremptory instructions—Two telegrams were sent to appellant by her brother from Poplar Bluff, Mo., to Clinton, Ky.

(1.) "To Mollie Thomas, in country, Clinton, Ky.:

"Father is dead. Send me what money you have. Meet me at Oakton."

Three hours later the second one was sent:

(2.) "To Mollie Thomas, in country, Clinton, Ky.:

"Under changes in the law we can't come. So please answer whether you can come."

Appellant resided two miles from Clinton, and was well known. The first telegram was received at Clinton office at 11:14 a. m., November 3, and the second one three hours later. Messenger fees were paid to insure prompt delivery. The agent at Clinton gave them to a neighbor of appellant on the morning of the 4th, who said he would deliver them when he went home that night. They were both delivered at 6 o'clock, p. m., November 4, and appellant immediately telegraphed her brother to hold the corpse until she arrived, and by the quickest route arrived November 5 at 9 o'clock, p. m. The corpse was so decomposed she could not see it. In her action for damages the lower court struck out of the pleading the second telegram and all the allegations in reference thereto, and after hearing the evidence of appellant gave the jury a peremptory instruction to find for appellee. Held—That the two telegrams when read together, meant: Father is dead. Can you come. Answer. And must have been so understood by appellee's

agent and by appellant, and by reason of the delay in appellee's agent in their prompt delivery appellant was prevented from seeing her father before his burial, for which she was entitled to recover damages for injury to her feelings.

Bullock & Smith for appellant.

Richards & Ronald and Geo. H. Fearons for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Nunn.

The appellant instituted this action against the appellee for \$1,000 in damages for its negligence in failing, by its servants and agents, to deliver to her in a reasonable time two telegrams sent to her by her brother from Poplar Bluff, Mo., and addressed to her at Clinton, Ky. The telegrams are as follows:

"To Mollie Thomas, in country, Clinton, Ky. :

"Father is dead. Send me what money you have. Meet me at Oakton."

This telegram was received at the Clinton office at 11:14 a. m., November 8, 1908. In about three hours after this the following was received:

"To Mollie Thomas, in country, Clinton, Ky. :

"Under the changes in the law we can't come, so please answer whether you can come."

Appellant received these telegrams at the same time, about 6 o'clock, p. m., on the 4th, and she immediately went to the telegraph office and telegraphed her brother to hold the corpse until she arrived. She took the first train and went the quickest route, and arrived at Poplar Bluff about 9 o'clock on the evening of the 5th. The corpse had not been buried, but it was in such a state of decomposition that it was impossible for her to see it, and this was occasioned by reason of the failure of appellee to deliver her the telegrams with reasonable diligence. The appellant, at that time, resided about two miles from the city of Clinton, and it appears, without contradiction, that her brother so informed appellee's agent at Poplar Bluff of this fact at the time the telegrams were sent, and paid him the messengers' fees, in addition to the cost of the telegrams, to insure their prompt delivery. The messages themselves corroborate this by being addressed to her as in the country. It also appears that appellant was well known in the town of Clinton and vicinity, and also that the messages were never delivered by a messenger, but were given to one of her neighbors, who happened to be in Clinton on the morning of the 4th. When this neighbor took the telegrams he informed the agent of appellee that he was not going home until night, and that he would not deliver them until that time.

On motion of appellee the lower court struck out of the pleadings the second telegram and all the allegations with reference thereto, and after the evidence of appellant was heard, sustained appellee's motion for a peremptory instruction, and she has appealed. It appears from the proof that it was the intention of her brother in Poplar Bluff to prepare the body and ship it to Oakton, Ky., for burial, and this was the reason he called upon her for what money she had. But he soon after ascertained that under the laws of that State that the body had to be embalmed before it could be shipped, and that the embalment would cost \$60 or \$65. After having

waited for about three hours, and not having heard from his sister, he changed his mind, and concluded to bury the body at Poplar Bluffs, and hence sent the second telegram. Appellant testified that she had sufficient money for the purpose, and would have sent it if she had received the first telegram before receiving the second. We are of the opinion that the lower court erred in striking out the second telegram and the pleadings and proof with reference thereto, and also erred in giving the peremptory instruction to find for appellee.

These two telegrams should be construed together. They were received by appellee's agent at Clinton within a few hours of each other; the first notified appellant that her father was dead, and the purpose to bury him at Oakton, near her; the second notified her of the abandonment of the purpose to bury him at Oakton, and requested her to answer as to whether she could come to Poplar Bluff. These two telegrams meant: "Father is dead. Can you come? Answer." Appellee's agent who received them must have so understood them. It is shown that appellant so understood them, for she went that night, after receiving them, to appellee's office and telegraphed her brother that she was coming, and not to bury the corpse. It appears that appellant was delayed twenty-six hours in getting to the place where her father's corpse lay, by reason of the negligence of appellee in failing to deliver these telegrams, although it had been paid messengers' fees for prompt delivery, and that by reason of its failure to deliver them with diligence she was prevented from seeing him.

This court, in the cases of *this appellee v. Fisher*, 21 Ky. Law Rep., 1293; *Same v. Matthews*, 21 Ky. Law Rep., 1405; *Same v. Van Cleave*, 22 Ky. Law Rep., 53, and *Chapman v. this appellee*, 90 Ky., 265, announced the principle that a party could recover against a telegraph company for injured feelings in failing to get to a relative before death or before burial, provided such failure was caused by the negligent failure of the telegraph company to deliver the messages with reasonable diligence. If a recovery in such cases can be had, we can see no reason why the appellant should not be permitted to recover in this case for injury to feelings and grief in not being permitted to see her father before his burial. If there is any difference between this and the cases referred to, it is only in degree.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting, except Judge Cantrill absent.

Judges Barker and Settle dissenting.

SEWELL v. DRAKE.

(Filed March 21, 1905—Not to be reported.)

Lands—Liens—It was error to award judgment against appellant and enforcing a lien upon his land, there being not the slightest pretext that he had any lien for the payment of the debt sued on, no fact being recited in the pleadings that authorized such lien.

W. J. Jackson for appellant.

O. F. Spencer for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Nunn.

The appellee instituted this action against appellant on the 9th of October, 1903, to recover on a promissory note for \$170.67. He also alleged in his petition that after the creation of the debt and the execution of the note the appellant had purchased from one John Bradley a tract of land in Powell county, on the waters of Brush creek, and that he had paid Bradley therefor and had taken the title in himself, but had never had the deed recorded. He prayed judgment for his debt, interest and cost; that he be adjudged a lien on this land and that it be sold in satisfaction of his debt. The appellant was served with process, and at the November term of the Powell Circuit Court, he having failed to plead, the petition was taken for confessed and a judgment was rendered against him for the amount of the note, and appellee was adjudged a lien on the land for the payment thereof, and the commissioner was directed to sell it, which was done, and appellee became the purchaser. After this the appellant filed a pleading, asking for a modification of this judgment and the setting aside of the sale. The appellee filed what is termed an answer to this pleading, but the court took no action on these last two pleadings.

The appellant has appealed from so much of the judgment referred to as gave appellee a lien on the land described, from the enforcement thereof and the sale thereunder. We are of the opinion that the appellant is entitled to the relief sought. It was error for the court to adjudge a lien in favor of appellee on appellant's land. There is not the slightest pretext that appellee had any lien on this land for the payment of his debt. He alleged in his petition that appellant had purchased and paid for this land since the creation of his debt. This fact did not give him any lien on this land, yet if true, it could, under certain circumstances and proper proceedings, be subjected to the payment of this debt.

For these reasons the judgment of the lower court is reversed, with directions to the lower court to modify the judgment to the extent that it gives appellee a lien on the land for the payment of his judgment and to set aside the sale made by the commissioner.

MORGAN, &c. v. BOULTON.

(Filed March 21, 1905—Not to be reported.)

Fraudulent conveyances—It appearing that Morgan the day before judgment herein was rendered against him conveyed twenty-five acres of land to his sons for the recited consideration of \$40; that the land was worth five times that amount, and that the sons were unmarried and lived with him and that this land was the only property he had that was subject to execution, the conveyance was properly adjudged fraudulent and the deed canceled.

Wright & McElroy for appellants.

J. G. Covington for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Nunn.

In the month of October, 1901, the appellee, Boulton, sued the appellant, S. P. Morgan, upon a merchant's account for \$270. Morgan made defense to that action, but on March 13, 1902, he, in open court, confessed and consented that a judgment for \$200 might be rendered against him in that action. Within the same month an execution was issued upon that judgment and placed in the hands of the sheriff, who returned it with the endorsement "no property found."

It appears that on the 12th of March, 1902, the day before the judgment was rendered for the \$200, the appellant, S. P. Morgan, conveyed to his sons, his co appellants, twenty-five acres of land for the named consideration of \$40 cash in hand paid. On the 3d day of May, 1902, the appellee instituted this action in equity against the appellants for the purpose of having the court declare the deed to this twenty-five acres of land fraudulent and void, alleging that the parties to it, with a full knowledge of all the facts, had combined to defeat the appellee in the collection of his debt; that the recited consideration of \$40 cash was false, and that no consideration whatever passed from the sons to the father for this land. The appellants answered, controverting these allegations. The court on the trial of the case adjudged that this deed was fraudulent and void and canceled it, and directed the land to be sold for the payment of appellee's judgment.

The proof showed that S. P. Morgan had no property except this twenty-five acres subject to execution, and that on the day before he permitted judgment to be rendered against him he, by this deed, attempted to put that out of the way of the execution, and received for it the alleged consideration of \$40, when the proof showed that at that time it was worth near five times that much. It also appears that these two sons were single men and had always resided with their father and had never accumulated any money or property, and the proof inclines one to the belief that the father supported them out of a pension which he received from the government. After a careful consideration of the facts as they appear in the record we are unwilling to say that the lower court erred in its conclusion with reference to the preponderance of the testimony.

Wherefore, the judgment is affirmed.

Judge Settle not sitting.

PALMER TRANSFER CO. v. EAVES.

(Filed March 21, 1905—Not to be reported.)

Damages—Negligence—Pleadings—Introduction upon trial of cause—The verdict appealed from appears to be sustained by the evidence—Under our form of practice, while the pleadings are addressed to the court, either party may introduce those of the opposite party as evidence.

Wheeler & Hughes for appellants.

Oliver & Oliver for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Nunn.

The appellee instituted this action for \$2,500 damages on account of injuries received by him by being wantonly, recklessly and carelessly knocked

down and run over by a horse and vehicle owned by appellants and driven by one of their employes while performing service for them.

The appellants answered, denying all negligence on the part of their driver and the injuries alleged, and averred that appellee by his own negligence and want of care for his own protection, brought about such injuries as he may have sustained. Appellee traversed the allegations of contributory negligence. A trial was had, which resulted in a verdict for \$1,000. On motion the lower court set aside this verdict. Another trial was had, which resulted in favor of appellee in a judgment for \$500. The appellants filed reasons and moved the court for a new trial, which motion was heard and overruled and appellants have appealed.

We are asked to reverse the judgment of the lower court for the reasons, first, that the amount of the verdict is too large; second, that the verdict is not sustained by sufficient evidence; third, because the court permitted the appellee to introduce as evidence to the jury the defendant's answer filed in the case; and, fourth, because the court refused to give the jury a peremptory instruction to find for the appellants. We will review these reasons in the order in which they are named: First, the proof shows, without contradiction, that the horse or vehicle struck the appellee in left temple, knocked him down and he remained unconscious for near two days; that the wound caused blood to issue from his eye and ear for several days; that he was confined, as a result of this injury, for two or three weeks; that after a lapse of seventeen months he has not recovered the sight in his left eye, nor the hearing in his left ear. The physician who attended him pronounced these injuries permanent. In view of this evidence as to his injuries we are unable to understand how appellants can claim that the verdict is too large. Second, without relating the evidence and circumstances in detail, as they appear in the record, it is sufficient to say that the verdict is sustained by the preponderance of the proof. Third, under our form of practice the pleadings of the parties are addressed to the court, yet either party has the right to introduce as evidence to sustain his claim the pleadings of the opposite party. (*Wild's Com'r v. Berry*, 25 Ky. Law Rep., 606; *L. & N. R. Co. v. Mulfinger's Adm'r*, 26 Ky. Law Rep., 8.)

The fourth reason was because the appellee failed to prove that the horse and vehicle was owned by appellants and that the driver was in their employ at the time. The appellants seem to overlook the fact that this was admitted in their pleadings, and in addition it was stated in the affidavit of Palmer, one of the appellants, for continuance, which affidavit was read as a deposition on the trial. The appellants excepted to the instructions given by the lower court, but in their brief admit that they were correct.

We are of the opinion that the instructions given were more favorable to appellants than they were entitled to, and even more favorable to them than the ones they offered.

Perceiving no error prejudicial to the substantial rights of the appellants the judgment is affirmed.

MONROE, &c. v. MATTOX, &c.

(Filed March 21, 1905—Not to be reported.)

1. Attachment—Lands—Agency—The tobacco in controversy was raised upon appellants' farm, one-half of it belonged to them and the other half to a tenant. W. E. Monroe, creditor of appellees, did no work in the tobacco, and had no interest in it so far as the record shows. While he had been in the habit of selling the crops made on the place in his own name, he seems to have done this with the knowledge and acquiescence of appellants and as their agents, but this gave him no title to the land or its products. Upon this state of fact it was error to dismiss the petition of appellants seeking to recover for the value of the tobacco in the hands of appellees, the attaching creditors.

2. Same—An attaching creditor stands in the shoes of his debtor and has no higher rights than the debtor has, and the proof in this action showing the debtor could not hold the tobacco, certainly appellees as attaching creditors can not do so.

J. J. Osborne for appellants.

Swinford & Webster for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Chief Justice Hobson.

In the year 1893 Jessie Monroe, the wife of W. E. Monroe, and Lizzie Monroe, his mother, bought a farm in Harrison county, about two miles from Cynthiana, for \$10,000, paying \$6,000 of the price down, and the remainder being unpaid. Jessie Monroe's father, Judge Tilton, paid \$3,000 of the price and Lizzie Monroe paid \$3,000. Since the purchase of the farm W. E. Monroe, his wife, and mother have lived on the farm. In the year 1894 they had on the farm a tenant by the name of Honican, who was a cropper. He needed supplies, which he obtained from appellants, Maddox and VanDerren. The parties differ as to the terms on which the supplies were furnished Honican. Appellees state that W. E. Monroe agreed to stand good for the account, and that it should be charged to him. W. E. Monroe says that he only agreed to be responsible to the extent of Honican's interest in the crop, which was insufficient to pay the account. Honican did not remain on the farm the next year, and Monroe refused to pay the balance due appellees, as he says; but they say that from time to time he promised to pay the account. Thus things ran along until the year 1900, when a crop of tobacco was shipped to Cincinnati, which had been raised on the farm in the year 1899 by a man named Cummins, when appellees instituted a suit before a justice of the peace in Cincinnati against W. E. Monroe attaching the tobacco in the warehouse, it having been shipped in the name of W. E. Monroe. Monroe defended the suit in Cincinnati, but judgment was given against him by the magistrate sustaining the attachment and subjecting the proceeds of the tobacco to the debt. Thereupon Jessie Monroe and Lizzie Monroe filed this suit against Maddox and VanDerren, alleging that they were the owners of an undivided one-half interest in the tobacco, and that the defendants had unlawfully converted it to their own use. The defendants denied the title of the plaintiffs to the tobacco and alleged that they had held out W. E. Monroe as the owner of one-

half of the crop, and were estopped to say that it was not his tobacco. On final hearing the court dismissed the plaintiffs' petition, the case having been transferred to equity, on the issue made by the defendants, and they appeal.

The tobacco was raised on the plaintiffs' farm. Cummins, who raised the tobacco, was their tenant, and was entitled to one-half of it. The other half belonged to them. W. E. Monroe did no work in the tobacco; his health was poor, and so far as appears from the record he had no interest in it. While the family had been living on the farm he had sold the crops in his own name, and from all the circumstances we think it clear that this was done with the knowledge and acquiescence of the plaintiffs. He acted as agent for his wife and mother, but this gave him no title to the land or its products, and the products of the land can no more be subjected to his debts than the land itself. The plaintiffs were not parties to the proceeding in Cincinnati, and are, therefore, not bound by that judgment. Their case is not substantially different from what it would be if that attachment suit had been instituted in Cynthiana, and they had intervened in that suit and set up their claim to the tobacco. We are referred to cases holding that as against a bona fide purchaser the owner of the land may be estopped to set up his right to the crop as against one whom he has held out as owning the crop, or permitted to be so held out. But an attaching creditor is not a bona fide purchaser without notice. He stands simply in the shoes of his debtor, and has no higher rights than his debtor has. Appellees, by their attachment against W. E. Monroe, acquired no better rights than W. E. Monroe had, and if W. E. Monroe could not hold this tobacco against appellants, they can not do so. (*Sabel v. Planters National Bank*, 110 Ky., 99; *Spratt v. Allen*, 20 Ky. Law Rep., 1824. and cases cited.)

Appellants in no way misled appellees. They had no communication with them at all, and from the fact that the land was deeded to them and the long delay of appellees in bringing the suit, as well as the fact that the family lived so near Cynthiana where appellees did business, it must be presumed that appellees had constructive, if not actual, notice of the condition of the title to the property.

Judgment reversed and cause remanded for a judgment and further proceedings consistent herewith.

BATES, &c. v. FRAZIER, &c.

(Filed March 21, 1905—Not to be reported.)

Deeds of partition—Mistake—Joinder of husband in deed to wife—Mortgage by husband—Knowledge of mortgage—A father conveyed land to his daughter and her son, the daughter then having another child (who was a daughter), and thereafter when both children became of age the mother and son decided to convey one-third of the land to the daughter, who was then married, and the mother also had remarried, and in making deeds of partition the draftsman, in preparing the deeds, by mistake conveyed the mother's lot to her and her husband, and the daughter's lot to her and her husband. In an action on a mortgage executed by the husbands of the

mother and daughter, respectively, on the land, in which their wives did not join, and in five years after the making of the deed of partition aforesaid, Held—It was error to enforce said mortgage where in a defense by the two wives it was alleged and proven that the conveyance to the husbands, respectively, was made by mistake, and the mortgagee knew of said mistake at the time of the execution of the mortgage.

Salzer & Baker for appellants.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Settle.

On the 19th day of February, 1878, Wm. M. Berry, of Letcher county, this State, by proper deed conveyed to his daughter, then Mrs. I. V. Bates, and her son, Patrick H. Bates, jointly, two tracts of land situated in that county. At that time Mrs. Bates had another child besides P. H. Bates, named Rosamond Bates, and both she and her brother, P. H. Bates, were then infants, though she was the younger of the two. Rosamond was not, however, a grantee in the deed from her grandfather, Berry, and, therefore, had no interest in the land thereby conveyed.

After Rosamond Bates grew to womanhood she became the wife of one N. R. Craft. Soon after her marriage her mother and brother, notwithstanding her exclusion by the deed from Berry from any interest in the lands, determined that they would share them equally with her, so they caused the two tracts of land to be divided into three equal parts, one-third being allotted to the mother; one-third to P. H. Bates, and the remaining third to Rosamond Craft.

Before the lands were divided Mrs. Bates, then a widow, became the wife of W. T. Holbrook. On January 10, 1898, the parties undertook to make deeds to each other in accordance with the division made of the lands, but by mistake of the draftsman the deed from P. H. Bates, his sister and her husband, by which they intended to convey their mother the land allotted to her, was made to her and her husband jointly, and that from P. H. Bates, his mother and her husband, whereby they intended to convey Rosamond Craft her third of the land, was made to her and her husband jointly. The mistake in each of the deeds mentioned was not disclosed to any of the parties by the draftsman, if he knew it, and they being illiterate and unfamiliar with the writing and making of deeds, did not at the time discover it.

Soon after the execution of the deeds Holbrook and Craft, desiring to secure an indebtedness of \$1,000 to James H. Frazier, for which they gave him their joint note, together executed to him a mortgage upon certain personal property owned by them, and also upon the lands allotted to their wives, respectively, in the division made between them and P. H. Bates, but neither of their wives ever signed or joined in the mortgage. Not long after the execution of the mortgage from Holbrook and Craft to Frazier, Rosamond Craft and N. R. Craft, her husband, sold and conveyed her part of the land received in the division to her brother, P. H. Bates, for \$700, which he then, or soon thereafter, paid in full. After the execution of the mortgage in question, and within five years next succeeding the date of the deed made to her and her husband by her son and daughter, Mrs. I. V. Holbrook

brought suit in the lower court against her husband, W. T. Holbrook, and James H. Frazier, and in her petition set forth the mistake in the deed to herself and husband from her son and daughter and the latter's husband, alleging her ignorance of the mistake at the time of the execution of the deed, its subsequent discovery by her, and asking the reformation of the deed by the striking of her husband's name therefrom as a grantee. It was also averred in the petition that Frazier, the appellee, had a pretended lien of some sort upon the land, which was declared to be invalid.

The petition contained the further averment that at the time of the execution of the mortgage from W. T. Holbrook and N. R. Craft to the appellee, Frazier, she and her husband were bona fide housekeepers with a family, and were then residing upon the land, and entitled to the whole thereof as a homestead, and that as she did not unite in the mortgage with her husband, that instrument did not convey the homestead right of herself or husband in the land. Appellee, in the answer filed by him, denied the mistake in the deed in question; averred that W. T. Holbrook was the owner of an undivided half of the land; that his mortgage lien was good as to that half, and that he accepted the mortgage in good faith and without notice of the mistake, if any, in the deed, or that W. T. Holbrook was not in fact the owner of one-half of the land, if such was the case. The answer was made a counterclaim and cross petition against W. T. Holbrook and N. R. Craft, and judgment was asked against them for his debt and the enforcement of the mortgage lien. The affirmative matter of the answer was denied by reply.

After the institution of the action by his mother, P. H. Bates also brought suit against appellee, setting up the purchase and conveyance to him from Rosamond Craft and her husband of the land she received in the division of the lands derived by himself and mother from W. H. Berry. His petition also set forth the mistake in the deed from himself and mother to Mrs. Craft; averred that her husband owned no part of the land, and that at the time of the execution of the mortgage to appellee by Craft and Holbrook the land of Mrs. Craft was occupied by her and her husband as a homestead; that they were then bona fide housekeepers with a family, and that as she did not unite with her husband in the mortgage it did not divest either of them of their homestead in the land, and that by his purchase of the land of his sister, and under the deed of herself and her husband to him, he became the owner of the land and homestead free from the alleged mortgage lien of the appellee, Frazier.

The answer of appellee to the petition of P. H. Bates contained in substance the same denials and averments found in his answer to the petition of appellee, I. V. Holbrook, and asked the same relief, and its affirmative allegations were denied by reply. The two actions were consolidated by order of the lower court and heard together, with the result that appellee's lien upon one-half each of both parcels of land embraced in the mortgage was adjudged superior to the titles attempted to be asserted by the appellants, I. V. Holbrook and P. H. Bates. Appellants were, however, given a fixed time to pay and discharge appellee's debt and lien, but upon their failure to do so within the specified time the lands were ordered to be sold in satisfaction of appellee's lien debt and costs. Appellants contend that

the judgment of the lower court was unauthorized and altogether erroneous, and we fully concur in that conclusion.

The proof shows conclusively that there was a mistake in the deed made appellant, I. V. Holbrook by P. H. Bates, Rosamond Craft and N. R. Craft, and also in the deed to Rosamond Craft from I. V. Holbrook, W. T. Holbrook and P. H. Bates. The husbands of these women had no interest whatever in the lands allotted to their wives, respectively, in the division made between them and P. H. Bates, and it was not intended by any of the parties that the deeds should embrace their names as grantees respectively. It is also patent that when the mistake was discovered by appellants each of them brought suit at once, and within five years of the time the mistake was made, to have it corrected. Furthermore, it appears from the evidence that appellee knew of the mistake in the deeds mentioned at the time of the execution of the mortgage, or was then put in possession of facts that informed him that neither Holbrook nor Craft owned any interest in either parcel of the land upon which he took the mortgage. N. R. Craft's deposition contains the statement, in substance, that he told appellee when he agreed to give him the mortgage that the lands belonged to his and Holbrook's wives. This was tantamount to informing him that there was error or mistake in each of the deeds. Appellee did not deny or attempt to contradict Craft in this statement. Indeed he introduced no proof, notwithstanding the burden was upon him to sustain the averment of his answer, that he accepted the mortgage in good faith, and without notice that Mrs. Holbrook and Mrs. Craft were in fact the exclusive owners respectively of the lands. This view of the case ought to have defeated the appellees' lien.

Upon yet another ground he was not entitled to recover. It is conceded Rosamond Craft and the appellant, I. V. Holbrook, did not unite with their husbands in the mortgage to appellee. "If a debtor executes a mortgage upon his homestead in which his wife does not join, no lien is created on it. The creditor acquires no right in it by virtue of the mortgage." (Monroe, &c. v. Price, 26 Ky. Law Rep., 250; Lear v. Totten, &c., 14 Bush, 101; Tong &c. v. Eifort, &c., 80 Ky., 152; Wing v. Hayden, 10 Bush, 276.) So if the lands in controversy had been owned by W. T. Holbrook and N. R. Craft, respectively, instead of their wives, as they were occupied by them as homesteads at the time of the creation of appellees' debt, and neither parcel was, according to the evidence, worth as much as \$1,000, appellee secured no lien thereon by virtue of his mortgage.

The answers of appellee in the consolidated causes, by failing to deny the averments of the petitions, that the appellant, I. V. Holbrook, and Rosamond Craft, and their husbands, were bona fide housekeepers with families, and that each was residing upon and occupying the parcel of land allotted her in the division of the Berry lands at the time appellee's debt was created and his mortgage executed, amounted to an admission of the facts alleged.

We see no valid ground for sustaining the decree of the lower court.

Wherefore, the judgment is reversed and cause remanded, with directions to the lower court to dismiss appellee's counterclaim and cross action, and to reform the deeds described in the petition by striking from the one the name of W. T. Holbrook and from the other that of N. R. Craft, as grantee.

WITTEN, BY, & C. v. BELL & COGGESHALL CO.

(Filed March 21, 1905—Not to be reported.)

Master and servant—Injury—Negligence—Peremptory instructions—In an action by a servant against his master for an injury by falling on a circular saw, where it is shown by the evidence that the injury was caused either by the servant falling on some loose scraps which he had negligently thrown on the floor, nor by standing in the scrap box where he had no business to be, and no act of negligence is shown by the master, a peremptory instruction to find for the defendant was proper.

B. H. Young and M. W. Ripj for appellants.

Barker & Woods for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Settle.

This action was instituted by the appellant, a boy sixteen years of age, and his next friend to recover of appellee damages for the loss of the fingers of his right hand from contact with a rip saw which was being operated by one of appellee's servants at its place of business in the city of Louisville.

Upon the conclusion of all the evidence heard upon the trial the lower court peremptorily instructed the jury to find for appellee, which they did.

A new trial was refused appellant, and by this appeal he seeks a reversal of the judgment. It is insisted for appellant that the trial court erred in granting the peremptory instruction. The appellant was employed by appellee as an offbearer of a saw. While at work in this capacity he fell toward the saw which one Crawford, another employe of appellant was at the time operating, and his hand coming in contact with the saw caused the loss of the fingers. It appears from the evidence that the saw, which is about a foot in diameter and of circular form, is operated upon a table. The sawyer stood on one side of the table and did his work by pushing the timber for sawing along the surface of the table until it came in contact with the saw, and thereby enabled it to do its work of cutting plank into small pieces for the manufacture of boxes. It seems to have been the duty of the offbearer to stand on the opposite side of the table from the sawyer and take the small pieces of plank, when cut into proper size, and stack them in piles, and to place the useless scraps in a box placed on the floor near the same table. Appellant contends that when hurt he was moving the scrap box away, while appellee contends that at the time he was hurt appellant was standing in the scrap box and not at work. Appellant also claims that he had been told to assist in removing the scrap box, and in doing so his feet caught on pieces of plank he had thrown on the floor, causing him to fall, in doing which his hand struck the saw, which was in motion, thereby producing his injuries.

No issue is made by the pleadings or proof as to the character of appellant's duties. The cause of action stated in the petition is by reason of some act of negligence on the part of appellee's agents and servants not stated, he was caused to fall against the saw while in motion which caused the injury. The fact that the saw was in motion is not alleged as a negligent act. In other words, under the allegations of [the petition the proximate cause of

the accident was the thing which threw him, or caused his fall, against the saw. No issue was made by the pleadings as to whether or not there was negligence in running the saw. Looking to the evidence, we find that of appellant shows his fall to have been caused by his stumbling over the pieces of plank or wood on the floor which he, by his own confession, placed there without direction from any one. According to his own testimony, therefore, his own negligence was the real or proximate cause of the accident. Upon the other hand the testimony in behalf of appellee conduced to prove that when appellant fell he was standing in the scrap box, where he had no right to be, and that he was merely idling and performing no duty whatever.

It is conceded that they were not sawing when the accident occurred because the sawyer was waiting for his help to bring him more lumber. During the waiting of a few minutes the saw was left running. The fact that the saw on previous similar occasions had sometimes been stopped did not amount to proof that it was an act of negligence for the sawyer to continue running it on the occasion in question. The proof failed to show that appellant was seen by the sawyer when he fell, or that the exercise of ordinary care on the part of the latter could have prevented the accident. Nor was there any allegation of proof to the effect that the continued running of the saw under the circumstances was negligence. We are of opinion that there was no proof of negligence upon the part of appellee, but that, according to the evidence, appellant's injuries were caused solely by his own negligence.

As said in *L. & N. R. R. Co. v. McGary's Adm'r*, 20 Ky. Law Rep., 691: "The burden was upon the plaintiff to show the negligence averred. Instead of showing facts from which the negligence averred on the part of the company might reasonably be inferred, he has presented a state of facts from which we may, with equal plausibility, infer either negligence or reasonable care on the part of the company. * * * Having neglected to specify wherein the negligence consisted upon which he bases his claim for recovery, he can not, under these pleadings, recover by showing a different character of negligence. * * * So granting that the derailment of the train, resulting in the death of plaintiff's intestate, was evidence from which negligence might be presumed, it nevertheless does not support the averment in the petition of negligence in permitting the track to remain in an unsafe and dangerous condition." (*Thomas v. L. & N. R. R. Co.*, 18 Ky. Law Rep., 164.)

We think the granting of the peremptory instruction by the trial court was proper. The above conclusion renders the consideration of the question of compromise unnecessary.

Wherefore, the judgment is affirmed.

GERMAN SECURITY BANK v. COLUMBIA FINANCE AND TRUST CO., &c.

(Filed March 21, 1905—Not to be reported.)

1. Fraud or mistake—Action for relief—Pleading—Discovery—Diligence—Where an action for fraud or mistake is brought after five years from the making of the mistake or the perpetration of the fraud, the plaintiff must

allege and prove that he discovered it within five years before the bringing of the suit, and must allege and prove facts showing that he could not, by reasonable diligence, have discovered it sooner.

2. Assignee—Duty and liability—It is the duty of an assignee before paying out the money of the assignor to know that his estate is solvent, or to have the fact judicially ascertained, else he takes the risk, and if he pay out the estate to some of the creditors, believing them to be all, he is still liable to those he negligently failed to pay.

Gibson, Marshall & Gibson for appellant.

Helm, Bruce & Helm for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

The Columbia Finance and Trust Co. and the German Security Bank of Louisville filed in the Jefferson Circuit Court the following agreed case on April 10, 1901:

"The parties hereto state that the controversy between them, hereinafter set out, is real, and these proceedings are entered upon in good faith to determine the rights of the parties.

"1st. On the 30th day of August, 1893, Samuel Russell, at Louisville, Ky., executed and delivered to Clinton McClarty his promissory note of that date, in words and figures following:

" '\$600, Louisville, Ky., August 30, 1893.

" 'Four months after date I promise to pay to the order of Clinton McClarty six hundred dollars, value received, with interest at the rate of 6 per cent. per annum from maturity until paid. Negotiable and payable at the Bank of Louisville.

" 'SAMUEL RUSSELL.'

"2d. Clinton McClarty endorsed the note and delivered it to James A. Kerr, who, before maturity, endorsed and sold it to the German Security Bank, which for full value discounted it in the regular course of its business and paid the proceeds to Kerr. The note was placed on the footing of a foreign bill of exchange.

"3d. The note was not paid at maturity (January 2, 1894). It was legally protested and due notice given the endorsers.

"4th. On the 9th day of February, 1894, the endorsers, McClarty and Kerr, at the request of Russell, made the following agreement with the bank, which was endorsed on a copy of the note:

" 'We, Clinton McClarty and James A. Kerr, endorsers on the original note of which the above is a copy, and which is held by the German Security Bank, under protest, hereby agree and bind ourselves to hold ourselves responsible to the holders of the original note until the 2d day of May, 1894, provided the discount and protest fee, amounting to \$18.55, is prepaid.

" 'Witness our hands this 9th day of February, 1894.

" 'CLINTON McCLARTY,

" 'JAMES A. KERR.'

"Russell then paid the discount and protest fee, and the above agreement became valid and binding, extending the time of payment as provided.

"5th. On December 30, 1893, Russell believing himself insolvent, made an

assignment for the benefit of his creditors to the Columbia Finance and Trust Co., which accepted the assignment, qualified as assignee at once, and notified creditors to produce their claims. The bank being so notified, promptly produced the note, properly proven, against Russell's estate.

"6th. On the 2d day of May, 1894, the assignee, believing Russell's estate to be solvent, but without taking any steps to judicially ascertain the fact, paid the bank the amount of the note, which was surrendered to it.

"7th. After the note was paid a number of claims were presented against Russell's estate, which were unknown to the assignee when it paid the note. The assignee proceeded to wind up the estate, reducing it to cash, and instituting a regular settlement suit in equity in the Jefferson Circuit Court. The bank was not a party to the suit; did not appear to it in any way, and had no notice of it. The assignee did not reduce the estate to cash until about February, 1899. The settlement suit was referred to the commissioner, and his report, filed June 29, 1899, showed the estate to be insolvent, and that in order to equalize the various creditors it was necessary that certain creditors who had been paid in full should refund. It was reported, and was true, that the amount paid to the bank was \$404.80 in excess of what would have been its proper share of Russell's estate on final settlement. Some of the claims presented were controverted, and their validity was not determined until the report was confirmed, which, on account of the summer vacation intervening, was not done until October, 1899, and shortly afterward the assignee for the first time notified the bank that it had been overpaid, and demanded that it refund the excess paid to it.

"8th. The bank claims that Russell and Kerr were solvent, of good credit, and that it could have easily collected the note from them. The assignee denies this. If the court considers the question of their solvency material, both parties may take proof. McClarty has since died, and his estate is insolvent. Kerr is now insolvent.

"9th. The bank is a regularly incorporated bank, organized and doing business as such in Louisville for more than twenty years.

"The assignee contends that it paid the note by mistake, believing Russell's estate to be solvent, and has the right to reclaim the excess so paid by mistake.

* "The bank claims that the payment having been voluntarily made to it, it ought not now be required to pay back any part of the sum paid to it, because to require it to do so would work a great hardship on the bank."

No proof being taken on the question of the solvency of McClarty or Kerr, and the case being submitted, the circuit court entered judgment in favor of the trust company, and the bank appeals.

We think it evident upon the face of the paper that the words "Russell and Kerr," in clause 8, are a clerical misprision for "McClarty and Kerr," for it is conceded that Russell was insolvent, and McClarty is named as having died insolvent in the concluding part of the clause. The money was paid to the trust company by the bank on May 2, 1894; no notice was given of the mistake until after October, 1899, and the suit was not filed until April 10, 1901. The money was paid to the bank under the belief that Russell's estate was solvent, which turned out to be a mistake, but no notice was given the bank of the mistake within five years, and no action was

brought against it by the trust company until the lapse of nearly eight years after the money was paid. By section 2515, Kentucky Statutes, an action for relief on the ground of fraud or mistake must be commenced within five years next after the cause of action accrues, and by section 2519 the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud. The action here was brought within ten years after the payment of money by mistake and was not, therefore, barred by limitation, unless the five years' statute applies. In construing the statute this court has held that it runs from the time the mistake by ordinary diligence should have been discovered. (*Dye v. Holland*, 4 Bush, 685; *Green v. Salmon*, 28 Ky. Law Rep., 517.) It has also been held that if the action is brought after five years from the making of the mistake or the perpetration of the fraud the plaintiff must allege and prove that he discovered it within five years before the bringing of the suit, and must allege and prove facts showing that he could not by reasonable diligence have discovered it sooner. (*Cotton v. Brown*, 9 Ky. Law Rep., 115; *Woods v. James*, 87 Ky., 511; *Cavanaugh v. Britt*, 90 Ky., 273.)

The general rule is that where money is paid by mistake, although there was negligence on the part of the person making the payment, it may be recovered back for the reason that otherwise the person receiving the money would be enriched at the expense of the other. But this rule is subject to the exception that the payment can not be recalled when the position of the person to whom the payment was made has been changed to his prejudice toward his debtor in consequence of the payment; and in such a case the person making the payment and not the person receiving it, without fault, must bear the loss. (*First National Bank of Chattanooga v. Behan*, 91 Ky., 560; 20 Am. & Eng. Ency. of Law, 820. and cases cited.)

The bank insists that the claim is barred by limitation, and that as it has lost its remedy against the endorsers of the note, who were released after five years by limitation, it is not liable to the trust company for the money, for the reason that thus a loss will be thrown upon it, which was due primarily to the negligence of the trust company. The trust company insists that it could not, by reasonable diligence, have discovered the insolvency of Russell's estate sooner, and that the bank has suffered no loss as McClarty has since died insolvent and Kerr is now insolvent. No proof having been taken as to the insolvency of McClarty and Kerr at the time the money was paid, the case must be determined on the presumptions of law arising on the facts agreed.

The assignment which was made by Russell to the trust company apprised it that he was insolvent. It accepted the trust, and can not escape liability to a creditor claiming under the deed by paying out the money on other debts of the assignor, although it did so believing the estate was solvent. It was its duty, before paying out the money, to know that the estate was solvent, or to have the facts judicially ascertained, else it took the risk. The bank was not required to know whether Russell's estate was solvent or insolvent, and had the right to rely on the trust company as to the condition of the estate. When the trust company paid it the full amount of its claim it was not, therefore, in fault in receiving the money, or responsible in any

way for the mistake of the trust company, which was due to its own negligence. While the bank should not be enriched at the expense of the trust company without consideration, it should not be placed in a worse position by reason of the negligence of the trust company. Here it is apparent that a loss must fall either upon the bank or the trust company, and he whose negligence caused the loss ought to bear it, rather than he who is innocent. It is not presumed that McClarty or Kerr were insolvent at the time the bank discounted the note, for banks do not usually buy paper of insolvent parties, and in the absence of proof it must be presumed that the bank did business as such business is usually done. The fact that McClarty afterwards died insolvent is not evidence, therefore, that he was insolvent at the time the money was paid, and the fact that Kerr is now insolvent is not evidence that he was insolvent at that time, or that a judgment against him will always be valueless. It is true that McClarty and Russell might not have pleaded limitation, but the bank's legal right of action was gone after five years, and the loss of the right of action is a substantial prejudice to it, and it can not, therefore, now be placed in statu quo. It does not appear from the facts stated that the insolvency of Russell's estate might not have been known to the trust company by ordinary diligence before it paid the note. Certainly it must be regarded as chargeable with notice of that fact from the time the claims were presented against the estate which were unknown to it when it paid the note, or from the time that it brought its suit for a settlement of the estate; and it does not appear from the agreed facts that this was within five years before the suit was filed. If it had made the bank a party to that suit, and thus apprised it of the situation, it might even then have protected itself from loss, but this was not done. We, therefore, conclude that the loss here should be borne by the party whose negligence caused it, and not by the bank.

Judgment reversed and cause remanded for a judgment as herein indicated.

AYER & LORD TIE CO. v. COMMONWEALTH, BY, &c.

(Filed March 23, 1905—Not to be reported.)

Campbell & Campbell for appellants.

Taylor & Lucas for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Paynter.

This case was before the court by a former appeal. The question involved on this appeal was decided on the former one. (Commonwealth, By, &c. v. Ayer & Lord Tie Co., 25 Ky. Law Rep., 2061.) Whether the conclusions of the court were correct or not, the opinion is the law of this case. Therefore, it is unnecessary to further discuss the question involved.

The judgment is affirmed.

586 BARRETT, &C. V. MUT. LIFE INS. CO., OF NEW YORK.

WATERS v. CLINE, &c.

(Filed March 22, 1905—Not to be reported.)

H. W. Root and Geo. H. Ahlering for appellant.

Lawrence Maxwell, Jr., J. C. Wright, L. J. Crawford, B. A. Wright and Joseph T. Graydon for appellees.

Appeal from Campbell Circuit Court.

Chief Justice Hobson delivered the following extended opinion:

The evidence introduced by appellees tending to show that wages were paid appellant during the time she remained at the home of John Cline was properly admitted. This fact, if true, was a circumstance tending to show that the contract relied on by appellant was not made. The case was properly set for a jury trial under section 12 of the Code of Practice. The exceptions to questions 28, 29, 35, 36, 37, 38, 47, 48, 61, 62 and 67 should have been overruled. (Hunter, Adm'r v. Marsh, 2 Ky. Law Rep., 241.) The answer of the witness in connection with the questions show that the witness was not in fact led by the questions.

The opinion is extended as above indicated.

BARRETT, &c. v. MUTUAL LIFE INSURANCE CO., OF NEW YORK.

(Filed March 22, 1905—Not to be reported.)

1. Life insurance—Contract—Three full premiums—Subsequent default—Paid-up policy—Action—Limitation—In an action for a paid-up policy by the husband and wife on a policy issued December 16, 1889, on the life of the husband, payable to his wife at his death, in consideration of an annual premium of \$189 for twenty years, which contained this clause: "After three full annual payments have been paid upon this policy the company will, upon legal surrender thereof or within six months thereafter, issue a nonparticipating policy for paid-up insurance; * * * when the husband paid four annual premiums, but failed to pay the fifth, due December 16, 1893, but did not demand a paid-up policy until December 7, 1894, to which the company responded that the policy had lapsed, and as an application for a paid-up policy was not made within six months, the policy became forfeited according to its printed terms, and was of no value." Held—That though the action was not brought until eight years after the default occurred, the demand having been made within five years after such default, the action for the issuance of the paid-up policy may be brought on the written contract at any time within fifteen years after the cause of action accrued.

2. Surrender of policy—In an action for a paid-up policy, where there was no demand by the company for a surrender of the policy, and there being a demand for a paid-up policy which was refused on the ground that the policy was no longer in force, it was not incumbent on the policy holder to tender the policy to the company before suit.

M. C. & G. D. Givens and Lockett & Lockett for appellants.

Edward L. Short, Yeaman & Yeaman and Grubbs & Grubbs for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Hobson.

On December 16, 1889, the Mutual Life Insurance Co., of New York, issued a policy of insurance upon the life of Thomas T. Barrett for the sum of \$5,000, payable to his wife, Clara P. Barrett, at his death, in consideration of an annual premium of \$189, to be paid on December 16 of each year for twenty years. Barrett paid four annual premiums, but failed to pay the annual premium due December 16, 1893. The policy contained this clause: "After three full annual premiums have been paid upon this policy the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a nonparticipating policy for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which the number of full years' premiums paid bears to the total number required, but said paid up policy shall not provide for any return of premiums."

Barrett did not demand a paid-up policy within six months after he failed to pay the premium in December, 1893, but on December 7, 1894, he wrote to the company demanding a paid up policy. The correspondence of the company for that period has not been preserved and, therefore, Barrett's letter is not produced, but his testimony on this subject is confirmed by the letter which he received from the company in answer to his letter, which, among other things, contains the following: "Your letter of the 7th inst. is received. According to my books, I find that policy No. 383,796 was issued on your life December 16, 1899, for \$5,000, and the annual premiums, amounting to \$189.85 each, were paid for four years up to December 16, 1898. The policy lapsed for nonpayment of the premium due at that time, and as application for a paid-up policy was not made within six months, the policy became forfeited according to its printed terms, and has no value at the present time."

This action was filed by Barrett and wife on December 23, 1901, to compel the company to issue to him a paid-up policy. The company relies upon limitation because the action was not brought for eight years after the default occurred. In *Washington Life Insurance Co. v. Lyne*, 26 Ky. Law Rep., 1070, the cases on this subject are collected, and the rule is deduced from them that the demand for a paid-up policy must be made within five years after the default is made in the payment of premiums, but that when the demand is made in time, the action to compel the issuance of the paid-up policy may be brought on the written contract at any time within fifteen years after the cause of action accrued. The statute of limitation is not, therefore, available in the case before us.

The defendant also relies upon laches upon the part of the plaintiffs in not bringing their action sooner, but as the action was brought after about eight years, or something like seven years before the statute would bar it, there is nothing to sustain this defense. It is further insisted that there was no surrender of the policy or offer to surrender it, and that, therefore, the action can not be maintained; but there being a demand for the paid-up policy, and that demand being unequivocally refused upon the ground that the policy was without value and no longer in force, it was not incumbent upon Barrett to go through the idle form of tendering the policy to the company. The unconditional refusal to issue a paid-up policy for the reasons stated in the letter above quoted relieved Barrett of the necessity of tender-

ing the policy just as proofs of loss are unnecessary where there is an unconditional denial of liability. The New York Statutes relied on have no extra-territorial operation. This question was fully considered in *Washington Life Insurance Co. v. Glover*, 25 Ky. Law Rep., 1827.

Judgment reversed and cause remanded for a judgment and further proceedings consistent herewith.

PRESTON v. PRICE.

(Filed March 23, 1905—Not to be reported.)

1. Election contest—Officers—Failure to sign returns—Offer to sign—In an election contest where the returns of a precinct were signed only by the clerk of the election, but on the trial the other officers testified to their accuracy and offered to sign them, this was not sufficient to justify the throwing out of the precinct. The officers should have been allowed to sign the returns, but the failure of the court to have this done worked no substantial prejudice to appellant.

2. Voting on table—Effect—While in some cases where men were allowed to vote on the table, signs were made in some way, by somebody on both sides, to those on the outside, indicating how such votes were cast, still this did not occur often, and the ends of justice would seem to be done by throwing out the vote cast on the table, where the voter was not sworn, and not throw out the precinct.

3. Voter—Physical disability—Under Kentucky Statutes, section 1475, providing that where one is "so physically disabled as to be unable to mark his ballot and shall so declare on oath," the judges of the election must decide as to what is "sufficient physical disability" if the voter is sworn and states that he is physically unable to mark his ballot, and such vote must be counted although the judges may err in their judgment as to such disability. The question must be decided by them in the exercise of their discretion, and the voter is not to be disfranchised because they make a mistake.

C. B. Wheeler for appellant.

Vaughn, Howes & Howes for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Chief Justice Hobson.

At the November election, 1901, appellant, Jethro Preston, and appellee, J. M. Price, were candidates for county court clerk of Johnson county. By the official count, as made by the commissioners upon the returns of the officers of the election, Price received a majority of twenty-eight votes, and Preston filed his petition contesting the election. Price filed answer to the petition, and Preston filed a reply, but not within the time allowed by law for that purpose. The circuit court struck the reply from the files and entered judgment in favor of Price, on the ground that the allegations of his answer not being controverted, he was entitled to the office. On appeal to this court it was held that the reply was properly stricken out, and that the affirmative allegations of the answer must be taken as true; but it was held that notwithstanding this the contestant might recover if he proved the averments of his petition; in other words, that the certified majority for the

contestee, together with the averments of the answer, were not sufficient to offset the averments of the petition. The judgment of the circuit court was reversed, with directions to the circuit court to consider the testimony and render judgment in accordance therewith. (Preston v. Price, 24 Ky. Law Rep., 1090.) On the return of the case to the circuit court it was tried on the merits. A recount of the ballots was had by the commissioner appointed for that purpose, who reported a majority of twenty-nine in favor of Price on the face of the returns by the election officers. The circuit court reduced this to sixteen on account of votes that were cast openly on the table by the clerk making the mark for the voter in the presence of the other officers of the election without the voter being sworn as provided by law. Judgment was again entered in favor of Price, and Preston appeals.

A great many grounds of reversal are relied on. In Big Gap Precinct the officers of the election did not sign and return a certificate on the stub book, as required by the statute, but only the clerk of the election signed the certificate. The officers of the election, however, all testified to the accuracy of the returns, and offered to sign them. There is no dispute as to the fairness of the election, or the correctness of the count. It was simply a mistake on the part of the election officers as to their duty in making the certificate. This is not sufficient to justify the throwing out of the precinct. The officers should have been allowed to sign the returns when they offered to do so, but the failure of the court to have this done worked no substantial prejudice to appellant. (Bennett v. Richards, — Ky. Law Rep., —.)

In Myrtle Precinct it is insisted that there were such frauds and irregularities as rendered the election in that precinct void. The judges of the election seem not to have been well posted as to their duties under the statute, and to have allowed certain voters to vote on the table without being sworn, on the idea that they knew them personally, and that it was unnecessary to swear the voters. Such an error on the part of the judges should not be ground for throwing out the vote of the entire precinct. There was no dispute between the officers at any time. They were evidently trying to do their duty. The election passed off quietly, and everybody voted and while it is true that in some cases where men voted on the table signs were made in some way by somebody on both sides, indicating how he had voted to those on the outside, still this, we are persuaded from the evidence, did not occur as often as some of the witnesses seem to think, and the ends of justice would seem to be done by throwing out the vote cast on the table where the voter was not sworn. We, therefore, conclude that the court properly refused to throw out this precinct.

There were a number of votes cast in the election in the several precincts where the voter was not sworn, and the clerk marked the ballot publicly on the table. Price averred in his answer that thirty-seven of these voted for Preston, and this not being controverted, must be taken as true. We have gone over the record carefully, and are satisfied that the finding of the circuit judge is as favorable to appellant on the question of these ballots cast on the table as the evidence warrants. Section 1475, Kentucky Statutes, so far as material, is as follows: "Any elector who declares on oath that, by reason of inability to read the English language, he is unable to mark his

ballot, may declare his choice of candidates or party ticket to the clerk, who, in the presence of the judges, sheriff and challengers and the elector, shall, with his pencil, mark a dot in the appropriate place for the cross-mark to indicate the choice of the elector. The clerk shall then fold and deliver the ballot to the elector, and instruct him to retire to the booth and there mark his ballot by making a cross-mark either in the squares showing dots or any other square he may desire. In all other respects he shall vote as is required of other electors. In case any person applying to vote is blind, and shall so declare on oath, the clerk shall be allowed to mark his ballot for him in the presence of the other officers of election and the challengers allowed by law; or, in case any person shall be so physically disabled as to be unable to mark his ballot, and shall so declare on oath, the clerk shall have the right to mark his ballot as in the case of a blind person applying to vote."

The statute, it will be observed, uses a very general expression, "so physically disabled as to be unable to mark his ballot, and shall so declare on oath." As to what is sufficient physical disability the judges of the election must of necessity decide. The statute is mandatory, and if the voter is not sworn his vote can not be counted, but if he is sworn and upon his statements under oath the officer of the election hold that he is physically unable to mark his ballot, then his vote must be counted, although they may err in their judgment. The question must be decided by them in the exercise of their discretion, and the voter is not to be disfranchised because they make a mistake. It is a substantial compliance with the statute if the voter is sworn to answer truthfully such questions as may be asked him, and then the judges interrogate him under oath as to his disability or disabilities.

As to the contested ballots returned by the commissioner, and not counted by him, we fail to see that any substantial error was committed to the prejudice of appellant. The ballots which he counted were properly counted. There are three ballots which he failed to count for appellant which we think should have been counted, and about the same number which should have been counted for appellee, but this would not affect the result.

The answer put in issue the allegations of the petition. We do not deem it necessary to extend this opinion by setting out the pleadings, but the denials of the answer were as broad as the allegations of the petition. It was held on the former appeal that the reply was properly stricken out. That opinion is the law of the case, and the facts now before the court are substantially the same as they were then. When the plaintiff charged that the vote had not been correctly counted by the officers and demanded a recount, it was unnecessary for the defendant to make any charges of errors in the count; and when the recount was had the case must be determined either by the original count or the recount. A judgment can not be made up in part from one and part from the other. The purpose of the proceeding is to ascertain who was elected, and if the appellant was not in fact elected he can not be adjudged the office. Although he failed to get a majority on the official count or on the recount, it is insisted for him that he should have the benefit of such gains as he made on the recount, and that

Price should not have the benefit of the gains which he made in certain precincts on the recount because he did not ask the recount. While this would not affect the result, as the gains were small which Price made, appellant can not be adjudged the office when on no count of the ballots he appears to have been elected.

On the whole case we are satisfied that Price was fairly elected, and the circuit court properly adjudged him entitled to the office.

Judgment affirmed.

BELL'S TRUSTEE v. CITY OF LEXINGTON, &c.

• (Filed March 22, 1905.)

1. Taxation—Injunction—Burden of proof — Retrospective assessment — When one comes into equity to enjoin the collection of a tax which has been officially ascertained to be due by the assessor or by the retrospective assessor, the burden of proof is upon the plaintiff, and to do this he is required to allege and prove, if controverted, every fact, whether it be negative or affirmative, necessary to show the invalidity of the tax assailed.

2. Listing property—Duty of taxpayer—Omitted property—It is incumbent on the taxpayer in listing his property for taxation to make, under oath, a full and fair disclosure, by items, of all his property subject to taxation, and if he does this and the assessor places a valuation on it that is too low, the city or State is bound by it; but if he fails to do this, and gives its valuation in a lump without being sworn and without disclosing the items, to the extent that the property is thereby underestimated, it is omitted property in the meaning of the law, and the negligence of the officer in not requiring such disclosure will not avail the delinquent taxpayer.

3. Notice—In an action to enjoin the collection of a tax made by an officer who is required to make retrospective assessments, it is not incumbent on such officer to show that he has given notice to the taxpayer of the assessment. As the law presumes the officer did his duty, if such notice was necessary, it will be presumed to have been given.

4. Validity of assessment—City ordinance—Assuming that the city ordinance establishing a back-tax collector is valid, there is nothing in the ordinance which indicates that he shall be more than an additional aid to the regular assessor, whose duty it is to retrospectively assess omitted property, just as it is made the duty of the sheriff and auditor's agent to look up and have assessed omitted property for State taxation.

5. The rule of equity—The rule is that when one comes into equity asking relief against taxation, it is incumbent on him to show clearly that he has paid, or is willing to pay, all that he justly owes toward the public burden; he must make a full, fair and complete disclosure of the property he has, or that his ward has, subject to taxation, so that the court may judge whether he is unjustly taxed; he must come not only with clean, but with open hands.

J. R. & G. D. Hunt, Breckinridge & Shelby and Bronston & Allen for appellant.

Morton & Darnell, Geo. S. Shanklin and Geo. C. Webb for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Fayette Circuit Court for an injunction restraining the delinquent tax collector of the city of Lexington from collecting tax bills in his hands, amounting in the aggregate to \$13,964.96, against the property of Clara D. Bell, held in trust by the appellant corporation. The origin of this claim is in the retrospective assessment by the city assessor of a part of the trust property for the years 1894, 1895, 1896, 1897 and 1898. For these years the assessor retrospectively assessed the estate as omitted property for the following values: For 1894, \$217,162; for 1895, \$211,104; for 1896, \$236,834; for 1897, \$238,925, and for 1898, \$214,583. By applying the tax rates for the given years to these various values of omitted property the aggregate claim of the city for back taxes, \$13,964.96, was reached.

Appellant substantially alleges, as grounds for equitable interference in its behalf, first, that for the years for which the officer retrospectively assessed the property in question it had given in all of the estate of its cestui que trust, and the whole having been once assessed, could not be re-assessed as omitted property; second, that it was not given notice of the retrospective assessment, and was thereby deprived of the opportunity either to show that the property was not liable to retrospective assessment at all, or, if so, the values placed upon it by the assessor were too high; third, that by ordinance of the city of Lexington there had been created a back tax assessor, who superseded, in matters of retrospective assessment, the assessor, and the latter was without authority to make the assessments complained of; fourth, that under the statute regulating the matters the delinquent tax collector could only sell the tax bills at public auction, but not enforce their collection by levy or distraint.

The defendants below, who are now appellees, by their answer placed in issue all of the material allegations of the petition, and then affirmatively alleged the retrospective assessments before mentioned, and the consequent claim of the city for back taxes evidenced by the tax bills in the hands of the officer, and prayed for the dismissal of the petition, and a judgment over for the amount of the city's claim. A reply and rejoinder were filed, and the issues made up on the lines indicated. Upon final hearing the court reduced the amount of the assessments for each year as follows: For the year 1894 he ascertained the omitted trust property assessable for taxation to be \$128,799; for the year 1895, \$116,176; for the year 1896, \$136,057; for the year 1897, \$134,996, and for the year 1898, \$176,716. At the tax rates for the respective years there was found to be due the city, as unpaid taxes, the sum of \$8,626, for which judgment was entered. This judgment appellant now seeks to reverse.

The first question with which we are confronted is, upon whom was the burden of proof in the action? Appellant urgently insists that it was incumbent upon the city to allege and prove every essential fact necessary to make out the validity of its tax claim. This position is untenable. It is true the presumption will be indulged as an original proposition, that the regular assessment for the years in question were valid, and that the officers making them performed their duty; but this presumption, when the officer under the authority of law and his oath of office, makes a retrospective assessment, will be overcome and replaced by the new presumption that, in

making the retrospective assessment, he also did his duty. It was as much the duty of those having the matter in charge to make retrospective assessment of omitted property as to make the regular assessment; and the same presumption of regularity and validity will attend the latter official acts as attended the first. The burden of proof, therefore, when one comes into equity to enjoin the collection of a tax which has been officially ascertained to be due, is upon the plaintiff to make out his whole case, and to do this he is required to allege and prove, if controverted, every fact, whether it be negative or affirmative, necessary to show the invalidity of the tax assailed.

The very question we have here arose in Board of Councilmen of Frankfort v. Mason, Hoge & Co., 100 Ky., 48. Upon the point in hand it was said: "It is insisted by counsel for appellee that in this proceeding to enjoin the collection of tax the burden is on the city to show that the property on which it is sought to collect tax was omitted from the assessment. To sustain this contention cases are cited wherein proceedings had been instituted to compel the assessment of property omitted in previous assessments or when direct proceedings were instituted to enforce the collection of taxes. In a proceeding in the county court to have property assessed which it is claimed was omitted from previous assessments by the authorities whose duty it was to assess it, the court very properly held that in such proceeding the burden was on those complaining to show that the taxpayer owned property subject to taxation which had been omitted in assessments. Likewise this court has repeatedly held that in actions to collect tax the plaintiff must show that the law authorizing the levy and assessment has been strictly complied with. This is a collateral proceeding. Proper authority made the levy and assessment. That levy and assessment is assailed. The presumption should be indulged that the assessment is correct until the plaintiff shows that it was improperly made, or that it was not the owner of the property, or that, if it was, the same was not liable for the taxes in question." (Judson on Taxation, section 550.)

The regular assessments for the years involved in this litigation were made by the appellant giving in a lump sum as the value of the personalty subject to taxation owned by the cestui que trust. These returns, although upon the blanks furnished by the assessor, were not sworn to as by law required, nor were the various items which made up the sum total given. Appellant, in making these annual returns for assessment, gave in the following:

"FOR THE YEAR 1894.

"Valuation under the equalization law..... \$294,000

"FOR THE YEAR 1895.

"Amount of bonds..... 300,000

"Notes secured by mortgage..... 2,700

"FOR THE YEAR 1896.

"Amount of bonds, notes, mortgages or other securities..... 300,000

"FOR THE YEAR 1897.

"Amount of bonds, notes, mortgages and other securities..... 303,000

"FOR THE YEAR 1898.

"Amount of bonds, notes, mortgages and other securities..... 280,000"

These figures were accepted by the assessor as correct. It does not appear of what items the aggregate values were composed. The assessor could not have made any valuation of them himself, and, therefore, there was no assessment of what was omitted. If appellant had submitted to the assessor the various bonds, mortgages, notes and other securities, which go to make up the aggregate values given in, and the officer, after surveying the whole, had assessed it for less than its real value, the city would have been bound by the valuation, and no re-assessment would have been permitted as omitted property. But that is not the case here. The officer simply accepted the return made by the appellant without knowing what property went into the valuation. It was incumbent upon the appellant to make a fair and full disclosure by items of all the property subject to taxation it held in trust for Clara D. Bell, and it in nowise discharged its duty to the city by imposing upon the officer an aggregate valuation without the items of which it consisted, and without being sworn to as by law required. The officer, too, neglected his duty in accepting the illegal return; but his laches can not avail the appellant.

The claim of a want of proper notice of the retrospective assessment has already been largely disposed of in what we said as to the burden of proof. It was necessary (assuming that notice was vital) for appellant to allege, and if denied, prove, a want of notice of the retrospective assessments by the officer. While this would involve the proving a negative, which is contrary to the general rule, yet this is necessary in cases such as this under discussion. As the law presumes that the officers having the matter in charge did their duty, if notice was necessary, it will be presumed to have been given. (Greenleaf on Evidence, section 78; Brandt v. Hyatt, &c., 7 Bush, 363; Brown v. Young, 2 B. Mon., 26.) In the latter case the court cited the ancient case of Monk v. Butler, 1 Rol. Rep., 83, and said: "That was a suit for tythes, in which the defendant pleaded the plaintiff had not read the thirty-nine articles, and it was held, both in the Spiritual Court and the Court of King's Bench, upon a motion for a prohibition, that the defendant was bound to prove it, 'for the law will presume that the parson had read the articles, for otherwise he would lose his benefice; and when the law presumes the affirmative, then the negative must be proved.'"

And also: "In the case of Williams v. The East Ind. Com., the rule was applied with the effect of requiring the plaintiff to prove that the defendants had not given notice of the combustible nature of certain oil, etc., which they had put on board the plaintiffs' ship."

While appellant in this case did not show that it had not received notice of the re assessment, we think the appellees established that it did have notice, although it was not necessary for them to have done so. This record shows that appellant relied upon the technical defense, that the regularity of the assessment made by the officer could not be inquired into, or any property of its cestui que trust re-assessed, and had no intention whatever of recognizing the right of the assessor to re-assess any of its property as omitted.

Assuming, for the purposes of this case, that the ordinance establishing a

back tax collector is valid, we do not think this officer displaces the regular assessor, or makes it less the duty of the latter to retrospectively assess omitted property. Section 8187 of the Kentucky Statutes (cities of the second class), among other things, provides: "Whenever the assessor ascertains that there has, in any former year or years, been any property omitted which should have been assessed, he shall assess the same against the person who should have been assessed with it, if living; if not, against his representative."

There is nothing in the ordinance which indicates that the back tax collector shall be more than an additional aid in looking up and assessing omitted property, just as it is made the duty of both the sheriff and auditor's agent to look up and have assessed omitted property for State taxation. The claim by appellant, that the city only had authority to sell the tax bills involved here is evidently based upon a misreading of section 8187 of the Kentucky Statutes (charters of cities of second class), which provides that the tax bills against real property shall be sold at public auction, but the bills for taxes on personalty shall be collected by distraint, etc.

We attach no importance to the formal visit of delinquent tax collector O'Mahoney and the then county attorney Allen to the place of business of appellant, or the exhibition of the property of the trust estate made to them. Whether these officials were, or were not, satisfied by the showing made, that all the property of the estate had been listed at the regular assessment, may be set aside as immaterial; the real question is, was all of the property so listed? If not, then it should have been, and it was the duty of the assessor, when he ascertained the omission, to remedy the error by retrospective assessment. The claim of appellant to escape a retrospective assessment of the property of its cestui que trust in this case is wholly technical; that it owes the tax it seeks to evade is made apparent by an examination of this record. Although it had in its hands the means of instantly and most conclusively showing either that the trust estate did not own the property with which it was assessed, or that the values were too high, it introduced no evidence whatever on this subject. While it was not incumbent upon the appellees to introduce any evidence, being authorized under the principles herein enunciated to await the evidence of appellant showing the invalidity of the assessment complained of, yet they did introduce evidence which we think clearly establishes that appellant justly owes the amount of the tax which has been adjudged against the estate of its cestui que trust.

Equity does not favor mere technical defenses to the collection of tax claims. Taxes are the very life blood of the government; the duty of paying a ratable share of this public burden is incumbent on every property holder. Whatever just part of this common burden is shirked by him whose duty it is to bear it, it necessarily casts an additional burden upon other shoulders; and, therefore, while at law one may sometimes be permitted to interpose mere irregularities as a defense to the imposition of taxes, when he asks the aid of the extraordinary power of the chancellor he should show, as a condition precedent to receiving it, that he has a meritorious defense to the tax claim he assails. The Supreme Court of Indiana, in the City of Delphi v. Bowen, 61 Ind., 88, thus states the rule: "A complaint to enjoin the collection of taxes must show that the assessment is illegal and void.

Irregularities in the assessment, which do not render it illegal and void, are not sufficient to maintain an injunction. When a portion of the taxes assessed is valid, and another portion void, the plaintiff must pay or tender the valid portion before he is entitled to equitable relief. These principles may be regarded as settled."

And in *Jones, Auditor v. Benton County*, 27 Ind., 511, it was said: "But when he appeals to a court of equity, and invokes its extraordinary writ of injunction, he must rely upon some substantial equity, and can not avail himself of naked irregularities, or the neglect of mere forms, to shield himself from a liability confessed to be just. It would be difficult to imagine a case more utterly barren of equity than this, if this answer be true. He committed serious errors in his lists, which in conscience, and as a good citizen, he ought voluntarily to have corrected, but did not. They were corrected, and now he asks to be secured in an advantage as the fruit of his own blunder, merely because the correction, though just, was directed by the wrong authority and without notice to him. The writ of injunction can not issue for such a purpose without disregarding both principle and authority." (*Reynolds v. Bowen*, 86 N. E., 756.)

In the case of *the City of Louisville v. Board of Trade*, 90 Ky., 419, the court, through Judge Holt, in speaking of enjoining the collection of taxes, said: "This being so, it was the duty of the party asking relief to definitely point out the extent to which he was entitled to be relieved. If he seeks equity, he must do equity. He must show his willingness to pay what he in fact owes, or at least, in a case like this, he must show to the court how much he in fact does not owe. He must, inasmuch as an injunction is peculiarly an equitable remedy, separate the just from the unjust portion of the claim, and ask relief only as to the latter. This the appellee has failed to do, and the judgment is reversed, with directions to dismiss the petition."

The rule then is, when one comes into equity, asking for relief against taxation, it is incumbent upon him to show clearly that he has paid, or is willing to pay, all that he justly owes toward the public burden; he must make a full, fair and complete disclosure of the property he has subject to taxation, so that the court may judge as to whether or not he is unjustly taxed; he must come, not only with clean, but with open, hands.

Upon the whole case we are of opinion that no injustice has been done appellant, and the judgment is affirmed.

ILLINOIS CENTRAL R. R. CO. v. STITH'S ADM'X.

(Filed March 25, 1905.)

1. Railroads—Causing death—Action by personal representative—Venue—Under Civil Code, section 73, providing that "an action against a carrier for an injury to a passenger or to other person or his property must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff, or his property, is injured, or in which he resides, if he resides in a county into which the carrier passes," a personal representative who resides in Hardin county, into which county the carrier passes, may bring an action in said county against the carrier

For negligently causing the death of her intestate, though he was killed in Grayson county, and at the time of his death resided in Jefferson county.

2. Negligence of intestate—Knowledge of danger—Risk—Right of protection—While plaintiff's intestate was guilty of negligence in taking his engine on the main track of the railroad in violation of the rules of the company at a station where there was at the time no telegraph operator, in order to supply his engine with water, and when he knew a fast through passenger train was then due to pass said station, and which was entitled to the right of way, it does not necessarily follow that he cut himself off from all right of protection, considering the steps and precaution he took to notify the approaching train of his situation.

3. Situation of intestate—Emergency—Decision—Prompt action—Precautions—Rules of company—Negligence of approaching train—Question for jury—Where deceased, who was the engineer of a work train, was awakened early in the morning by his night watch and found his engine leaking and nearly dry, which he was compelled to supply with water from the tank nearby on the main line, or draw his fire and let his engine die, and in the emergency decided to move his engine on the main track to the water tank, and flag the fast passenger train, which was then past due, but was usually from a half hour to four hours late, but before doing so sent his flagman with his red light and a torpedo to a curve 1,120 yards from the water tank and left the switch open with its red light shining squarely down the track in the direction of the approaching train, 905 yards from the curve on a straight line to the curve, the rules of the company being for "engineers to keep a constant lookout for signals and the position of switches while running, and not to pass red signals and red lights on the switches, but must stop and ascertain the cause," the only question that should have been submitted to the jury was whether those in charge of the fast train saw, or by the exercise of ordinary care could have seen, the train in charge of deceased in time to have stopped or checked their train and saved deceased from injury and death. If so, plaintiff should recover, otherwise the finding should be for defendant.

4. Tests of air brakes—Competency—Advertisements of professed tests of air brakes in the back of a book of instructions with reference to the use and operation of such brakes were incompetent as evidence in the case as they seem not to have been prepared and issued by the defendant company.

Poston & Moorman, Pirtle, Trabue, Doolan & Cox and J. M. Dickinson for appellant.

L. A. Faurest for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Nunn.

The appellee's intestate was an engineer on a work train of appellant, and was killed on December 27, 1902, at Caneyville, Grayson county, Kentucky. The decedent, at the time of his death, was a resident of Louisville, Jefferson county, Kentucky, where the appellee qualified as the administratrix of his estate.

She, as such administratrix, instituted this action in the Hardin Circuit Court, and in substance alleged in the petition that appellants, Illinois Central R. R. Co. and one Louis Cofer, an engineer in the employ of the railroad company, by gross negligence ran its engine and train of cars on its railroad, upon which Cofer was acting as engineer, with great force and

violence against the engine in charge of her intestate, and upon which he was at the time, and against the cars attached thereto, and against her intestate, and did thereby kill him, to appellee's damage in the sum of \$20,000.

The appellant first filed a plea to the jurisdiction of the Hardin Circuit Court, stating that the accident occurred in Grayson county, Kentucky; that Stith at the time he was killed was a citizen and resident of Jefferson county, Kentucky; that appellee qualified as his administratrix in Jefferson county, Kentucky, and that she resided in Jefferson county at the time of filing this suit and still resided there; that appellant had its chief officer and offices, which it had in Kentucky, in Jefferson county at the time of filing this suit and ever since; that its co-appellant, Louis Cofer, did not reside in Hardin county at the time of the happening of the things complained of in the petition, and did not then reside in Hardin county. Upon these facts it asked for a dismissal of the action because the Hardin Circuit Court did not have jurisdiction. The appellant, by answer and amended answers, traversed all the material allegations of negligence contained in the petition, and set up the separate defense of contributory negligence on the part of Stith, and also set out certain rules of the company for the government of its employes, and averred that Stith's position on the track at the time he was killed was taken in violation of these rules.

It appears that the reply of appellee was lost from the record, and in order to avoid delay and expense it was agreed that all pleadings should stand as if all affirmative matter in them had been controverted of record, and as if all affirmative pleas that could have been made had been made thereto, and the affirmative pleas controverted of record. Thus the issues were fairly made up as to the place of residence of appellee at the institution of the action and down to the time of the trial, and as to negligence, contributory negligence and the violation of rules governing the service of decedent and other employes of the appellant company. Upon these issues there was a trial, and a verdict and judgment for appellee for \$5,000 against both of the appellants. Their motion for a new trial having been overruled they have appealed.

The first ground urged for a reversal is that the lower court had no jurisdiction of the action. It appears from the record that at the time of Robert Stith's death he was a resident of Jefferson county, Kentucky, and appellee was appointed administratrix of his estate by the county court of that county. The injuries causing his death were inflicted in Grayson county, but at the time of the institution of this action the appellee was a resident of Hardin county, and the action was brought in that county, and appellant's line of railroad passed through that county. These facts are virtually conceded by both sides. Appellants contend that the personal residence of the appellee in Hardin county did not confer jurisdiction upon the circuit court of that county to try the action.

Section 78 of the Civil Code provides: "An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he resided in a county into which the carrier passes."

This section fixes three localities where such an action may be brought,

namely: The county of defendant's residence; the county where the injury was done, and the county of the plaintiff's residence. If the carrier passes into that county. Manifestly the personal representative is the only plaintiff in this action, and the only person who could have brought it, for by section 6 of the Kentucky Statutes it is provided that the action to recover such damages shall be prosecuted by the personal representative of the deceased. Therefore, according to the letter of the statute, the residence of the personal representative is one of the places where the action may be brought. When the general assembly enacted section 78 of the Code it evidently had the convenience of all parties in mind, therefore, it allowed the plaintiff to sue at the home of the defendant if he so desired, or go to the county where the injury was inflicted, and where it would probably best suit the convenience of the witnesses, or to his own home county, provided the carrier passed through such county. The purpose of this last clause was to place the jurisdiction convenient to the plaintiff, and yet not inconvenient to the defendant. The fact that plaintiff resided there would make it convenient for him, and the fact that the defendant passed through the county would insure that it would not be unreasonably inconvenient to it. There is reason in this provision if the home of the personal representative, in cases of death, is referred to, because he is the one who must look after and prosecute the suit, but it is absurd if the residence of the deceased is referred to, for his convenience can no longer be consulted; he can have no connection with the trial of the action. Therefore, we are of the opinion that the spirit as well as the letter of the law requires the construction contended for by appellee to be placed on this section. (Turner's Adm'r v. L. & N. R. R. Co., 23 Ky. Law Rep., 340; L. & N. R. R. Co. v. Gilliam's Adm'r, 24 Ky. Law Rep., 1536; Sherrill v. C., O. & S. W. R. R. Co., 89 Ky., 302.)

The substance of the facts as they appear in the record are as follows: Appellee's intestate was employed by the appellant company in the capacity of engineer, and was placed in charge of the engine on one of its work trains. This train worked during the day at Rosine tunnel and laid up at night at the town of Caneyville, where they had no yardmaster or yard hands. The crew of the work train consisted of the deceased, Eiffler, fireman; McCann, conductor, and Turner, flagman. At night a watchman named Bell was placed at the engine, but, under the rules of the company, he could not move it. The tank of this engine became leaky, and on the morning of December 27, 1902, before the usual time to arise, Stith, Eiffler, McCann and Turner were all aroused at their boarding house by Bell, who informed them that the water had leaked out of the tank and was low in the engine, and that something had to be done at once. They all dressed and went to the engine. Stith went into the tank to repair the leak, and came out with dry feet. The engine had become hot for lack of water, and was getting hotter all the time. There was no night operator at Caneyville, and it was too early for the day operator. No. 104, a fast passenger train going north, was past due, but had been running from one half hour to four hours late, and they had no means of knowing when that train would pass. They all considered the question whether they should flag No. 104 and take the engine out on the main track to a water tank near by and take water, or whether they should draw the fire from the fire box and let the engine die.

They realized that one of these things must be done at once, and concluded to flag No. 104, and take the engine out to the tank. Stith ordered Turner, the flagman, to proceed south and flag No. 104. Turner took his lantern and went to the curve south of Caneyville, 1,120 yards from the water tank, and after Turner had reached this point McCann threw the switch, the engine was taken out on the main track to the water tank, McCann left the switch open with the red light shining squarely down the track, and very soon thereafter No. 104 crashed into the work engine, and killed Stith and Bell. The proof also shows that the distance from the water tank to the switchlight, where the engine came upon the main track, was 215 yards, and the switch light was south of the tank, and the track continued straight south for 905 yards to the point where flagman Turner was. The appellant, Cofer, testified that 104 was one of four fast trains, which had the right of way, under the rules of the company, over all other trains on the road; that he was the engineer on 104 that morning, and was going north; that he did not see Turner at the point named by him attempting to flag his train, nor did he notice that the switch was turned and the red light was against him until he was about 100 yards from it; nor did he discover decedent's engine and caboose on the main track until the head light on his engine shone upon the caboose of the decedent's train; that he then immediately applied the emergency brakes, but could not stop his train, and the collision occurred with such force as to throw both engines from the track; that when he first saw the red light of the switch the thought occurred to him that the crew of some train leaving there had left it turned; that he could with his train pass over it without injury, as his train was going north, but the switch was so constructed that it would have been dangerous for a southbound train to have attempted to pass it.

The appellants contend, under the facts as proven, that they were entitled to a peremptory instruction for the reason that Stith took his train from the side track, a place of safety, and placed it at the water tank on the main track, in a place of danger, when he knew that 104 was due, and had not passed, and under the rules of the company it was entitled to the right of way as against his work train. Appellee contends that her intestate was not guilty of any negligence; that he was confronted with an emergency which required prompt action to avert injury to the engine in his charge, which by the rules of the company he was required to protect, and also to avert loss of time to the train crew of hands at Rosine tunnel, which would have resulted if he had drawn the fire from the box and permitted the engine to die, and refers to rule 106 of the company, which reads: "In all cases of doubt and uncertainty, the safe course must be taken and no risks run," and claims that, being confronted with this emergency, he exercised his best judgment, and it was for the jury to say whether he exercised this judgment properly under all the circumstances.

We are of the opinion that appellee's intestate erred in taking his engine upon the track under the circumstances.

He knew that 104 was entitled to the right of way, and by his going upon the main track with his engine he would probably impede the progress of this fast passenger train, which had important connections to make for the benefit of passengers, and might endanger the lives of the passengers and

the company's employes and its property, which unfortunately did occur by reason of his mistake and violation of the rules. He should not have taken the risk, but should have taken the safe course, and remained on the side track. But this being true, it does not necessarily follow that appellant was entitled to the peremptory instruction. The rules of the company, as shown in the record, required its engineers "to keep a constant and vigilant lookout for signals and the positions of switches while running, and not to pass red signals and red lights on the switches, but must stop and ascertain the cause." It is further provided by the rules that when a train stops or is delayed, or the main track is obstructed, the same must be protected by the flagman when necessary to prevent accident.

In the case at bar the deceased, confronted with the emergency stated and in an endeavor to protect the property and interest of his employer, obstructed the main track by placing his engine at the water tank. But before doing so he sent out the flagman with his red light and a torpedo 1,120 yards in the direction of which 104 was coming, for the purpose of flagging it. The red switch light was also turned against it. The deceased knew that the rules of the company required Cofer, in charge of 104, to stop his train, and not to pass these red signals, and he had the right to assume that he would perform his duty under the rules, and would keep a constant and vigilant lookout for signals and switches, especially in a town, and if Cofer had done so decedent would not have been injured or killed.

In view of the peculiar facts of this case we are of the opinion that appellee's intestate violated the rules of the company in taking his engine out on the main track, and if he had done so without sending out the flagman and turning the switch light, thereby giving notice or warning to the engineer of 104, the court should have given a peremptory instruction to find for appellant. But conceding that he erred in judgment as to his duty, the facts show that it was an honest mistake; his purpose was to protect the property of his master; he took all the necessary steps and precautions provided by the rules to notify and warn Cofer of his situation on the main track. Under these facts and circumstances we are not willing to say that decedent cut himself off from all right of protection. Appellant contends that unless the judgment is reversed, with directions to the lower court to grant them a peremptory instruction, we will in effect overrule the opinions in the cases of *L. & N. R. R. Co. v. Hiltner*, 21 Ky. Law Rep., 1826; *L. & N. R. R. Co. v. Scanlon*, 22 Ky. Law Rep., 1400; *L. & N. R. R. Co. v. Howard*, 82 Ky., 212; *N. N. & M. V. Co. v. Denver*, 97 Ky., 92, and *Brown v. L. & N. R. R. Co.*, 97 Ky., 229.

After an examination of the cases we are of the opinion they do not apply to the facts of the case at bar. The last three cases were cases of ordinary trespassers, and at places where they had no right under any circumstances to be, and the company was not required to keep a look out, and owed them no duty except to save them if discovered in time. The first two cases cited are cases where the engineers were injured by reason of the violation of rules, but they did not give, or attempt to give, the company or its agents in charge of other trains any notice or warning of their perilous positions, as required by the rules, so as to place the company or its agents under the duty of exercising care to avoid injuring them.

We are of the opinion that the principles announced in the following cases, when considered with reference to the particular facts of this case, negative the idea that appellants were entitled to a peremptory instruction: *L. & N. R. R. Co. v. McCoy*, 81 Ky., 415; *L. & N. R. R. Co. v. Earle's Adm'r*, 94 Ky., 368; *I. C. R. R. Co. v. Mayhan*, 17 Ky. Law Rep., 1200; *Cahill v. Cincinnati, & Co., R. R. Co.*, 92 Ky., 354; *L. & N. R. R. Co. v. Coniff's Adm'r*, 16 Ky. Law Rep., 298; *L. & N. R. R. Co. v. Adams*, 106 Ky., 359; *L. & N. R. R. Co. v. Lome*, — Ky. Law Rep., —, and *Bowling Green Stone Co. v. Capshaw*, 23 Ky. Law Rep., 945.

In the last case cited *Capshaw* was an employe of the stone company; his duties were that of a carpenter in the company's mill. When he was injured he was in front of a truck for the purpose of testing the stone thereon, to see if it had been sawed in straight lines, and while attending to this he was injured by the engineer backing the truck over his foot. The company claimed that *Capshaw* was not in a place, or performing labor, where his duties required him to be. This court, in that case, in discussing an instruction, said: "We are of opinion that this instruction is erroneous and prejudicial to appellant in the use of the phrase 'or by the exercise of ordinary care might have known.' This placed upon appellant the duty of keeping a lookout for appellee at a place where he voluntarily placed himself, without orders, direction or duty to be. If appellee, outside of the duties which he was employed to perform, and without direction from Douglas, the superintendent so to do, went voluntarily into a place of danger, in front of the truck, he should have called attention to his position so that the hookers or engineer would know of his peril, and would then be under the duty of exercising care to avoid injuring him. If appellee, being thus situated, without directions from Douglas, and outside of his duties, failed to give the hookers or engineer notice of his position, he would be guilty of contributory negligence, for which he could not recover."

The principles enunciated in this case seem to completely cover the one at bar, i. e., if appellee's intestate, in violation of the rules, went voluntarily into a place of danger onto the main track on the time of 104, he should have called attention to his position so that those in charge of 104 would have known of his peril, and would have then been under the duty of exercising care to avoid injuring him. It appears that the deceased performed this duty, and gave notice of his position in the way and manner prescribed by the rules. The only question that should have been submitted to the jury was whether those in charge of the fast train, No. 104, saw, or by the exercise of ordinary care could have seen, the train in charge of Stith in time to have stopped or checked their train, and saved Stith from injury and death. If so, the appellee should recover; otherwise, the finding should be for the appellants.

On the trial appellee, over the objection of appellants, introduced in evidence some professed tests of the Westinghouse air brakes, appearing in the back of a book of instructions with reference to the use and operation of such brakes. We are of the opinion that the court erred in permitting this to be introduced as evidence. These professed tests were nothing more than advertisements of the makers for the purpose of inducing purchasers, and they seem not to have been prepared and issued by appellants.

For these reasons the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

The whole court sitting.

JETT v. COMMONWEALTH.

(Filed March 25, 1905—Not to be reported.)

1. Homicide—Assassination—Defense—Alibi—Hearsay evidence—On the trial of defendant for the assassination of James Cockrell, by shooting him from the window of the upper story of the courthouse while deceased was standing on the street below, the defense being an alibi, it was error in the court to allow a witness for the Commonwealth to state in his testimony that he, witness, was in the office of P., and that when the shooting occurred P. went to the front window of his office, and while looking out of the window and apparently at those doing the shooting, called out the name "Curtis Jett." This evidence was incompetent as hearsay. The witness himself did not see Curtis Jett, but was allowed to state that P. said he saw him. The fact that the court required the witness to eliminate the statement "he called the name of Curtis Jett," and substitute therefor "he called attention to Curtis Jett," does not alter the incompetency of the testimony.

2. Continuance—Absence of counsel—Inflamed public opinion—Where defendant had been tried with another defendant in the same county within less than a month prior to this trial for another murder, in which both the defendants were convicted and their punishment fixed at a life sentence in the penitentiary, and public opinion was greatly inflamed because the death penalty was not inflicted, and it was shown that on this last trial two of defendant's counsel, on whom he mainly relied in his defense, were necessarily absent, and who were acquainted with defendant's witnesses, while the remaining counsel was a stranger to them, the defendant having been in jail for four months by change of venue, 100 miles from his home, and where his witnesses lived, the court erred in overruling his motion for a continuance and forcing him to trial under these exceptional circumstances.

Hazelrigg, Chenault & Hazelrigg and J. I. Blanton for appellant.

A. F. Byrd and N. B. Hays for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Barker.

Curtis Jett was indicted by the grand jury of Breathitt county for the murder of James Cockrell. This indictment was returned on the 30th day of May, 1903, at a special term of the court, called by the judge in vacation, by posting notices on the courthouse door in accordance with the provision of section 964 of the Kentucky Statutes. At the same term the grand jury indicted appellant and one Thomas White, charging them jointly with the murder of J. B. Marcum. Subsequently the Commonwealth's attorney filed his affidavit, stating, substantially, that, in his opinion, there existed such a state of lawlessness in Breathitt county that the officers, whose duty it was to summon witnesses, select jurors, and have charge of the trial of the case, would be prevented from discharging their duty, and the jurors so selected would be deterred from rendering an impartial verdict. Based upon this affidavit, he moved the court to transfer the case for trial to an-

other county outside of the Twenty-third Judicial District. To this motion the defendant objected, but the court announced that the motion would be sustained and the venue of the prosecution changed to the county of Morgan, whereupon the Commonwealth's attorney, after consultation with his associates in the prosecution, asked to be allowed to withdraw the motion for a change of venue, which the court permitted to be done, over the objection of the defendant, and the order was never entered upon the record.

Afterwards a trial was had of the case of the Commonwealth v. Jett and White for the murder of J. B. Marcum, which resulted in a mistrial, the jury being unable to agree upon a verdict, whereupon the Commonwealth's attorney renewed his motion for a change of venue in this case, and the court, on the 19th day of June, 1908, entered an order changing the venue of trial from Breathitt to Harrison county. A similar order was made in the case of the Commonwealth v. Jett and White for the murder of Marcum. A trial was had in the latter case in the Harrison Circuit Court, which resulted, on the 15th day of August, 1903, in a verdict of guilty against the defendants, and their punishment being fixed at confinement in the penitentiary for their lives.

On the 8th day of September, 1903, the appellant, upon the calling of this case in the Harrison Circuit Court, filed a special demurrer to the jurisdiction of the court, and a motion to quash the indictment, both of which were overruled. He then filed an affidavit, and moved the court to continue the case for trial, which was also overruled, and the case was then set for the seventh day of the term for trial, being a week later than the day on which the motion for a continuance was overruled. After overruling this motion the court entered an order offering the accuse a special venire to be selected either from Nicholas, Robertson or Pendleton counties, if he so desired. This was not accepted by the defendant. After the motion for a continuance was overruled appellant moved the court for a change of venue to another county, which was overruled. The trial resulted in appellant's conviction, and his punishment being fixed at death, of which he complains on this appeal.

The motion to quash the indictment was based upon a statement contained in the affidavit of the appellant, that the indictment against him was returned by the grand jury at a special term of the Breathitt Circuit Court, which had been called by the judge by posting notices on the courthouse door, and the fact that no order for the special term had been made upon the order books of the court at the last regular term of the court. And it is now urged that "a special term of court to hear, determine or try criminal or penal cases can only be called by the court or ordered by the court when in session, and that the judge of said court had no authority to call a special term in vacation; that the regular term of the Breathitt Circuit Court, fixed by law and order of court, begins on the first Mondays in March, June and November in each year and continues for three weeks, and that at no special term of the Breathitt Circuit Court was an order made by said court calling a special term of the court for the purpose of returning indictments or of hearing or determining criminal or penal cases."

This question arose in the case of *Thomas White v. Commonwealth*, ante, 561, decided by this court on the 17th day of March, 1905, as did also the question

of the jurisdiction of the Harrison Circuit Court, based upon the claim that after the Commonwealth's attorney made the first motion for a change of venue from Breathitt county, which he subsequently withdrew by leave of court, this exhausted his right to make further application, and the action of the court in granting the second motion was void under the provisions of section 1118, Kentucky Statutes. As the indictments in the case of White v. Commonwealth and that at bar were returned by the same grand jury, and the procedure, up to the time they were filed in the clerk's office of the Harrison Circuit Court by an order changing the venue, was identical, it is unnecessary here to do more than refer to the opinion of the court in the former case as having decided both of the questions now under consideration adversely to appellant.

The motion for a continuance was based upon the necessary absence of two of appellant's counsel, B. F. French and J. D. Black. The motion for a change of venue was based upon a petition in which was set forth that appellant and Thomas White had just been tried in the Harrison Circuit Court for the murder of J. B. Marcum; that this trial had ended on the 15th day of August, 1903, the jury rendering a verdict of guilty as to each, and sentencing them to the penitentiary for their natural lives; that this trial had created great excitement throughout the city of Cynthiana and the county of Harrison, and the public mind had become inflamed against him (appellant), and great prejudice had been aroused and existed against him by reason of the fact that he was only sentenced to the penitentiary for life instead of being hung; that one of the jurors in the Marcum case, Jape King, whom it was claimed had been instrumental in preventing appellant being sentenced to be hung, had been burned in effigy by a mob, and subsequently indicted by the grand jury of Harrison county for false swearing in qualifying himself as a juror in the case.

Upon the trial of the question as to whether or not appellant was entitled to a change of venue, a large number of citizens testified in appellant's behalf, to the effect that they did not believe, owing to the facts set out in the petition, that appellant could obtain a fair and impartial trial at that time in Harrison county. On the other hand, an equal number testified in favor of the Commonwealth that they believed he could obtain a fair and impartial trial. Whereupon the court overruled the motion for a change of venue. The orders of the court in overruling the motions for a continuance and for a change of venue were set forth as grounds for a new trial, as were several other rulings of the court claimed to have been erroneous and prejudicial to his interest.

As we have reached the conclusion that this case should be reversed for a new trial, we shall not discuss the facts further than necessary to illustrate the principles of law decided, nor notice any grounds assigned for new trial except those which, in our opinion, were erroneous and prejudicial to the substantial rights of the appellant.

James Cockrill was assassinated on the 20th day of July, 1902, by one or more persons concealed in the second story of the courthouse in Jackson, Ky., who shot him from the windows of that building while he was standing in the street below. He did not at once die, but was taken to Lexington, Ky., for medical treatment, and there died of his wounds within a day.

or two after they were inflicted. Several witnesses testified to seeing the appellant in the second story of the courthouse at the time of the shooting, and identified him as one of the assassins. The defense was an alibi, the appellant claiming and undertaking to show by evidence that at the time of the shooting he was in another building, known as "Hargis' store," in company with the proprietors and several others. One of the witnesses for the Commonwealth, J. L. McCoy, testified that at the time of the shooting he was in the law office of John Patrick, another witness for the Commonwealth; that when the shooting occurred Patrick went to the front window of his office and looked out, and the witness was allowed to state that, while looking out of the window and apparently at those doing the shooting, he (Patrick) called the name of Curtis Jett. Upon objection, this answer was excluded by the court, who said to the witness:

"I said to you not to say what Mr. Patrick said; if he called attention to any person, you may say to whom he called attention without saying what he said "

"A. As I understand now, I am to answer whose attention he called."

"The court: To whom he called the attention of those in the office, if he did, to any person."

"A. To Curtis Jett."

This evidence was incompetent as hearsay, and must have been prejudicial to the substantial rights of the appellant. The witness, McCoy, did not himself see Curtis Jett, but was allowed to state that Patrick said he saw him. The fact that the court required the witness to eliminate the statement he "called the name" (of Curtis Jett) and substitute the expression he "called attention" to Curtis Jett, does not alter the incompetency of the testimony. The practical result was that Patrick called attention to Curtis Jett by saying he saw him. This was injurious to the defense of appellant because it tended to discredit and break down his alibi. If he was in Hargis' store while the shooting was taking place, he was not where Patrick could have seen him at the moment of the shooting. As what Patrick said about seeing Curtis Jett was hearsay, and tended to prejudice the substantial rights of the appellant, it necessarily follows that the court erred in admitting it as evidence.

We think the court also erred in not granting appellant a continuance under the peculiar circumstances surrounding the case at the time it was called for trial. He had just been convicted of murder, and it is clearly established that at least a large part of the community thought his punishment should have been fixed at death, instead of confinement in the penitentiary for life. The passions of a large number of citizens were so aroused as to cause them to burn in effigy the juror who was thought to have been instrumental in securing the infliction of the lesser penalty. No one can read this record without being convinced that there was great excitement in Harrison county concerning the Marcum trial, and great indignation that the defendants were not hung instead of being sentenced to the penitentiary for life. The trial in the Marcum case had been long and arduous, taking place in midsummer. Within less than a month after its completion the appellant was put upon his trial upon a second charge of murder. His leading counsel were necessarily absent; one was sick and the other detained by

business which prevented his being present at the trial. It is shown that the remaining counsel, J. I. Blanton, was not acquainted with appellant's witnesses, and that he had mainly relied upon attorneys Black and French to conduct his defense. The appellant had been in jail for months, at a place at least one hundred miles from his home, where his witnesses lived, and he was necessarily, by all of these circumstances, placed at a great disadvantage in being forced into trial without the presence of the counsel upon whom he mainly relied to defend him, and who were personally acquainted with his witnesses.

When popular passion is inflamed its effect can not be measured or weighed, and when one charged with a high crime is in danger of being its victim, every precaution should be taken in order that the trial may be had free from its influence. The Commonwealth is more deeply interested in having an unprejudiced trial than in the conviction of the defendant, no matter what his guilt. We do not think the court erred in refusing to change the venue of trial, but under the very exceptional circumstances surrounding the defendant at the time, his motion for a continuance should have been sustained.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

McDONALD'S EX'ORS, &c. v. McDONALD, &c.

(Filed March 25, 1905.)

1. Wills—Testamentary capacity—It is as necessary in order to have testamentary capacity for one to have such sensibilities as will enable him to know the obligations he owes to the natural objects of his bounty, as it is for him to have the capacity to know the nature and value of his estate and a fixed purpose to dispose of it.

2. Fixed purpose—Aversion to children—Verdict of jury—On the trial of a will contest, though the evidence showed that the testator had the mind to know his estate and the nature and value of it, but had a fixed purpose to give his children as little interest in it as possible, and that his aversion to his children was such that he did not know the obligation he was under to them, there was abundant evidence tending to show a lack of testamentary capacity to justify the court in submitting the case to the jury, and a verdict of the jury against the will is not flagrantly against the weight of the evidence.

W. O. Davis and Field McLeod for appellants.

D. T. Edwards and T. L. Edelen for appellees.

Harry A. Schoberth guardian ad litem for infant appellants, Howard Sellers McDonald, &c.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Paynter.

This appeal results from a contest over the will of John McDonald. He left six children, three sons and three daughters, and the children of Mrs. Davis, a deceased daughter. His will provides for the distribution of his

estate into seven parts. Each of his children take one part and the children of the deceased daughter one part. The children were not given fee simple titles to the interest devised to them, but only a life estate. They were given no more freedom in the use of the life estates than that afforded by law. Some of those taking life estates had children and some did not have, and if any died without children the parts devised went back to the estate. A trial resulted in a verdict for the contestants.

A reversal is asked upon the following grounds: First, that there was no evidence tending to show a want of testamentary capacity; second, that the verdict of the jury was flagrantly against the weight of the evidence; third, that the instructions given were erroneous and misleading.

The testimony is voluminous, and we will, therefore, only state in brief some of the evidence introduced by the contestants which tended to show a lack of testamentary capacity. The testator accumulated a large estate. Early in life he developed a great desire to make and save money. He was grasping and miserly, and evidently cared more for money than he did for his family. If the testimony of the contestants is to be believed, he had no genuine affection for his family, and not the proper conception of his duty to them. There is evidence tending to show that he did not want his wife and children to have any of his estate, as he expressed it, he did not want them to have a "damn dollar;" that he would like to leave it in debt, so that it would take the rents of the land thirty or forty years to pay it; that if he knew the day he was going to die he would buy land so it would take that period of time for the rents to pay for it; that he wanted to leave it in such a way that the children would have to work like dogs to get a living out of it. While he seemed to express a pride in the good looks of one of his daughters, yet he only allowed her \$70 to clothe her and to pay the other expenses incident to her social position. His daughter, Mrs. Davis, married contrary to his wishes. She lived away from home. Some times she would return home with her children, and he would tell her to take her children out of his sight and return home with them. He lived in a comfortable house, and on one occasion when one of his sons returned home sick he put him in a cabin on his place, which had been occupied as a residence by negroes. When one of his married daughters visited his house upon one occasion her mother had to slip coal to the daughter's room to make it comfortable. When his daughter, Mrs. Davis, died in Lexington he refused to go where her body was, though he went to the funeral and sat in the back part of the church. One witness testified that he said concerning his deceased daughter, Mrs. Davis, "she is dead now and I hope in hell." One of Mrs. Davis' sons was ill and an operation was necessary to save his life. A doctor offered to perform the operation free if the testator would pay the hospital fee. He said he had nothing to do with it; "damn him, let him die." He said on one occasion that if he could take his property with him he could die happy. In speaking of one of his sons he said that he was a thieving son of a b—, and was robbing him of his wheat.

There was much testimony offered by the contestants tending to show that the testator did not know the obligations he owed to his children. He unquestionably had the mind to know his estate and the nature and value of it. He seems to have had a fixed purpose as to the disposition of his estate, and that purpose was to give his children as little interest in it as possible.

The contest was waged upon the ground that his aversion to his children was such that he did not know the obligations he was under to them. It is as necessary in order to have testamentary capacity for one to have such sensibilities as will enable him to know the obligations he owes to the natural objects of his bounty, as it is for him to have the capacity to know the nature and value of his estate and a fixed purpose to dispose of it. (Murphy's Ex'or v. Murphy, 23 Ky. Law Rep., 1460; Wise, &c. v. Foote, &c., 81 Ky., 10; Woodford v. Buckner, &c., 23 Ky. Law Rep., 627.) We are of the opinion that there was abundant evidence tending to show a lack of testamentary capacity to justify the court in submitting the case to the jury. We do not think the verdict of the jury is flagrantly against the weight of the evidence. The instruction defining testamentary capacity is substantially the same as was given in the case of Woodford v. Buckner, &c., and, in our opinion, was a proper definition of testamentary capacity.

The judgment is affirmed.

SMITH, &c. v. SMITH, &c.

(Filed March 25, 1905—Not to be reported.)

C. H. Breck, F. J. Smith and W. S. Moberly for appellant.

R. E. Roberts for infant appellees.

Appeal from Madison Circuit Court.

Judge Settle delivered the following response to petition for extension of opinion:

The court is asked to extend the opinion herein by giving its construction of those parts of the will of T. J. Smith containing the devises as to the "dwelling house," on Lancaster avenue, and the "store house," situated on Main street, in Richmond. As the construction given the devises in question, by the judgment of the lower court was as contended for by appellants, and, therefore, favorable to them, and no appeal was taken by them from that part of the judgment, and no cross appeal was prayed or taken by appellees therefrom, it is the opinion of the court that the devises referred to are not properly before it for construction, and that the extension of opinion asked should not, therefore, be granted.

Wherefore, the petition is overruled.

KENTUCKY BUILDING AND LOAN ASSOCIATION'S ASS'EE, &c.
v. DAUGHERTY, &c.

(Filed March 25, 1905—Not to be reported.)

Copying record—Omitting word—Changing meaning—When in a petition, for a rehearing it is shown that in copying the record the clerk omitted the word "no" before the word "credit," and so made the sense just the opposite of what was expressed in the original record, and the opinion is

based on this matter, such opinion is withdrawn and a rehearing granted and the case continued for further consideration, with leave to file additional briefs.

James C. Poston, Burnett & Burnett and C. B. Blakey for appellants.

L. A. Faurest and John I. Sprigg for appellees.

Appeal from Hardin Circuit Court.

Chief Justice Hobson delivered the following response to petition for rehearing:

In the petition for rehearing it is shown that in copying the record the clerk omitted the word "no" before the word "credit," and so made the sense just the opposite of what was expressed in the original record. The opinion is based on this mistake, and is withdrawn. From a careful re-inspection of the record we conclude there was enough in it to show the mistake, and, therefore, the authorities relied on for appellant do not apply.

The parties are given until the first day of the April term to brief the case further on the following questions:

1st. What were Daugherty's rights as against the new company after he accepted the new stock and before the new company failed?

2d. Was the old company merged in the new, and did the former fail in the latter within the spirit and reason of the rule laid down in Reddick v. United States Building and Loan Association, 106 Ky., 94?

3d. Is Daugherty now entitled to credit on his debt for his dues paid on his old stock, he having received no credit therefor on his new stock?

The petition for rehearing is sustained.

WISE v. WOLFE, &c.

(Filed March 25, 1905.)

1. Judicial sales—Relief from bid—While the rule of caveat emptor applies in all its strictness to judicial sales, it is not thought that when a purchaser, before confirmation, shows a failure of title in some material particular a court of equity may not relieve him of his bid where it was made under a clear misapprehension of fact or law inducing the bidding.

2. Limitation—An unreleased lien on land for purchase money must be deemed to be barred by limitation against a decedent's estate after fifteen years.

3. Adverse possession—After thirty years' continuous, adverse possession of land in this State, all rights of others are barred, no matter under what disabilities the true owner may have labored.

4. Same—Infancy—Where a grantee of land took possession of his purchase, not recognizing or admitting the right of any other person to enjoy it, or any part of it, with him, but in hostility to every other title, under a warranty of a complete title, his possession is adverse to any owner who did not join in the conveyance, although such owner may have been an infant.

5. Valid title—Lands sold at a judicial sale which had been in the adverse possession of the decedent (for whose estate it was sold) and those claiming under him, for more than fifteen years before the suit, which fact was set out in the petition, conferred upon the purchaser a good title thereto.

6. Separate interest in separate parcels—Sale as a whole—In a sale of land

as a whole for a division of the proceeds, where the heirs are by different parents and do not own a joint interest in each parcel, the fact that one of the heirs, who is an infant, owns an interest in a portion of the tract which is of a greater value than an average of the whole tract, is not cause for setting aside the sale, as this fact can be ascertained by the court before distribution, and the proceeds apportioned so as to give to such infant its equitable interest therein.

7. Wife not party—A sale will not be set aside because the wife of one of the defendants is not a party to the suit, as she can still be brought before the court before distribution of the sale money, and her potential interest ascertained and paid to her out of her husband's share.

8. Misdescription of boundary—Where the land intended to be sold is manifest, the sale will not be set aside because of a misdescription of the boundary caused by a resurvey by the officer making the sale, nor because said survey was not filed, nor because some taxes are due on the land which can be paid out of the sale money before distribution.

9. Setting aside sale—The sale will not be set aside because one of the daughters of deceased is claimed to have died testate, devising all her property to her sister, and that her will is being contested, because if the will is probated her sister, who is a party to this action, will be bound by the decree, and if rejected, then all her heirs are parties to this action and are bound by the judgment and sale.

10. Valid sale of land—A sale of land made and confirmed at a special term of the circuit court, regularly called, is valid.

11. Confirmation—Same day of filing report—A sale confirmed the same day the report was filed, though unusual, is not invalid as to the purchaser, where it is not shown that the purchaser was not prevented by that act from filing exceptions of merit to the sale, and does not show to have been prejudiced thereby.

J. C. Beckham & Son and George Nicholas for appellant.

N. L. Bronaugh and Willis & Todd for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge O'Rear.

Herman Rothschild owned about 400 acres of land in Shelby county, part of it jointly with one of his sons. Herman died testate, making an unequal disposition of his estate. Several of his children have since died intestate and unmarried. The children were not all full brothers and sisters. In consequence, the land having been owned in several tracts though adjoining, was not susceptible of division, even if it be deemed as one tract, so as to set-off to some of the ultimate heirs their respective portions without greatly impairing its value. This suit was brought under subsection 2 of section 490, Civil Code, for the sale of the land that its proceeds might be divided among those in interest. A decree of sale was rendered at the January term, 1904, of the Shelby Circuit Court. No time was fixed in the judgment for the sale. The commissioner advertised it immediately, and sold it on the first day of the county court in February, 1904. Appellant was the highest and best bidder, and executed bonds in accordance with the terms of the judgment. At the January term, 1904, the court, by an order of record, called a special term of the Shelby Circuit Court, to be held February 20, 1904, to consider and dispose of any motions arising in and try

certain designated cases on the docket, including this case. The sale was reported to the court at the special February term on February 20, 1904, and there being no exceptions filed, the sale was that day confirmed, and a deed ordered to be made to the purchaser.

At the next regular term, which was in May, appellant, the purchaser, filed exceptions to the commissioner's report of sale, and moved that the order confirming the report made February 20 be set aside. The substance and effect of the grounds for setting aside the order of confirmation, in so far as they are competent to open up such an order after the term at which it is entered, may be stated as accident and surprise suffered by the complaining party, by which he was prevented from appearing and defending the action.

It is settled in this State that an order confirming a judicial sale is a final judgment, over which the court rendering it has no control after the expiration of the term at which it was entered (*Carpenter v. Strother*, 16 Ben Mon., 295; *McGowan v. Pennebaker*, 8 Met., 502; *Thompson v. Brownlie*, 25 Ky. Law Rep., 623; *Dawson v. Litsey*, 10 Bush, 208), except for the causes mentioned in sections 518 and 340, Civil Code, regulating the granting of new trials after the term at which the judgment may have been rendered. (*Hocker v. Gentry*, 8 Met., 463; *McManama v. Garnett*, 3 Met., 517.)

Section 531, Civil Code, requires as a condition precedent to a complainant's right to have a new trial under section 518 that he must state in his application or petition, and must establish a valid defense. It, therefore, becomes necessary to first look into the exceptions taken to the sale by the purchaser, as if they are not a valid defense to the confirmation of the sale the judgment of the court will not be disturbed on a mere matter of informality of practice where no substantial injury is done to the party complaining. The exceptions are numerous, and go to the point of questioning the validity of the judgment, as well as its regularity. They also raise the sufficiency of the title sold to certain parts of the land. While the rule of caveat emptor applies in all its strictness to judicial sales, it is not thought that when a purchaser before confirmation shows a failure of the title in some material particular a court of equity may not relieve him of his bid, where it was made under a clear misapprehension of fact or law, inducing the bidding.

This case, for the purposes for which we are considering it, may be deemed as coming up on the exceptions before confirmation, as we are to look at it as if the exceptions were presented as a defense to the motion to confirm. Exception No. 1 is because the records of the Shelby County Court clerk's office show an unreleased lien against part of the land sold, being for a balance of purchase money, evidenced by notes due March 1, 1887, and March 1, 1888, respectively. As more than sixteen years have gone since a cause of action arose upon the notes, they must be deemed barred by limitation against the decedent's estate. (Sections 2514, 2528, Kentucky Statutes; *Yeates v. Weedon*, 6 Bush, 348; *Prewitt v. Wortham*, 79 Ky., 287, 2 Ky. Law Rep., 282; *Kendall v. Clark*, 90 Ky., 179.) Even if kept alive by promises or payments in the meantime, they are nevertheless barred as liens against the land in the hands of a subsequent innocent purchaser for value. (*Tate v. Hawkins*, 81 Ky., 577; *McCracken County v. Mercantile Trust Co.*, 84 Ky., 844; 8 Ky. Law Rep., 814.)

The second exception is that in 1859 certain-named persons, as heirs at law of one Thomas McClain, purported to convey to Herman Rothschild a parcel of land now sold under the court's decree; that as a matter of fact the grantors in that deed were not the only heirs of Thomas McClain; that certain others, some of whom were then infants, were also heirs, and as such owned undivided shares of that tract; that the deed was invalid for certain informalities, and by reason thereof failed to convey the title of certain others of the heirs named as grantors, and that the statutes of limitation can not be invoked by Rothschild because, being a mere joint tenant in the ownership of the land, his possession was not adverse to the others, but was amicable. After thirty years of continuous, adverse possession in this State all rights of others are barred, no matter under what disabilities the true owner may have been laboring. (Section 2508, Kentucky Statutes.) Rothschild bought the land, and it was attempted to be conveyed to him, the whole of it, by those heirs who joined in the deed. They did not attempt to convey, nor does the deed show that Rothschild thought of buying, less than the whole tract. When he entered into possession under his purchase he took possession, not recognizing or admitting the right of any other person to enjoy it, or any part of it, with him, but in hostility to every other title. The grantors warranted to him the complete title against all claims, and went so far as to specifically guarantee the title against the claims of certain infants, whose conveyance, when they attained their majority, the grantors undertook to get. This precise point was before the court in *Pope v. Brasfield*, 110 Ky., 128, and it was there decided that the grantee, under a similar conveyance, took adversely to the owner who did not convey, and not amicably as a joint tenant. (*Larman v. Hugby*, 13 Ben Mon., 346; *Riddle v. McBee*, 4 Ky. Law Rep., 898.)

The lien reserved in the deed of 1859, and not released of record, is long since barred by limitation, and is not a cloud against the title.

The third exception goes to the sufficiency of the title to some fifteen acres to which the Rothschilds do not show any proper conveyance. It is alleged in the petition, however, as well as otherwise shown in the record, that Herman Rothschild, and those claiming under him, had been in the actual, adverse possession of this parcel of land, claiming and using it openly and exclusively for more than fifteen years before the suit was brought. This conferred upon them, even if they did not own it before, a perfect title, so far as the record shows and so far as is claimed. (Section 2505, Kentucky Statutes; *Terrell v. Herron*, 4 J. J. Mar., 527; *Marshall v. McDaniel*, 12 Bush, 381.) The section of the Civil Code, section 499, requiring the filing of the written evidences of title for the division of land, obviously can not apply to this proceeding.

The fourth exception raises the question of the validity of the calling of the special term of court for February 20, 1904, which will be particularly noticed further along.

The fifth exception complains that the judgment of sale is void, for each of two reasons: First, "because it is not sufficiently stated that the property sold is 'a vested estate in possession.' "

Under section 490 of the Civil Code only such estates can be sold under this proceeding. The petition does set out the character of the title owned

by the parties, which shows on its face a vested estate in possession, the correct manner of pleading that fact. Instead of using the pleader's conclusion without the facts. And, second, this suit was brought as shown by the pleadings under subsection 2 of section 490, Civil Code of Practice, for the purpose of selling the real estate described in the pleadings, that the proceeds of sale might be divided among those entitled; that it is not possible to do this under this sale because all the property described in the petition was sold as one tract, and said property is composed of tracts of land derived from three different sources, in which plaintiff and defendants are interested in different ways and in different proportions."

The land sold as a whole for \$46.50 per acre. It was appraised as a whole (though not required by law to be appraised at all) at \$45 per acre. It may be true that each acre is not worth precisely what every other acre is. In that event it may be possible that by the process adopted in making this sale some of the owners suffered while others gained. So far as the adults are concerned the matter is not objectionable, for if they saw proper to adopt it, and have had the sale confirmed notwithstanding, they are bound by it so far as the purchaser is concerned. But one of the defendant owners is an infant. The interest of that one may be the one which has suffered by the course indicated. If it has, within a given time after arriving at majority the case could be re-opened and the error shown by the infant, and the purchaser made to bear the loss, if the purchase money has by that time been paid to the heirs, and is gone. But there is no occasion to take that risk. The purchase money is yet to be paid into court, and its distribution has been expressly reserved by the judgment of the court. The circuit court can, and should, investigate the question as to whether the land, in which the infant has the greatest interests, were of greater average value than the other tracts, and, if so, the extent of the difference; if found to exist, the court can, and should, adjudge to the infant out of the purchase money, adjudging the remainder to the adults as their interests are or may be fixed by the record. In this way the interests of the infant and of the purchaser will be fully protected.

The sixth exception is that one of the defendant owners, Samuel Rothschild, was a married man; that his wife was not joined in the suit, and that her inchoate dower in her husband's interest in the land is a cloud upon the title sold. (Section 495, Civil Code; *Woman's Club v. Reed*, 23 Ky. Law Rep., 1346, 111 Ky., 806.) The court may, and should, yet cause her to be made a party defendant, if living, and the value of her potential right found and paid to her out of her husband's share of the proceeds of the sale. This precise practice was done and approved in *Reed v. Reed*, 25 Ky. Law Rep., 2324.

The seventh exception relates to apparent discrepancies in the description of the boundary as shown by a comparison of the petition and the commissioner's report of sale and deed. It is not claimed, though, and doubtless is not a fact, that the land ordered to be sold was not actually sold, and that the descriptions of it, both in the petition and in the commissioner's report, do not fully cover it. The discrepancy occurred by reason of a resurvey caused to be made by the commissioner, and referred to in the order confirming his report. The objection is not substantial. Until some error

is pointed out the niceties for exact verification desired by abstractors will not be allowed to control, and to upset an otherwise regular judicial sale. The sale passes the title, notwithstanding there may have been a misdescription in the judgment or commissioner's deed, the land intended to be sold being manifest. (Hildebrand v. Bumshu, 19 Ky. Law Rep., 430.)

The eighth exception complains that the survey last alluded to was not filed of record in the case. That can be done yet if desired.

The ninth exception relates also to the description. The description is by metes and bounds, courses and distances, and is as explicit in form as is customary, indeed more so, and sufficient in every sense. It is not claimed that it is erroneous in any material particular.

The tenth exception says that the answer of the infant defendant was filed by his mother, who styles herself in the pleadings as her statutory guardian, and that she does not exhibit evidence of the fact. The statutory guardian is the person required to file the answer. (Section 36, Civil Code.) It is not claimed that she is not in fact the statutory guardian. Until there is an issue upon that allegation the proof of it is not required.

The eleventh exception is that taxes to the amount of \$66.30 assessed against the land for the year 1903 had not been paid. Though a lien on the land, they were not due when the sale occurred. The proper practice is to have their amount credited on the sale bonds, and for the purchaser to pay them, or to require them to be paid out of the purchase money fund in court.

The twelfth exception is that one of the owners, A. Rothschild, conveyed his interest to another, Louis Rothschild, by deed dated July 9, 1898, reciting that \$1,000 of the purchase money was not paid, and reserving a lien on the land to secure it; that A. Rothschild is dead, and that his personal representative has not been made party to the suit, and the lien has not been released. Let the personal representative be made a party before the purchase money is distributed, and his rights fully adjudged, and the money paid to him out of the fund in court, and the lien released by judgment of the court, unless it is done voluntarily sooner.

The final objection is that one of the daughters is claimed to have died testate in Colorado, devising to her sister all her property, including her interest in the lands sold; that the will offered for probate in Colorado is being contested, and that her interest in the lands is in abeyance. If the will is probated, her sister, the devisee, being a party to this action, will be bound by the decree and sale in this case. If the will be rejected by the tribunal having the jurisdiction of it, then all her heirs at law who are her brothers and sisters (she having died then intestate, unmarried and without parent living), are parties to this suit, and are bound by the judgment and sale. Besides, the court may, and doubtless will, in the present state of the record, hold the purchase money represented by that deceased sister's share until the controversy as to its inheritance has been finally decided. We thus conclude that, taking as true all that appellant says in his exceptions as to the state of the title, still he got a good title, the fee simple to the land bought by him, under proceedings regular upon their face, and in a court having jurisdiction of the subject-matter of the action and of the parties to it. He presents no ground for setting aside the sale. The re-

maining question is, was the special February term, 1904, of the Shelby Circuit Court legally called, for otherwise its judgment confirming the sale would be invalid?

By section 964, Kentucky Statutes, a special term of a circuit court may be held in any county whenever the business so requires in the judgment of the judge, and may be called either by an order entered of record at the last preceding regular term in the county, or by notice signed by the judge and posted at the courthouse door of the county for ten days before the special term is held. "The order or notice shall specify the day when the special term is to commence, and shall be the style of each case to be tried, or in which any motion, order or judgment may be made or entered at the special term, and no other case shall be tried, or motion, order or judgment entered therein unless by agreement of parties."

That section was literally complied with in this case, but appellant contends that as he was not a party to the action when the order calling the special term was entered, he can not be deemed to have had constructive notice of it. The statute does not contemplate that actual notice must reach persons to be affected by it. Constructive notice, resulting from a reasonable opportunity having been afforded them to know that the cases in which they may be interested are to be tried, is all that is practicable. A purchaser at a decretal sale becomes, when he has complied with the terms of the sale, a party to the action. He must take notice not only of what follows in the action, affecting his interest, but must look to what has gone before. (*Kincaid v. Tutt*, 88 Ky., 396; *Bean v. Hoffendorfer*, 84 Ky., 685; *Huber v. Armstrong*, 7 Bush, 591.)

That the sale was confirmed the same day the report was filed, though unusual, and if it had been shown that the purchaser or other party were prevented by that act from filing exceptions of merit to the sale, would have been held an abuse of judicial discretion, does not seem to have been prejudicial in this case, as no one has, even at the succeeding term of the court, presented any reason against the confirmation. We conclude that appellant, as purchaser, got the complete title to all the land sold, and that the proceedings by which the sale was confirmed are without harmful error.

The judgment is, therefore, affirmed.

COMMONWEALTH, BY, &c. v. STITES.

(Filed March 25, 1905—Not to be reported.)

R. W. Bingham for appellants.

Roger Yeaman and Humphrey, Hines & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

This case is affirmed by a divided court.

Judge Cantrill not sitting.

SILVERMAN v. MAES, BISHOP, &c.

(Filed March 25, 1905—Not to be reported.)

Fred. Bassman and E. P. Simmons for appellant.

Thos. Healey for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Settle.

This case is affirmed by a divided court.

Judge Cantrill not sitting.

MURPHY v. METZ, &c.

(Filed March 25, 1905—Not to be reported.)

Deeds—Valuable consideration—Reversion—Where a deed to a schoolhouse lot shows that it was made for the consideration of \$35, paid in hand, although it purports to convey the lot to the "trustees of a school for the use and purposes herein expressed and for no other use whatsoever," such deed shows that the grantor was not a donor of a charity. The conveyance was made for a valuable consideration and for a presumptively commensurable consideration, without any reserved reversion and in such case the property does not revert.

D. R. Castleman and Pryor & Sapinsky for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Judge Paynter delivered the following response to petition for rehearing:

The deed of Stinson to the trustees, made the 29th day of August, 1850, gives the consideration of the conveyance in the following language: "That the said James Stinson, for and in consideration of the sum of \$35 to me in hand paid before the sealing and delivery of these presents, the receipt whereof he hereby acknowledges, has given, granted, bargained and sold, and by these presents does hereby give, grant, bargain and sell, to the said Benjamin Williams, Preston Zenor and David Arnold, as trustees of a school, the following lot or parcel of ground lying and being in the county aforesaid, and for the use and purposes herein expressed, and no other use whatsoever."

The deed shows that the grantor was not a donor of a charity. If he had been, and there has been a failure in the object of the donation, the property would, by an implied trust, have reverted. The conveyance was made for a valuable consideration and for a presumptively commensurable consideration, without any reserved reversion. In such a case the property does not revert. (Morrow, &c. v. Slaughter, 5 Bush, 330.) The court passes upon the question as to whether the property would revert to appellant, a remote vendor of Stinson, because counsel for appellant insists that the court in the judgment appealed from held that it would not revert.

Chief Justice Hobson dissenting.

GAYLE v. RIGG.

(Filed March 25, 1905—Not to be reported.)

1. Passways—Grant—Presumptions—A grant of way over one's premises will be understood to be a general way for all purposes, and where a right of way is granted or reserved without limit of use, it may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted.

2. Public use—Unrestricted for fifteen years—Acceptance of easement—Estoppel—Where the public has continued for any and every purpose suitable to their needs, in hauling and traveling, without let or hindrance, to use a passway for more than fifteen years, its public use can not be restricted even though one has accepted a deed containing an easement of a private grant of the way, for if the public then owned the right of way it was not appellee's to grant, nor could any member of the public exclude himself by estoppel from using a public highway that every other member of the public had the right to use.

Cammack & Perry for appellant.

Moody & Bourne for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge O'Rear.

This controversy is over the existence of a public passway from appellant's land to the Marion's Landing and New Liberty turnpike road. Many years ago A. M. Rigg, Sr., appellee's father, owned a tract of about 600 acres of land on Kentucky river, in Owen county. He established a boat landing and warehouse on his place, on that part of his land now owned by appellant. A public highway was opened by A. M. Rigg, Sr., or at least was permitted to be used by him from the old dirt road, later converted into the Marion's Landing and New Liberty turnpike road, to his landing and warehouse, and on down the river. It was so used for many years by the traveling public. In 1875 A. M. Rigg, Sr., conveyed to his son, appellee, a part of the 600 acre tract. The latter then established a boat landing and warehouse on his land, a few hundred yards from the place where his father's had been, and extended the road down to it. The terminus of the turnpike road and the steamboat landing at that point had resulted in the growth of the village of Moxley. A. M. Rigg, Sr., discontinued his boat landing and warehouse about the time A. M. Rigg, Jr., established his. Yet the old passway from the end of the turnpike to A. M. Rigg, Sr.'s, home place, a distance of about 200 yards, remained open to the public, and has never been enclosed since or denied to the public. A. M. Rigg, Sr., died about 1887, and the home tract was sold to another son, who afterward sold it, until it has come to appellant. These deeds contain grants of right of way out to the turnpike road. For what purposes is not stated. After appellant came to own the A. M. Rigg, Sr.'s, home place he has re-established a boat landing there, and has opened a warehouse for coal, salt, grain, agricultural implements, and so forth. Appellee brought this suit to restrain appellant from using the old passway, which he claims is partly on his land, as a general passway for any purpose except agricultural, and in connection with appellant's farm. Appellee claims that appellant is putting it to an

additional servitude, by hauling coal and other merchandise over it, and by permitting and inviting it from the public.

There is a serious question whether appellee's deed embraces any part of the passway. But admitting that it does, still it is not clear that the language of the grant in appellant's deed is not broad enough to embrace the very use to which he has been putting it. The language of the grant is general. The grant is appurtenant to the land. A grant of way over one's premises will be understood to be a general way for all purposes. A right of way granted or reserved without limit of use may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted. (*Abbott v. Butler*, 59 N. H., 317; *Walker v. Pierce*, 38 Vt., 94; *Bakeman v. Talbott*, 31 N. Y., 866, 88 Am. Dec., 275 282.) In view of the fact that appellant's land was naturally and reasonably adapted to the use to which he is now putting it, and was at the time of the special grant by A. M. Rigg, Sr., and indeed had been so used by him for many years, is strongly persuasive that the parties so intended by the words employed that the easement given for it over the adjacent estate should be such as was compatible with that use, and as would insure to the dominant estate its highest enjoyment. The elder Rigg can not be deemed to have intended excluding his son, O. C., to whom the special grant was made, in favor of appellee, without the use of apt language, fairly indicating such purpose. If there be any doubt of the meaning of the words it must be resolved against the grantor. In further view of the fact that this is the only way to and from appellant's farm, that construction is particularly applicable, as in buying the farm he may well be supposed to have had in mind utilizing it for every legitimate advantage and profitable employment. It is not denied that appellant has the right to use the passway, by himself, servants and tenants, for agricultural purposes connected with that farm; that he has embarked in a business threatening appellee's previous monopoly seems to be the cause of the trouble.

At one time the passway in question was undeniably dedicated by the owner of the land, the elder Rigg, to the general public use, to travel and haul over it to and from a boat landing on the farm now owned by appellant, and it seems for the purpose of general travel even beyond that point. The vendees of A. M. Rigg, Sr., have for more than fifteen years denied the public use of all of that passway except the 200 feet now in dispute. It, the public, has continued for any and every purpose suitable to their needs in hauling and traveling, without let or hindrance till this suit. Appellant, even if the part of the passway in dispute is on his land, can not now restrict the public's use, or deny it to appellant, even though appellant may have accepted a deed containing an easement of a private grant of the way, for if the public then owned the right of way, it was not A. M. Rigg, Sr.'s, to grant. Nor could any member of the public exclude himself by estoppel from using a public highway that every other member of the public had the right to use. Appellant's assenting to the proposition that the way was a private one only, did not make it less a public way if it was one, as we hold it was. The rights of the public could not be bartered in that way.

The judgment enjoining appellant from the use of the strip of land in

dispute, and adjudging damages to appellee for its previous use by appellant, is reversed and the cause is remanded, with directions to dismiss the petition.

THACKER v. COMMONWEALTH.

(Filed March 25, 1905—Not to be reported.)

Criminal law—Maliciously injuring railroad engine—Intent—Under Kentucky Statutes, section 807, making it a felony for any person to “willfully and maliciously * * * do any act whereby an engine or car might be upset or thrown from the track,” where a boy twenty years of age, in stealing a ride on a train, turned an angle cock which applied the air to the brakes, which had the effect to stop the train, but the proof shows was calculated to bring it to a sudden stop and throw it from the track, where there was evidence tending to show that the boy did the act without knowledge of its probable consequences, and if this be true his act was not malicious, the court should have given an instruction to the jury submitting the question as indicated.

C. W. Lester for appellant.

N. B. Hays and Chas. H. Morris for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Paynter.

The indictment was based on the alleged violation of section 807, Kentucky Statutes, which reads as follows: “Any person who shall willfully and maliciously tear up, displace, break or disturb any rail or other fixture attached to the track or switch of any railroad in operation, or break any bridge or viaduct of such road, or do any other act whereby any engine or car might be upset, arrested or thrown from the track of such road or switch, or any branch or turnout, shall be confined in the penitentiary not less than one year nor more than five years.”

The appellant is about twenty years of age, and the evidence tends to show that while stealing a ride on the train he turned an angle cock, which applied the air to the brakes and had the effect of stopping the train. The proof shows that to turn the air on in that way was calculated to bring the train to a sudden stop and throw it from the track. There is evidence tending to show that the boy innocently did the act without knowledge of its probable consequences, and, therefore, had no intent to do an act which was calculated to upset, arrest or throw the engine or cars from the track. If this be true, his act was not malicious, therefore, the court should have given an additional instruction to the jury submitting to it the question above indicated.

The judgment is reversed for proceedings consistent with this opinion.

T. G. & M. F. SKIDMORE v. R. P. & R. M. SCOBEE.

(Filed March 25, 1905—Not to be reported.)

Contract—Sale of lumber—Delivery—Acceptance—Payment—Estoppel— Under a contract by which appellants agreed to deliver lumber on board cars at Bowen, Ky., where appellant delivered twenty carloads, nineteen of which appellee accepted and paid for without complaint, in an action by appellant for the agreed price of the remaining car it was error for the court to permit appellee, the purchaser, to plead as a counterclaim damages for alleged defects in the nineteen carloads which appellees had inspected, accepted and paid for, as appellees were estopped to claim damages therefor.

John D. Atkinson and R. L. Greene for appellants.

B. R. Jouett, Pendleton & Bush and J. Smith Hays for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Nunn.

The appellants, as partners, on March 8, 1903, entered into a contract with appellees, by which they sold them their poplar and linn lumber at \$15 per thousand feet delivered on board cars at Bowen, Ky., and after having delivered same, in all twenty carloads, and appellees having failed to pay for the last car, amounting to \$241.14, appellants filed this action seeking judgment for this balance.

Appellees filed an answer and counterclaim, in which they sought to recover damages by reason of a portion of the lumber, known as saps, being inferior in quality, caused by the alleged manner in which it was handled by appellants; appellees also sought to recover for lumber which they claimed appellants refused to deliver to them under the contract sued on, in all amounting to \$714.

Appellants traversed the affirmative matter in the answer, and alleged that the lumber left on the mill yard was the individual property of appellant, T. G. Skidmore, and manufactured from his own individual timber, and also alleged that appellees had received, inspected and accepted, without objection, and paid for all except the last carload, and that they were estopped, by reason of their acts, from setting up any claim for damages on account of the way in which the lumber was stacked and handled. This affirmative matter was denied by the appellees. A trial was had, which resulted in a verdict in favor of appellees. The facts, as they appear, without much contradiction, are in substance as follows: One of the appellees was upon the premises of the appellants and at the place where the logs were piled when the contract was made, and agreed with appellants to pay them \$15 per thousand feet, log run, for the lumber delivered on the cars at Bowen. And it was agreed that appellees were to have all the lumber that the logs there and belonging to the partnership would make. It appears that appellants sawed this timber and shipped to appellees twenty carloads, one car at a time. The appellees inspected, accepted and paid for each car when received without any objection as to the kind, quality or condition of the lumber, except the last car, and there never was any complaint or objection as to the quality of the lumber or the manner in which it had been handled until some days after the last car was received by them and until a few days before the institution of this action by the appellants.

One of the appellees testified that on the 17th of October, 1908, he went to the lumber yard of appellants and made a rough calculation of the lumber then on the yard, and he estimated it at about 48,000 feet, and that after that appellants shipped them only about 26,000 feet, leaving about 17,000 feet that appellees were entitled to under their contract, which was wrongfully retained by appellants; that it was worth \$32 per thousand feet at Bowen. This appellee also testified that when at the mill yard he noticed that there was some good lumber stacked on the opposite side of the road from the main lumber yard, and that there was other lumber near there that showed evidences of having been restacked. He also testified that he saw T. G. Skidmore on that day, after he left the lumber yard, and Skidmore told him that the lumber which was stacked across the road from the main pile was his individual lumber, made from his own trees; that it did not belong to the partnership, but that he had had that made into lumber after they had finished their contract for the purpose of erecting for himself a dwelling house, which he was then erecting. Appellee made no response at that time to the statements of Skidmore, but on his return to his home he wrote to Skidmore a letter, which we copy in part: "The writer while on the yard made a very careful estimate of what there was of the thick stuff, and also of what there was of the inch common and better laid out, and also the amount of log run in the original stacks. The writer noticed that the pile of common and better on the right as you go up was not the original stack in which this lumber was dried; could tell that from the old stick marks; also noticed same on top of ash and that some of the inch on top of the thick stuff was not in the original stack. We also made an estimate of the lumber at the railroad. We will measure and inspect this lumber when it comes in, and will know whether or not you have shipped us the common and better which you have held back."

After all the twenty cars had been received by the appellees, and on the 29th of October, 1908, they addressed to the appellants the following letter:

"Under our contract of March 3, 1903, we were to get all of the lumber you manufactured out of a certain lot of logs, at a price of \$15 per M. log run, board measure, and were to pay for same f. o. b. cars Bowen, less 2 per cent. for cash. We are ready and willing to comply with our contract fully, but you are not complying with your part, in that you are not shipping us all of the lumber, but are retaining back some common and better grade.

"We write to ask you to please ship us all of this lumber at once, and we will pay as per our contract. We might say here that you have very seriously failed in complying with your part of the contract in another particular, viz., you failed to stack the lumber as agreed, and have not given the stacks the proper elevation and width as agreed upon, and in this you have virtually ruined all of the saps."

It is proper here to remark that this letter contains the first intimation or claim by appellees to appellants that there was any defect or damage to the lumber they had received on account of any failure to stack it in accordance with the contract. The appellants proved by themselves and several witnesses that this lumber claimed by appellees to have been held back did not belong to the partnership, but was the individual property of T. G. Skidmore; that he had had it sawed for the purpose of building himself a dwell-

ing house out of his individual logs, and that this lumber was not sawed until after they had completed their contract with appellees. Upon this question of holding back of lumber in violation of the contract we are of the opinion that the appellees introduced a scintilla of proof to support their claim, and it was proper for the court to submit that question to the jury. But upon the question of damage to the lumber, by reason of improper stacking and handling, we are of the opinion that, under the evidence, the court should have given peremptory instruction to the jury to find for the appellants on that claim, as the evidence, without contradiction, shows that appellees received this lumber, inspected and accepted it and paid for each car as received, except the last one, and there never was any complaint with reference thereto until the 29th of October, 1903, which was after all had been received, and by reason thereof the appellees are estopped from now claiming damages on account thereof. (Albin Co. v. Kentucky Table Co., 28 Ky. Law Rep., 2261; Mattingly v. Matthews, 14 Ky. Law Rep., 300; Overman v. Nelson Bros., 15 Ky. Law Rep., 92; Jones v. McEwen, 91 Ky., 373.)

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

COMMONWEALTH, BY, &c. v. PATE, &c.

(Filed March 25, 1905—Not to be reported.)

1. Taxes—Penalty for nonpayment—Property of county—Liability of sheriff—Under Kentucky Statutes, section 4143, providing that a penalty of 6 per cent. shall be collected by the sheriff of persons failing to pay their tax by the first day of December, after it is due, it is the duty of the sheriff to collect such penalty as well as the principal, and such penalty is the property of the county, and the sheriff must account for it on his official bond.

2. Sheriff's settlement—Surcharging—Limitation—Diligence—While it is true that the county is barred from maintaining an action to surcharge a settlement after five years from the time when the mistake could have been discovered by the exercise of ordinary diligence, it may be further conceded as true that if it appeared in the case that five years had elapsed after the settlement and before the action was instituted it would be necessary if limitation is pleaded for the plaintiff to allege and prove, if controverted, that the mistake could not have been discovered by the exercise of reasonable diligence within five years next before the institution of the action. No action accrued to the county until the settlement was made.

J. A. Dean and Gus Brown for appellants.

Morris & Eskridge and Miller & Todd for appellees.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the Commonwealth of Kentucky for the use and benefit of Breckinridge county, and Breckinridge county against S. A. Pate, a former sheriff, and his bondsmen on his official bond, to recover certain sums of money alleged to have been collected by him in his official capacity and not accounted for as by law required.

The allegations of the petition, as amended, are substantially that the sheriff collected of the county taxes for the year 1895, after the 1st day of December, 1895, the sum of \$10,657.65, and 6 per cent. penalty thereon, as by law required, amounting to the sum of \$613.98; that after the 1st day of January, 1896, the fiscal court appointed one J. O. Cunningham a commissioner to settle with the sheriff for the county taxes for the year 1895, and a settlement was made and returned as by law required, but by mistake the officer was not charged with the penalty collected by him, and he retains it, although payment has been demanded of him. A general demurrer to the petition was sustained by the court, and the appellants declining to plead further, the petition was dismissed, of which they are now complaining.

By section 4143, Kentucky Statutes, any person failing to pay his taxes by the 1st day of December, after it is due, shall pay a penalty of 6 per cent. on the amount unpaid, and it is the duty of the sheriff to collect the penalty, as well as the principal, and must pay it over to the proper authority before the first day of the succeeding January, or himself pay a penalty of 6 per cent. on the amount wrongfully withheld. The penalty collected on the county tax is the property of the county, and the officer must account for it on his official bond. The facts admitted by the demurrer show that S. A. Pate collected \$657.65 as penalties from delinquent taxpayers; that the fiscal court appointed a commissioner to settle with him his accounts as to the fiscal matters of the county for the year 1895; that in this settlement, by mistake, the officer was not charged with this sum; that he now wrongfully withholds it from the county, although demand had been made upon him for payment.

It is true, as contended for by appellee, the county is barred from maintaining an action to surcharge the settlement after five years from the time when the mistake could have been discovered by the exercise of ordinary diligence; and it may be further conceded as true that if it appeared in the case that five years had elapsed after the settlement and before this action was instituted it would be necessary for the plaintiff, if limitation is pleaded, to allege and prove, if controverted, that the mistake could not have been discovered by the exercise of reasonable diligence within five years next before the institution of the action. No action accrued to the county until the settlement was made, and the petition, as amended, does not disclose when it was made. The principles herein enunciated are supported by the cases of *Commonwealth v. McClure*, 20 Ky. Law Rep., 1568; *Bates v. Knott County Court*, 24 Ky. Law Rep., 73; *Pulaski County v. Watson, Sheriff*, 106 Ky., 500, and *Fidelity and Deposit Co. v. Logan County*, 27 Ky. Law Rep., 66.

The court erred in sustaining the demurrer to the petition, and for this reason the judgment is reversed for proceedings consistent herewith.

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COURT OF APPEALS OF KENTUCKY.

E. H. TAYLOR, JR. & SONS v. TAYLOR.

(Filed March 17, 1905.)

1. Trade-mark infringement—Action—Injunction—Accounting of profits—Simulation—Damages—Election—In an action by a distilling company for damages for an infringement of its trade-mark as a manufacturer of whisky, and for an injunction and accounting of profits alleged to have been made by the defendant thereby, it was proper for the lower court to require the plaintiff to elect whether it would prosecute its action for an injunction and profits, or for damages, as an injunction and profits could be had in an equitable proceeding, while damages for the simulation of its whisky is properly a common law action as in other cases of fraud.

2. Partnership—Assignment of firm—Incorporation of same parties—Right to firm trade-mark—Where a partnership was formed by E. H. T., Jr. & Sons for distilling whisky, which was advertised and known as the "Old Taylor" whisky, and said firm made an assignment, and was succeeded by the same parties, under the corporate name of E. H. T., Jr. & Sons Co., which continued to make and advertise their product as the "Old Taylor" whisky, it must be presumed, nothing to the contrary appearing, that the debts of the firm were settled, and that the "brand," as the property of the partners, reverted to them, and they had the right to use it in the name of the corporation which they subsequently formed.

3. Registration of trade-mark—"Fac simile of firm signature"—Effect—Where an application was made by the firm which appellants succeeded to register its trade-mark, "Old Taylor," was rejected by the patent office because of a prior use of the brand, and later the firm made another application which was granted, in which they said: "Our trade-mark consists of the arbitrary word—symbol 'E. H. Taylor, Jr. & Sons,' being a script fac simile of the signature of our firm name by the senior member thereof," the trade mark of the firm did not consist in the words "Old Taylor," but it was abandoned for the one registered, and as it is not claimed that defendant has infringed the registered trade mark, so much of the action as sought an injunction to restrain the defendant from infringing plaintiff's trade-mark, or on account of profits therefor, was properly dismissed by the circuit court.

4. Rights of plaintiff—Concealments by defendants—Blended whisky—Imposition on public—Injury to plaintiff—It appearing from the evidence

that appellant (defendant) was not a distiller, but a blender of whisks, and that he intentionally labeled and advertised his whisky as "Old Kentucky Taylor," but not as blended goods, and as the whisky of appellant (plaintiff) had attained a high reputation as a pure Kentucky distilled whisky, the selling by appellee of his blended whisky was a violation of appellant's rights which can not be sanctioned. The appellee may properly sell his brand of "Old Kentucky Taylor," provided he so frames his advertisements as to show that it is a blended whisky, but he can not be allowed to impose on the public a cheaper article, and thus deprive appellant of the fruits of its energy and expenditures, by selling his blended whisky under labels or advertisements which conceal the true character of the article. So much of appellant's action as sought damages having been dismissed without prejudice, the only remedy to which it is entitled is an injunction as indicated.

Wm. McKee Duncan, Wm. Lindsay and Hazelrigg & Hazelrigg for appellants.

Humphrey, Hines & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

E. H. Taylor, Jr. & Sons Co. is a corporation formed under the laws of Kentucky, and engaged in the manufacture and sale of whisky in Woodford and Franklin counties, claiming the exclusive use of a certain trade-mark which is lettered upon the barrels, bottles and cases containing their whisky, and printed upon their letter heads and their advertisements, their brand being "Old Taylor," coupled with the words, "The premier Kentucky whisky," and with the script signature of E. H. Taylor, Jr. & Sons. It filed this suit, charging in its petition that while it had the exclusive right to use the above trade-mark the defendant, Marion E. Taylor, was, without its consent, in the city of Louisville, using on barrels, bottles, etc., containing a spurious compound of whisky, a trade-mark and brand substantially the same and almost identical with that of the plaintiff; that this he did fraudulently to mislead the public, purchasers and consumers of whisky into the belief that the whisky so branded by him was the whisky manufactured by the plaintiff; that the defendant advertised himself as a distiller, when he owned no distillery, and was not a distiller of whisky, and was palming off his compound as "Old Taylor" whisky, although he was only a blender of whisky, and was thus infringing upon the plaintiffs' trade mark, which was of value \$100,000, and had thus enriched himself to the full amount of \$75,000. An injunction was prayed, restraining the defendant from further piracy of its trade-mark, and an account was sought of profits made by the defendant in his infringement of the plaintiff's trade-mark, and also damages in the sum of \$100,000 for the simulation of plaintiff's whisky and the selling of the defendant's whisky for it.

The defendant entered a motion that the court require the plaintiff to elect whether it would prosecute the claim on account of profits or the claim for damages. The court sustained the motion, and thereupon the plaintiff elected to sue for an injunction and accounting of profits, and dismissed so much of its petition without prejudice as claimed damages, reserving the right to sue therefor in another action if it should so desire. This action of

The court was proper as the plaintiff was not entitled to both an accounting of profits and damages for the simulation of its whisky. The account of profits could he had in an equitable action, but damages for the simulation of its whisky would properly be had in a common-law action, as in other cases of fraud. There was thus left in the action only the question of an injunction and an accounting of profits if the infringement of the trade-mark was established. The defendant answered, traversing all of the allegations of the petition. On final hearing the court dismissed the petition, and the plaintiff appeals.

The proof shows that on January 1, 1887, a partnership was formed of E. H. Taylor, Jr & Sons. This firm operated a distillery in Woodford county, manufacturing whisky which was known as "Old Taylor," and was so branded on the barrels, bottles, etc. They advertised it very extensively, and it attained a high reputation as a first class whisky. The firm made an assignment in the year 1893, and on April 30, 1894, the corporation of E. H. Taylor, Jr. & Sons Co. was formed, which has since manufactured "Old Taylor" whisky, and has continued to advertise it extensively, and sell it all over the country. It is claimed by the defendant that it is not shown how the corporation ever got the right to use the brand "Old Taylor," no transfer appearing from the assignee of the firm, but it is shown that the corporation bought the distillery at which the whisky was made, and as neither the assignee nor any of the creditors of the firm have objected to the use of the brand by the corporation, it must be presumed that the debts of the firm were settled, and that the brand as the property of the partners reverted to them, and that they had the right to use it in the name of the corporation which they subsequently formed.

It remains, therefore, to determine what trade-mark the firm had. It appears that the firm applied in 1887 to the United States authorities to register a trade-mark "Taylor" or "Old Taylor," but the application was rejected by the patent office because of a prior use of the brand. After this, in the year 1889, the firm made another application to the patent office to register a trade-mark, which was granted. In this application they said: "Our trade-mark consists of the arbitrary word—symbol 'E. H. Taylor, Jr. & Sons,' being a script fac simile of the signature of our firm name by the senior member thereof. This has generally been arranged, as shown in the accompanying fac simile, in which it appears, in black script, on a horizontal line within a circular border embracing the words 'Old Taylor;' but these are nonessential, and it may be differently arranged or colored without materially altering the character of our trade-mark. It has sometimes been used with additions in the following form, to wit: 'Yours truly, Edmund H. Taylor, Jr. & Sons;' but the essential feature of the trade-mark is the script fac simile signature 'E. H. Taylor, Jr. & Sons.' This trade-mark has been used continually in business by us since January 1, 1887."

Where a trade-mark is registered the registry must be presumed to show what the trade-mark is, and things which are disclaimed as going to make up the trade-mark must be considered as abandoned. Under this rule the trade-mark of the firm did not consist in the words "Old Taylor," for these are expressly said to be nonessential in the application, and the essential feature in the trade-mark is the script fac simile signature "E. H. Taylor,

Jr. & Sons," by the senior member of the firm. (Stagg v. Taylor, 95 Ky., 661.) It is not claimed that the defendant has infringed in any way this trade-mark. He has not used anything in his brands of this character, and, therefore, so much of the action as sought an injunction to restrain the defendant from infringing the plaintiff's trade-mark or an account of profits therefor was properly dismissed by the circuit court.

It remains to consider whether there was a fraudulent simulation of the plaintiff's whisky by the defendant. The proof shows that the plaintiff's whisky was a high priced article, and was advertised extensively as a pure distilled whisky, most of it being bottled in bond. The defendant, Marion E. Taylor, at the time the suit was brought was not a distiller, and did not own a distillery. He was a rectifier, doing business in Louisville. Before going in business in Louisville, about the year 1889, he had been a drummer traveling through the south, and had been known among some of his friends as "Kentucky Taylor." When he went into the rectifying business he began putting up a whisky which he called "Old Kentucky Taylor." Rectified or blended whisky is known to the trade as single stamp whisky, while bonded whisky is known as double stamp goods. The proof shows that the rectifiers or blenders take a barrel of whisky and draw off a large part of it, filling it up with water, and then adding spirits or other chemicals to make it proof and give it age, head, etc. The proof also shows that from 50 to 75 per cent. of the whisky sold in the United States now is blended whisky, and that a large part of the trade prefer it to the straight goods. It is a cheaper article, and there is, therefore, a temptation to simulate the more expensive whisky. The bottle in which the defendant sold his whisky were not similar to the plaintiffs' bottles. The label used by the appellant on its bottles is as follows:

In his advertisement appellee followed often the label on his bottles; in other advertisements he used the following:



Appellee advertised his whisky extensively, and we think it reasonably clear that one reading these advertisements who was not familiar with the whisky trade would understand that "Old Kentucky Taylor" was a straight whisky, and without going into the minutiae of the evidence, we deem it sufficient to say that we are satisfied from it that appellee intentionally labeled and advertised his whisky as he did, to pass it off, not as blended goods, but as the whisky of appellant, which had attained a very high reputation as a pure Kentucky distilled whisky, and that his thus selling his blended whisky was a violation of appellant's rights. Appellant had sent out thousands of circulars every month advertising its whisky; it had spent hundreds of dollars in the trade journals and otherwise advertising it as the "Premier Kentucky Whisky," and it had thus given value to its brand. Appellee's whisky was a cheaper article, and could be sold at prices at which appellant could not afford to sell its whisky. The selling of the cheaper goods under labels and advertisements which to the uninitiated would indicate that it was appellant's whisky, so well advertised as a first class article, can not be sanctioned. The defendant may properly sell his brand of "Old Kentucky Taylor," provided he so frames his advertisements as to show that it is a blended whisky, but he can not be allowed to impose upon the public a cheaper article, and thus deprive appellant of the fruits of its energy and expenditures by selling his blended whisky under labels or advertisements which conceal the true character of the article, for this would destroy the value of the appellant's trade.

In the action for fraudulent simulation of the plaintiff's goods there can be no accounting of profits in equity. The remedy is by the common-law action for damages as in any other case of fraud. So much of the action as sought damages having been dismissed by the appellant without preju-

dice, the only remedy to which it is entitled is an injunction as above indicated.

Judgment reversed and cause remanded for a judgment and further proceedings consistent herewith.

Whole court sitting.

WEATHERHEAD v. CODY, &c.

(Filed March 16, 1905—Not to be reported.)

1. Street improvement—Ordinance — Intention—Although an ordinance may be inartificially drawn, yet where it is evident that the board of trustees intended that the abutting property should pay the expenses of an improvement to the street they should be required to pay for same.

2. Attested copy of ordinance —Validity— Presumption—Where attested copies of an ordinance is filed as evidence in a case the presumption must be indulged that they were regularly passed until their validity is impeached, and if the town clerk had failed to make a record of the passage of the ordinance that fact could be established by parol testimony.

3. Passage of two or more ordinances—Effect—While the clerk of the board of trustees should have recorded the separate action of the board on different ordinances, although this is not shown, and although the board may have passed two or more ordinances at the same time, such action would not prevent a recovery by the appellees for the work which they did.

S. W. Adams for appellant.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

The appellant owned property on Spring street, in Elsmere, a town of the sixth class. The board of trustees enacted ordinances providing for the improvement of the streets of the town. It did so by virtue of section 3706, Kentucky Statutes. The section provides that the costs and expenses shall be paid out of the general fund of the town or by the owners of land fronting or abutting on public streets, as the board of trustees may determine. The improvement was made by the appellees in front of the appellant's property as provided by the ordinance and required by the terms of the contract.

The payment is resisted because, first, that the ordinance did not provide that it should be made at the expense of owners of property fronting or abutting on the street improved; second, that the board of trustees could not pass five separate ordinances by the same vote; third, that the ordinance was not duly passed; fourth, that the acts of the board of trustees can only be proven by the minutes kept by the town clerk.

By the second section of the ordinance of September 30, 1899, it is provided that the contractor was to be paid by assessments collected from the owners of lots fronting or abutting on the street improved. While the section is inartificially drawn, yet it is very evident that the board of trustees intended that the abutting property owners should pay the expenses of the improvement. Neither the contractor nor the property owners could have gathered any other meaning from the ordinance. We will consider objections Nos. 2 and 3 together. It is insisted that the plaintiff failed to show

by the minutes of the board of trustees that the ordinance was duly passed. Attested copies of the ordinances were filed as evidence in the case. From these attested copies the presumption must be indulged that they were duly and regularly passed, until their validity is impeached. If the town clerk had failed to make a record of the passage of the ordinances of the board of trustees, still it could be established by parol testimony.

Dillon on Municipal Corporations, 238, says: "Where the records of a municipal corporation have been so carelessly and imperfectly kept as not to show the adoption of a resolution or other acts of the city council, and there is no written evidence in existence, parol testimony may be admitted, e. g., to show that certain work was done by authority of the city, by proving the passage of a resolution of the council, the appointment of a committee to make the expenditure, their report after the work was done, and its adoption by the council."

While it was established by parol testimony that the ordinance was passed, this was not necessary as the appellant did not overcome the prima facie case of regularity which was made out by the attested copies of the ordinances.

The evidence does not show that the ordinance was voted on together with other ordinances. While the clerk should have recorded the separate actions of the board of trustees on different ordinances, still the record does not sustain appellant's claim that two or more ordinances were voted on at the same time. If it had been done, the action of the board of trustees would not prevent the appellees from recovering for the work which they did, for this court has so adjudged.

The judgment is affirmed.

ATHERTON v. WARREN, &c.

(Filed March 16, 1905.)

Judicial sales—Vested estate—Joint owners—Infants—Remaindermen—Under Civil Code, section 490, providing for the sale of real property held jointly by two or more persons, if the property be in possession and can not be divided without injuring its value, such sale may be made where there are vested estates jointly held, though one of the parties is a life tenant and the remaindermen are infants.

Henry W. Sanders for appellant.

Wilkins G. Anderson, Henry M. Johnson and Johnson & Heatt for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Paynter.

This action was instituted under section 490, Civil Code of Practice, for the sale of property on the southwest corner of Chestnut and Fourth streets, in the city of Louisville. The property can not be divided without materially impairing its value. It belongs to the estate of L. L. Warren, who died leaving a widow and nine children. Each child took an undivided

one-ninth interest, subject to the widow's dower. The widow is dead and a daughter died before her mother, leaving her husband, Eugene W. Lee, Sr., and four children, two of whom, Eugene W. Lee and George F. Lee, being infants. W. B. Warren, a son of L. I. Warren, conveyed his one-ninth interest to his mother, Mary A. Warren. Mary A. Warren died intestate, and the one-ninth interest conveyed to her by her son descended to her eight surviving children and her grandchildren, the Lees. One son, Cary I. Warren, conveyed his undivided one-ninth interest to his sister, Ella M. Warren. Eugene W. Lee, Sr., is tenant by the curtesy in one-ninth interest inherited by his wife, and his four children hold the remainder interest, and they each inherited from their grandmother, Mary A. Warren, one-fourth of one-ninth of one-ninth interest. The foregoing statement shows the condition of the title of the property as well as the possession at the time the action was instituted.

The property was ordered sold and the appellant, Peter Lee Atherton, became the purchaser at the price of \$30,000. He resisted the confirmation of the sale chiefly upon the ground that the interest of the two infants could not be sold under section 490, Civil Code of Practice.

Section 490 of the Civil Code of Practice reads as follows: "A vested estate in real property jointly owned by two or more persons may be sold by an order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant:

"1st. If the share of each owner be worth less than \$100.

"2d. If the estate be in possession and the property can not be divided without materially impairing its value, or the value of the plaintiff's interest therein."

This court has been called upon frequently to construe the above section of the Code. In the cases of *Berry, &c. v. Lewis, &c.*, 28 Ky. Law Rep., 530; *Liter v. Fishback*, 25 Ky. Law Rep., 260; *Swearingen v. Abbott, &c.*, 99 Ky., 271, and *Malone v. Conn, &c.*, 95 Ky., 93, the court had this section of the Code under consideration. In each of these cases it appeared that there was either a life estate in the property sought to be sold, or that there was a life tenant or tenant by the curtesy of the entire property sought to be sold, and the court held that it could not be sold for one or the other of these reasons, as it was not an estate in possession jointly owned by two or more persons who are in possession thereof.

In *Dineen v. Hall*, 23 Ky. Law Rep., 1615, the court held that the property could not be sold under section 490, Civil Code of Practice. In that case it appeared that John Hall was entitled to curtesy in one undivided one-half of the property sought to be sold, and the fee to that half was in an infant, and the other half of the estate was owned by the plaintiff, so the court denied the right to sell the property because those with vested interests were not joint owners in possession. The court is confronted with the question as to whether or not it will adhere to the opinion in the case of *Dineen v. Hall*. If it is adhered to, the sale to Atherton is invalid.

In the case of *Kean v. Tilford*, 81 Ky., 600, there were life estates and remainders over, and the court held the property could be sold under section 490. In passing upon the question, the court said: "In this case all the parties in interest are before the court and vested with the title. In the

case of Phillip Speed's will he provides that after the death of his wife his property shall be divided between his children, the children of any who may be dead receiving the share of the parent. 'This was a vested interest. The same provision, in substance, is found in the will of Joshua Speed. By the codicil he devises an interest in his estate to three of his sisters for life; then to the children of his other brothers and sisters. 'The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder.' (Walter v. Crutcher, 15 B. M., —.) All the parties in interest who are *sui juris* are seeking to have the entire property sold, and the testimony of those who are familiar with the hotel is to the effect that it is not susceptible of division. It is insisted by counsel for the infant that a unity of interests must exist, and a joint right of possession, to authorize a sale of the entire property; that all the unities of interests, title, time and possession, creating a joint tenancy at the common law, must be found to exist in this case, or the chancellor is without power to adjudge a sale. Such is not the meaning of the Code. A vested estate is all that is necessary or required. Joint tenants, tenants in common, and coparceners are entitled to have a division of their real estate, and whether called the one tenancy or the other, they have a vested estate; and with such an interest, when the property is not susceptible of division, it may be sold by the decree of the chancellor. Such was the plain purport of the statute.'

In view of these decisions the court is called upon to reconcile the real and apparent conflict in them.

The possession of the property is jointly held by the Warren heirs and Lee, as tenant, by the curtesy in an undivided part. The Warren heirs and Lee are tenants in common. The legislature evidently intended by the enactment of section 490 to give joint owners having a vested estate in real property in their possession, when it could not be divided without materially impairing its value or the value of the plaintiff's interest therein, the right to have it sold. Under this provision of the Code, if the value of the plaintiff's interest alone is materially impaired by continuing to hold the property, he is entitled to have it sold. The tenant by the curtesy has a vested interest in the property the same as have the Warren heirs. This being true, the record presents a case where persons with a joint interest and in possession seek the sale of the property under section 490. They have the right to the sale of the property under that section. To take any other view would be to hold that the legislature intended that although persons with a vested interest and in the possession of the property could be prevented from selling it on account of the small interests of remaindermen. In our opinion the intention of the legislature is effectuated when we hold that property may be sold under section 490 where there are vested estates jointly held, although one so holding is a life tenant. This view would be in harmony with the other decisions of this court which have denied the right of the sale of property under section 490, where the possession was in a life tenant alone in possession of the property. From the conclusion we have reached *Dineen v. Hall* should be, and is, overruled. Our conclusion is that the proceedings under which the appellant, Atherton, made the purchase is regular, and the court can vest him with the fee simple title to the property.

The judgment is affirmed.

WATHEN, &c. v. CITY OF LOUISVILLE.

(Filed March 22, 1905—Not to be reported.)

Taxation--Exemptions--Hospital--Adjunct to medical school--Under section 170 of the Constitution exempting "institutions of purely public charity" from taxation, a hospital which is an adjunct to a medical school is subject to taxation, although patients who are not able to pay for treatment therein are admitted free for the purpose of the education of the students of the medical school in their profession.

W. S. Pryor for appellants.

H. L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

Dr. W. H. Wathen and three other gentlemen owned property 200x200 feet between Sixth and Center streets, upon which buildings are situated in which a medical school is conducted under the name of the "Kentucky School of Medicine." The medical school building fronts on Sixth street and what is known as the infirmary or hospital fronts on Center street. These buildings are connected by a hall on the second floor. The latter building is used as a hospital and dispensary in which there are operating rooms and rooms for surgical dressing, etc. Medicines are dispensed and patients are treated free of charge unless they are able to pay from \$3 to \$5 per week. If patients are not able to pay they are admitted without charge. Dr. Wathen says the hospital was erected in order that the proprietors might have clinical instruction in a certain degree under their direct supervision, so as to make a doctor better qualified to administer to the wants of patients. The income from the hospital does not meet its expenses by from \$5,000 to \$7,000 when interest is charged upon the investment in the hospital. It is claimed that the property used as an infirmary or hospital is exempt from taxation by virtue of section 170 of the Constitution, which reads as follows: "There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education."

It is manifest from the evidence that the hospital is maintained because it is necessary to the successful conduct of the school of medicine. Without the clinical instruction and the operations by the professors in the presence of the students the school could not be maintained with success. The hospital is an adjunct or a part of the medical school. Whatever gain may result from the operation of the medical school goes to the owners of the property. While the evidence shows a great deal of charity work is performed in the treatment of patients and in dispensing medicines, still the institution is conducted for profit. As it is operated for gain no part of it is exempt from taxation under section 170 of the Constitution. This conclusion is supported by *Gray Street Infirmary v. City of Louisville*, 23 Ky. Law Rep., 1874.

The judgment is affirmed.

GLOBE FERTILIZER CO. v. TENNESSEE PHOSPHATE CO.

(Filed March 25, 1905—Not to be reported.)

1. Continuing contract—Action thereon—Entire damages—In an action for a breach of a continuing contract the plaintiff has a right to sue at once for his entire damages without waiting for the expiration of the contract period.

2. Breach of contract—Evidence considered, and, Held—That appellee was guilty of a breach of its contract for the shipment of phosphate rock to appellant.

Kohn, Baird & Spindle, Dodd & Dodd and Hazelrigg & Chenault for appellant.

Helm, Bruce & Helm for appellee.

Appeal from Jefferson Circuit Court, Law and Equity Division.

Opinion of the court by Judge Paynter.

The appellant, a corporation, was engaged in the manufacture and sale of fertilizers. The appellee, a corporation, was engaged in mining, preparing and selling to manufacturers of fertilizers phosphate rock to be used by them in the manufacture of fertilizers. The appellee, at the time it was proposed to enter into the contract to which reference will be hereafter made, was in the hands of a receiver, and its managers, in order to justify them in taking it from the control of the court, desired to enter into contracts with consumers of phosphate rock, and thereby insure a certain and regular consumption of its product. Among others, it sought to and did make a contract with the appellant by which it was to furnish it such phosphate rock as it needed in the conduct of its business. The negotiations culminated in the making of a contract of the date of September 23, 1896, which was to continue for a period of five years from January 1, 1897. This contract is admitted. Sections Nos. 2, 3 and 5 read as follows:

“Section 2. The phosphate rock to come from the phosphate deposits near Mt. Pleasant, Tenn.

“Section 3. The quality of the rock to show, on fair average sampling, a minimum of 72 per cent. bone phosphate, a maximum of 5 per cent. of oxide of iron and alumina, and a maximum of 3 per cent. of moisture. Should at any time during life of contract rock be received which shows below 72 per cent. bone phosphate and above 70 per cent. bone phosphate, the same is to be accepted and paid for by you at a reduction in price per ton of $5\frac{1}{2}$ cents for every unit of bone phosphate below 72 per cent. Your company to have the right to reject all rock running below 70 per cent bone phosphate. Should, at any time during life of contract, rock be received which shows above 5 per cent. oxide of iron and alumina and under 6 per cent. oxide of iron and alumina, the same is to be accepted and paid for by your company on the basis of one unit of excess iron and alumina equals two units of bone phosphate. All analysis to be made on dry basis, and when rock is analyzed for oxide of iron and alumina the bone phosphate in same must also be determined.

“Section 5. The rock to be crushed so as to pass through a three-inch ring.”

Shipments were made under this contract from time to time, but appellee

failed to crush a large per cent. of the rock so that it would pass through a three-inch ring, which rendered it necessary for appellant to install a rock crusher in order to reduce it in size so that it might be used in the manufacture of fertilizer. The appellant finally asked the appellee to ship uncrushed rock, but the appellee would not agree to do that, except at its option, as shown by the letter of January 19, 1898, where it is said: "It is our intention to carry out our understandings, verbally and otherwise. * * * Naturally we want to hold onto your business if we can do so without the loss of money. * * * We suggest that our contract stand as it is, and that we undertake to furnish you with uncrushed rock at \$1.55 whenever we can secure the same satisfactorily to ourselves, we to make an honest effort to secure the uncrushed rock. Whenever we are unable to secure the uncrushed rock, we are to have the right to ship to you crushed rock at \$1.60. This would seem to us fair, and we hope that you can see your way clear to agree to it."

On January 26, 1898, appellee's manager wrote appellant a letter, in which language appears as follows: "With reference to the contract, we would say that it has been our intention all along to place those factories with which we have time contracts on equally as good a footing as their competitors, as long as we can do so without the loss of money to ourselves. In other words, we intended to meet any legitimate competition, or let our patrons buy where they could buy the cheapest and most satisfactory. (Will you please send us a copy of our letter of September 1st?) With reference to the contract, we have felt that it was an obligation for five years, and at a price at which we would probably come out even. We are still preparing to furnish you our prepared rock at the contract price, but if you think you can supply yourself at a lower cost, we prefer to cancel the contract, and after you have made investigations as to prices, etc., if you do not advise us to the contrary, we will regard the contract as canceled. With reference to the guarantees as to quality, we will say that we have never taken these into consideration at all, as we named them for safety, at a time when no one knew what could be produced out of these deposits. We fully realize that none of the rock we have shipped has failed to be very much superior in quality than the guarantees named in the contract. For instance, recent sampling of our rock, analyzed by different chemists, shows as follows:

Moisture.	1 & A.	B. L. P.
.66 per cent.	4.75 per cent.	79.72 per cent.
.41 per cent.	5. per cent.	80.07 per cent.

"We have not had a single analysis during the past six months that showed under 78 per cent. Certainly if a change of guarantees would be of any benefit to you, we would be willing to change the guarantees as follows:

Moisture.	1 & A.	B. L. P.
8 per cent.	5 per cent.	77½ per cent.

"We have already commenced shipping you three cars of lump rock for test, but we can not undertake to bind ourselves to secure this rock regularly, because its production depends on the weather. The only way rock of this character can be produced to cover contracts with safety is to mine it, dry it, and haul it from the fields during the summer and autumn,

months and store it under sheds for shipments as ordered. We trust that the above plain statements will enable you to acquit us of pique or any desire to wriggle."

On January 27, 1898, the appellant wrote the appellee as follows: "Now, taking your letters of January 19 and 26, it suits us to have the contract continued, as these letters indicate very clearly your intention to carry it out in good faith. Now the quality of rock which you propose to furnish us as indicated in your letter of January 26 is entirely satisfactory, and you may enter our order for twenty-five carloads for shipment, commencing February 15. You can have the option of shipping us uncrushed rock in accordance with your letter of January 19, at \$1.55, or the crushed at \$1.60."

After the exchange of these letters in January, 1898, shipments of phosphate rock were continued until the fall of 1898. Some time in 1898 the appellee made a gradation of its phosphate rock mined at Mt. Pleasant. The rock containing 78 per cent. and over of bone of phosphate of lime was called export rock and the product of the mines of 75 to 78 per cent. as domestic rock, and all below 75 per cent. was classified as screenings. Previous to this classification the run of the mine was shipped to the appellant under the contract. The appellant claimed the appellee failed to carry out its contract as modified, and a controversy existed as to the character of rock appellant was to receive under the contract, when they entered into a verbal arrangement by which appellant agreed to receive rock under the contract which contained 75 per cent. of bone of phosphate of lime, providing they would make the shipments promptly. This the appellee failed to do, whereupon appellant demanded that they ship the rock under the guarantee of January 26, 1898. The appellee refused to ship the rock, and this action was brought for an alleged breach of it.

Before entering into a discussion of the rights of the parties under the contract we will dispose of a question of pleading. We are of the opinion that if there was a breach of the contract the appellant had the right to at once bring suit for his entire claim for damages without waiting for the expiration of the contract period. It is said in *Roehm v. Horst*, 178 U. S., 1: "The rule is that after the renunciation of a continuing agreement by one party the other party is at liberty to consider himself absolved from any further performance of it, retaining his right to sue for any damages he has suffered from the breach of it; but that an option should be allowed to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option."

It follows that the court erred in requiring the appellant to reform its petition. The guarantee of January 26, 1898, is admitted. If it is binding, then the appellee was guilty of a breach of the contract in refusing to ship the phosphate rock required by its guaranty. By the contract the appellee was to furnish appellant for its entire consumption phosphate rock from the Mt. Pleasant fields. The minimum per cent. of bone phosphate of lime was fixed by the guaranty; and further, that it should contain less than a certain per cent. of oxide of iron and aluminum and of moisture. The evidence shows the situation of the parties at the time the contract was made. The appellee could not ship rock containing less than the minimum per

cent. of bone of phosphate of lime. The parties evidently contemplated that the appellant was entitled to have shipped to it the run of the mines, providing the analysis did not show it to contain less than the minimum quantity of bone phosphate of lime stipulated in the contract. It was not a compliance with the contract for the appellee to make a gradation of the phosphate rock and ship the appellant a lower grade than the run of the mines, although the grade thus shipped did not fall below the minimum per cent. of bone phosphate of lime stipulated in the contract. There is nothing in the contract that suggests that the phosphate rock mined at Mt. Pleasant was to be graded, for if it had been the intention of the parties that it should be done, there would have been a minimum and maximum per cent. of bone phosphate of lime specified in the contract. For the foregoing reasons we conclude that under the contract it was the duty of the appellee to ship appellant the run of the mine, so that the per cent. of bone phosphate of lime did not fall below that fixed in the contract. The evidence tends to show that if the appellee had not made a gradation of the phosphate rock mined, and had shipped the appellant the run of the mine, the per cent. of bone phosphate of lime in the rock would probably have been $77\frac{1}{2}$ per cent. This being true, the guaranty of January 26, 1898, would have imposed no greater burden than was imposed by the original contract.

It is admitted that the rock shipped by appellee to appellant was not crushed as required by the contract. This was true to a large extent during the shipments under the contract. So much of the rock shipped would not go through a three inch ring that the appellant was forced to install a rock crusher so as to put the rock in a condition for use in its factory. By reason of the appellee's failure to crush the rock as required by the contract the appellant had the right to abandon it on the 26th of January, 1898. The appellee did not choose to do so as evidenced by its letter, because it expressed the desire to see the contract continued, as it was satisfied that the appellee intended to carry out its provisions in good faith. It results that there was a consideration to uphold the guaranty of January 26, 1898. It follows from this conclusion that the appellee was guilty of a breach of the contract for which an action would lie, therefore, the court erred in giving a peremptory instruction to the jury to find for the appellee. We deem it improper at this stage of the case to discuss the question as to the measure of damages for the breach of the contract.

The judgment is reversed for proceedings consistent with this opinion.

FRENCH v. BOWLING, &c.

(Filed March 25, 1905—Not to be reported.)

1. Actions—Bond taken by commissioner—Authority to sue—Where land was sold by the master commissioner of a court under a decree of the court, and bond taken payable to himself as commissioner for the use and benefit of the owners of the land, with lien on the land, an action may be maintained by such commissioner or his successor in office on such bond without joining with him the persons for whose benefit the land was sold.

2. Sale bond for land—Limitation—Where a petition, in an action by a

commissioner on a sale bond given for land, shows on its face that such bond was executed more than fifteen years before the filing of the petition, a demurrer thereto was properly sustained and the lien to secure its payment is likewise barred by limitation and can not be enforced.

J. J. C. Bach and W. H. Miller for appellant.

Wm. Cromwell and W. C. Eversole for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Settle.

The administrator of the estate of Judah Lewis, deceased, early in the year 1879, brought suit in the Perry Circuit Court for the sale of 640 acres of land lying in Perry county, this State, of which his intestate was the owner at the time of his death, the object of the sale being to procure money to pay the intestate's debts and settle his estate. At the June term, 1879, of the court a decree was entered in the usual form, ordering the master commissioner to sell the land and take from the purchaser a bond for the purchase price, with good personal security, payable one year after date to himself as commissioner, and retaining a lien on the land as further security for its payment.

The land, after proper advertisement, was publicly sold by the commissioner pursuant to the provisions of the decree November 17, 1879, and Wm. Bowling became the purchaser. He thereupon, and as of that date, executed bond to the commissioner, with Henry T. Begley as surety, payable twelve months after date, bearing 6 per cent. interest from date, its payment being also secured by a lien on the land retained in the bond. The sale was duly reported to and confirmed by the court. Immediately after the sale Bowling, the purchaser, took possession of the land, but no deed was ever made to or received by him therefor. For some reason, unexplained in the record, no steps were taken by the commissioner who made the sale to collect the sale bond, though an order appears to have been entered by the court at its December term, 1884, directing him to collect it, but the record affords no evidence of his having done so. It appears, however, that the action to settle the estate was kept on the docket; that at the September term, 1902, of the court an order was entered directing the appellant, E. Holliday, the then and present commissioner of the court, to institute a suit for the collection of the bond in question, and this action was brought by him in obedience to that order against Robert Bowling and others, children and heirs at law of Wm. Bowling, principal in the sale bond, the latter having died some years after the maturity of the bond.

The petition contained a statement of the facts showing the institution of the suit to settle the estate of Judah Lewis, the decree for the sale of the land, its purchase by Wm. Bowling, the execution of the sale bond, its date, maturity and nonpayment, and in addition claimed a lien upon the land for the purchase price for which the bond was given, and asked its enforcement by a sale of the land to satisfy the amount of the bond, principal and interest. The petition also set forth the authority given appellant to collect the bond, and alleged that the appellee's children and heirs at law of Wm. Bowling were in possession of the land. A demurrer was filed by appellees to the petition, which the lower court sustained, and appellant failing.

to plead further the petition was dismissed. But before the judgment of dismissal was entered the appellant, B. F. French, offered to file a petition making himself a party to the action as a creditor of the estate of Judah Lewis, and asking to be allowed to prosecute the action as such and because of an alleged interest in the proceeds of the sale bond. The court refused to allow the petition of French to be filed, and he unites with the commissioner in the prosecution of this appeal.

If, as argued by counsel for appellants, the demurrer to the petition was sustained by the lower court upon the ground that the commissioner had no right to maintain the action, that view of the case was unauthorized. Section 21, Civil Code, provides: "A personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, * * * may bring an action without joining with him the person for whose benefit it is prosecuted."

It is also provided by section 304, Kentucky Statutes, that "the commissioner of the court shall settle the accounts of insolvent estates adjudicated in the court of which he is the master commissioner, and perform such other duties as the court may require of him."

As the commissioner made the sale of the land bought by Wm. Bowling and the sale bond was made payable to him in his official capacity, he made the contract with Bowling in his own name for the benefit of the heirs at law and creditors of Judah Lewis; for that reason his successor in office, the appellant, was authorized by section 21 of the Code supra to bring suit on the sale bond, and the order of court directing him to bring suit thereon being authorized by section 304, Kentucky Statutes, there can be no doubt of his right to do so. This being true, there was no necessity for making appellant French a party to the action, and we do not think the court erred in refusing to allow his petition to be filed.

It is, however, contended by counsel for appellees that the demurrer was sustained upon the ground that the action on the sale bond was barred by limitation, and this was undoubtedly true. The bond became due November 17, 1880, and suit thereon was filed by the commissioner September 13, 1902, twenty one years, nine months and twenty-six days thereafter.

Section 2514, Kentucky Statutes, provides: "Civil actions other than those for the recovery of real property shall be commenced within the following periods, and not after: An action upon a judgment or decree of any court of this State * * * or upon a bond for costs, or other bond taken by a court or judge, or by an officer pursuant to the directions of the court or judge in an action, or after judgment or decree, or upon a replevin, sale or delivery bond, taken under a decree, * * * or upon a bond or obligation for the payment of money or property, * * * shall be commenced within fifteen years after the cause of action accrued."

Obviously the action was barred by the statute of limitation long before its institution, and it is well settled that when a debt is barred by limitation a lien given to secure its payment is likewise barred, and can not be enforced. (*Prewett, & Co. v. Wortham, & Co.*, 70 Ky., 287; *Yeates v. Weeden*, Adm'r, 6 Bush, 488.)

While ordinarily the statute of limitation, if relied on to defeat a recovery, must be pleaded, yet when the petition shows not only a sufficient lapse of time, but the nonexistence of any ground of avoidance, or if the petition shows that the action is barred, and that plaintiff is not within any of the exceptions contained in the statute which gave his right to sue, a demurrer will be sustained. (*Rankin v. Turner*, 2 Bush, 555; *Board v. Jolly*, 3 Bush, 86; *Chiles v. Drake*, 2 Met., 146; *Commonwealth v. Gardner*, 17 Ky. Law Rep., 75; *Stillwell v. Leavy*, 84 Ky., 379.)

An inspection of the petition will show that it left nothing to be stated by way of answer on the part of appellees in order to enable them to rely upon the statute of limitation as a bar to the action. We are of opinion, therefore, that the defense afforded by the statute was properly interposed by the demurrer to the petition, and, furthermore, that the demurrer was properly sustained. The authorities relied on by counsel for appellant do not militate against the conclusions herein expressed. They only hold that a vendor will not be compelled to transfer his title to the vendee without payment for the land, and that the latter will not be permitted to rely upon adverse possession or limitation as against the vendor, and yet look to him for a conveyance of the title. The case at bar does not involve the specific performance of a contract for the sale of land, nor is it an action of ejectment, but only a suit upon a sale bond, once secured by a lien on land, but the right to recover upon which is, on the face of the petition, barred by the fifteen year statute of limitation.

There being no error in the judgment appealed from it is hereby affirmed.

SMITH, &c. v. COURTNEY'S EX'ORS.

(Filed March 25, 1905—Not to be reported.)

1. Wills—"Dying without heirs"—Construction—The testator by his will directed that his farm be sold and the proceeds divided between his three children, after the payment of a named sum to his widow, and concluded with the following words: "The estate so willed above, should any of the heirs die without heirs, is to be divided amongst the survivors; and should they all die without heirs, it is to be divided amongst my brothers and sisters, or their children." Held—That this must refer to the death of the devisees without children before the division of the estate.

2. Same—In a devise of the remainder of his estate to his three children Thomas A. Courtney, Pauline Smith and Orma E. Courtney, the will provides: "Paulina Smith may use the estate so willed to her, but at her death it is to go to her bodily heirs." Held—That this can not refer to her death in the testator's lifetime, or before the division of the estate, but as the estate devised was money, the testator intended that his daughter should use the money as she pleased, and if any of it was left at her death, which could be identified, it was to go to her children.

C. S. Weakley for appellants.

P. J. Beard for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Settle.

The will of G. W. Courtney, omitting the caption, is as follows:

"1st. I desire that all my just debts and funeral expenses be paid out of my estate as soon after my decease as my administrator can make it convenient to do so.

"2d. I desire that the farm on which I now reside be sold, and that \$3,000, and all the household furniture, be paid and given to my wife, Claymenoy Mamie Courtney, to do as she may desire to do with it or think best. I will and bequeath her the \$3,000 and the household furniture in lieu of the dower she may be entitled to at my decease.

"3d. The remainder of my estate I desire that it be divided into three equal parts amongst my three children, Thomas A. Courtney, Paulina Smith and Orma E. Courtney.

"To Thomas Courtney I will and bequeath one-third of the remainder of my estate after my wife shall get her \$3,000 and the household furniture.

"To Paulina Smith I will and bequeath one-third to her and her bodily heirs of the remainder of my estate, after my wife shall get her \$3,000 and the household furniture. Paulina Smith may use the estate so willed to her, but at her death it is to go to her bodily heirs.

"To Orma E. Courtney I will and bequeath one third of my estate, after my wife shall get her \$3,000 and the household furniture. The estate so willed above, should any of the heirs die without heirs, it is to be divided among the survivors; and should they all die without heirs, it is to be divided amongst my brothers and sisters, or their children.

"Lastly, I do appoint my wife, Claymenoy Mamie Courtney, administratrix and Thomas A. Courtney administrator, without bond for the same, of this my last will and testament."

The executors named in the will qualified and made a contract with George W. Nave to sell him the farm for \$7,000, but the purchaser having doubts of their power to convey him a good title, this suit was filed for a construction of the will as to the power of the executors to sell and convey the land. The devisees were also made defendants, and the court was asked to construe the will and determine what interest the children and grandchildren took in the proceeds of the land. The circuit court held that the executors had power to sell and convey the land, and that each of the testator's children took the estate devised to him in fee.

The rule as to the power of an executor to sell and convey land is thus laid down in the case of *Marratt v. Babb's Ex'or*, 91 Ky., 90: "Upon the death of the owner his real estate at once passes to his heirs or devisees in the absence of testamentary counterdirection from him. The personal representative, whether he be administrator or executor, has no inherent authority over it or title to it by virtue of his appointment merely. In case he be executor, such power or right does not exist, unless it be conferred by the will. To enable him to sell it the power must either be expressly given or arise by implication. If the avails are to pass through his hands in the execution of his office, as for the payment of debts or legacies, then the power to sell will be implied. If the will directs a sale, but does not name the donee of the power, and the proceeds must, either by its provisions or by the rules of law, be distributed by the executor, then he, by necessary implication, is invested with the power of sale, unless some other intention

upon the part of the testator be shown by his will. If this were not so, the executor could not execute his trust. The payment of debts and legacies is one of the functions of his office, and, therefore, if the will directs a sale of the real estate, either for the payment of debts or for the payment of the proceeds to legatees, as the proceeds must pass through the hands of the executor, he is, by implication, vested with the power to sell, although not named as the donee of the power. If the management of the fund so to arise be confided to him, either by the will or by law, then he has the power of sale."

Under this rule we think it apparent from the will, which in effect directs a sale of the land and a division of the proceeds, that the executors have the power to make a sale and convey the land. The rights of the three children in the proceeds of the land involves a question of more difficulty. It will be observed that at the conclusion of clause 3 there are these words: "The estate so willed above, should any of the heirs die without heirs, is to be divided amongst the survivors; and should they all die without heirs, it is to be divided amongst my brothers and sisters, or their children."

This must refer to the death of the devisees without children before the division of the estate, which is above provided for. The land was to be sold and the money divided. A testator does not usually look beyond a division of money which he directs to be made when such words as those above quoted are added to the clause directing the division. (*Birney v. Richardson*, 35 Ky., 424; *Wren v. Hines*, 59 Ky., 129; *Harvey v. Bell*, 26 Ky. Law Rep., 338 9.) It follows that Thomas A. Courtney and Orma E. Courtney take the fund devised to them absolutely, there being no other limitation on these devises. But as to Paulina Smith the words of the will are: "The remainder of my estate I desire that it be divided into three equal parts amongst my three children, Thomas A. Courtney, Paulina Smith and Orma E. Courtney. * * * To Paulina Smith I will and bequeath one-third to her and her bodily heirs of the remainder of my estate after my wife shall get her \$3,000 and the household furniture. Paulina Smith may use the estate so willed her, but at her death it is to go to her bodily heirs."

It will be observed that the testator first assigns an equal part to Paulina Smith and then wills and bequeaths this to her and her bodily heirs, which, under section 2343, Kentucky Statutes, would ordinarily pass a fee. Then he adds: "Paulina Smith may use the estate so willed her, but at her death it is to go to her bodily heirs."

This can not refer to her death in his lifetime or before the division of the estate, for she could have no use of the fund until the division. Still she is given the unqualified right to use the estate so willed her, and this use is without limitation. Considering the size of the fund, the relationship of the parties, the awkward manner of the will as drawn and the fact that the devise is of money, which has no earmarks, and often disappears with the using, we conclude that the testator intended that his daughter was to use the fund as she pleased, and that what was left of it at her death should go to her children. She may spend the fund if she sees proper, but if anything is left at her death which may be identified it goes to her children. The executors may, therefore, properly pay her the fund. While the judgment of the circuit court is not expressed in these words, this is its

Legal effect, as the suit is simply by the executors for the direction of the court in the discharge of their duties, and no other question is presented by the record.

The judgment appealed from is, therefore, affirmed.

BANK OF NEW ROADS v. KENTUCKY REFINING CO.

(Filed March 25, 1905—Not to be reported.)

1. Bills of lading—Delivery to bank—Title to goods—A delivery of a bill of lading is a symbolical delivery of the property which it represents, and where by the terms of a contract two tanks of oil were sold and the bills of lading therefor were delivered to a bank to be disposed of by the bank at current market prices and the proceeds applied in a given way, the title to the oil under the laws of Louisiana, where the contract was made, vested in the bank and was not subject to an attachment by the consignee in Kentucky.

2. Payments by debtor—How applied—Where a creditor has part of his debt secured and part unsecured, the law does not apply a payment by the debtor to the older items of the account, but will apply it to the unsecured debt.

W. O. Bradley and Bradley & Batson for appellant.

A. M. Rutledge for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

On March 4, 1903, the New Roads Oil Mill and Manufacturing Co., a corporation doing business in Louisiana, shipped to the Kentucky Refining Co. two tanks of oil, and on the same day drew a draft on it for \$8,870.28, to which the bill of lading for the oil was attached, and delivered the draft to the bank of New Roads with the bill of lading attached, and was credited by the bank by the amount in its deposit account with the bank as a customer. The bank forwarded the draft with the bill of lading attached to the American National Bank of Louisville, Ky.; the Kentucky Refining Co. refused to pay the draft, which was thereupon protested for nonpayment, and returned to the New Roads Bank which, on March 17, charged the amount of the protested draft to the account of the oil mill and manufacturing company, thus producing an overdraft by that company of \$1,948.88 at the close of the business of that day. After this the following contract was entered into between the bank and the oil mill and manufacturing company:

"This is to certify that for the consideration hereinafter expressed, we, the New Roads Oil Mill and Manufacturing Co., Limited, have this day sold, transferred, conveyed, assigned, set over, delivered and abandoned unto the Bank of New Roads, here represented by L. Bouanchaud, cashier, present and accepting the said transfer and acknowledging possession and delivery thereof, the following described property:

"The contents of two K. R. Co. tank cars, Nos. 1,530 and 1,430, containing crude cotton seed oil, weighing respectively 54,500 and 47,300 pounds net,

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shipped by New Roads Oil Mill and Manufacturing Co., Limited, on March 4, 1903, to their order to Louisville, Ky., for which above described two tank cars of cotton seed oil the bill of lading issued by the Texas & Pacific Railway Co. to us as shippers is likewise assigned and delivered to said Bank of New Roads, who, through their said cashier, L. Bouanchaud, accept same and acknowledge possession and delivery thereof.

"The consideration of this sale and transfer is as follows:

"Whereas, our account with the Bank of New Roads on this day stands overdrawn to the amount of \$5,793.78, we sell, transfer, assign, set over and deliver these two tank cars of cotton seed oil to the said bank to be sold and disposed of by said bank at current market prices, and the proceeds thereof to be applied by them to the credit of our said overdraft.

"In faith whereof we have hereunto set our hands on this 18th day of March, 1903.

(Seal) "NEW ROADS OIL MILL AND MAN'FG CO., LTD.,

"By H. A. FITZHUGH, Manager,

(Seal) "BANK OF NEW ROADS,

"Per L. BOUANCHAUD, Cashier."

The contract, although dated the 18th of March, is shown by the proof to have been drawn on the 18th and executed on the 19th. At the close of business on March 19 the account of the oil mill and manufacturing company was overdrawn with the bank \$5,460.81. On March 21 the Kentucky Refining Co. filed suit in the Jefferson Circuit Court against the oil mill and manufacturing company upon a large claim for damages, and took out an attachment which was levied on the oil. The bank intervened in the suit and filed its petition, setting up its claim to the oil which had been attached. It executed a bond to perform the judgment of the court or to have the attached property or its value forthcoming, and took possession of the oil and sold it. By the proof in the case it appeared that the overdraft of the oil mill and manufacturing company with the bank increased during the months of March, April and May until at one time it amounted to something over \$13,000. After this it declined until August 23, when the bank received the proceeds of the sale of the oil, amounting to \$2,200. The overdraft on that day before this credit was entered was \$903.30. The circuit court on final hearing adjudged the bank this sum, and gave judgment against it in favor of the refining company for the remainder of the proceeds of the oil, and the bank appeals.

While the books of the bank show only an overdraft of \$903.30 on August 23, the proof shows that the debt had not been in fact paid, but had been simply placed in the form of notes, which had been discounted by the bank, the proceeds being credited on the account, and thus it appears that the account was overdrawn largely in October when the oil mill and manufacturing company executed a note for \$20,000, secured by a lien on its plant to cover its indebtedness to the bank.

The principal question in this case is whether the oil was subject to attachment by the Kentucky Refining Co. in its suit against the oil mill and manufacturing company as the property of that company at the time the attachment was levied on it. The law of Louisiana is pleaded and proved, according to which, under the undisputed evidence, the title to the

oil vested in the bank. The delivery of the bill of lading was a symbolical delivery of the property which it represented. By the terms of the contract the oil was sold and transferred to the bank, to be disposed of by it at current market prices, the proceeds to be applied to the credit of the overdraft of the oil mill and manufacturing company to the bank. The bank had possession of the oil from the time of the delivery of the bill of lading, and had authority to sell it and apply the proceeds in a given way. The oil mill and manufacturing company could not take the oil from its possession or interfere with its sale by it for the purposes set out in the contract. The Kentucky Refining company as the attaching creditor of the oil mill and manufacturing company simply acquired by its attachment such rights as the debtor had at the time of the levy of the attachment. The property being in the possession of the bank under the contract was not subject to be levied on under the attachment. This question was fully considered in *Sabel v. Planters National Bank*, 110 Ky., 299, and this case was followed in *Temple National Bank v. Louisville Cotton Oil Co.*, 26 Ky. Law Rep., 518; also *Monroe v. Mattox*, 27 Ky. Law Rep., 575.)

The fact that money was deposited to the account with the bank by the oil mill and manufacturing company after March 19 and up to August 23, is relied on for the appellant, and it is insisted that this money should be applied to pay the older items on the account, and that, therefore, the entire overdraft on March 19 was paid off by August 23. But where a creditor has part of his debt secured and part unsecured the law does not apply the payment to the older items of the account, but will apply it to the unsecured debt. The appellee took no proof; the case is submitted on the proof taken by the bank. From this we can not say that there was any fraud in the transaction. On the other hand, it seems to have been made under the advice of counsel for the purpose of protecting the bank, which was evidently carrying the company.

Judgment reversed and cause remanded for a judgment in favor of appellant.

BONNER v. COMMONWEALTH.

(Filed March 25, 1915—Not to be reported.)

Bail bond—Forfeiture—Proceedings—In a proceeding upon a forfeited bail bond in the circuit court no judgment can be rendered thereon against the bail in the absence of the record from the examining court showing that the accused was held over and was in custody at the time the bail bond was executed.

E. E. McKay and Albert S. White for appellant.

N. B. Hays and Loraine Mix for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge O'Rear.

This appeal is prosecuted from a judgment of the Jefferson Circuit Court, Criminal Division, upon a forfeited bail bond.

Maggie Porter and Robert Gray were indicted by the grand jury, charged with felony. Failing to appear and answer the indictment an order was

entered forfeiting their recognizance and directing a summons to issue against the bail. The summons reads thus:

“The Commonwealth of Kentucky.

“To the Sheriff of Jefferson County, Greeting:

“You are commanded to summon D. J. Bonner to appear before the judge of the Jefferson Circuit Court (Criminal Division), at the courthouse in the city of Louisville, on the 7th day of October, 1901, to show cause, if any, he has or can, why the Commonwealth shall not have judgment and execution thereon against him, the said D. J. Bonner, in the sum of \$300, according to the form and effect of a recognizance entered into by him in the police court of Louisville on the 19th day of July, 1901, and for a breach of the conditions thereof.

“Witness: JOHN H. PAGE, Clerk, Etc.”

The bond is not copied into the record, nor are any of the proceedings in the Louisville Police Court. The bill of exceptions show nothing.

It is argued for the Commonwealth that there is a diminution of the record, from which the court must presume that the missing parts, if supplied, would sustain the judgment. But there is nothing in the record to show that the missing bond or transcript of proceedings in the police court were ever filed in this record. The clerk of the Jefferson Circuit Court certifies that the copy sent up by him is a complete copy of the record of his office. Appellant insists that as the record fails to show that any bond was executed, or that the defendants in the prosecution were in custody, no cause of action is stated against appellant.

By section 94, Criminal Code, proceedings upon a forfeited recognizance are begun by an order of the court declaring the bond forfeited, and directing a summons to issue against the bail. The beginning of the action against the bail is the issual of the summons, which, under subsection 3 of section 94, takes the place of the petition in an ordinary action.

In *Baird v. Commonwealth*, 2 Duv., 78, the precise practice and language in the summons in this case was held sufficiently specific to apprise the sureties of the nature of the proceeding, “and left no ground for ignorance or surprise.”

Subsection 3 of section 94, Criminal Code, requires that all proceedings subsequent to the summons shall be the same as in an ordinary civil action. This means that the answer of the bail must be in writing (*Brown v. Commonwealth*, 4 Met., 222), and that all matters stated or necessarily implied from the statements in the summons are deemed admitted if not denied, provided the essential foundation for the forfeiture is in the record. In this case there was no answer. If the transcript from the examining court had been filed, which can not be dispensed with unless lost or misplaced when its contents may be shown as other lost records (*Morgan v. Commonwealth*, 13 Bush, 84), then it, in connection with the summons, would have fully stated all that was necessary to have put the defendant, the bail, upon his defense. But we must hold consistently with *Morgan v. Commonwealth*, supra, that the absence of the record from the examining court showing that the accused was held over, and was in custody, is fatal to the judgment of forfeiture in this case.

The judgment is, therefore, reversed and cause remanded, with directions to grant appellant a new trial under proceedings not inconsistent herewith.

**HOPPER, &c., TRUSTEE v. EASTERN KENTUCKY LUNATIC
ASYLUM.**

(Filed March 26, 1905—Not to be reported.)

1. Lunatics—Void inquest—Action by asylum for board—Although the proceedings in the county court committing a lunatic to the asylum were void by reason of the absence of such lunatic at the inquest, the asylum may, by action against the trustee of the lunatic on a quantum meruit, recover for her board while confined in the asylum.

2. Limitation—In such action the lower court properly sustained a demurrer to all of the claim created more than five years prior to the commencement of the action.

3. Estate of lunatics—Subjection by creditors—A creditor of a lunatic can subject an estate devised to her to the payment of its debt to the same extent that the lunatic could subject such estate to her own use.

4. Trustee—Power under will—Under a devise by the father of a lunatic to a trustee for the benefit of the lunatic with power to pay her only the income of the devise during her life for her comfort and support, unless in case of necessity the trustee may see fit and proper to expend more, she could have maintained an action against the trustee for the whole of the estate if her necessities required it.

John P. McCartney and W. G. Dearing for appellants.

B. S. Grannis and R. J. Babbitt for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

Emila Hopper has been confined in the Eastern Kentucky Asylum since the year 1895 and the proof shows her to be hopelessly insane.

The appellee brought this action against her and her trustee, Garland Hopper, on the 19th of August, 1902, to recover \$200 per year for board, attention and treatment given here while in the asylum. It appears that the judgment of the county court committing her to the asylum was void for the reason that the judgment did not show affirmatively that she was present at the inquisition. The appellee filed an amended petition, seeking a recovery on a quantum meruit. The only defenses made by appellant, which we deem necessary to notice, are, first, that the action of the county court in adjudging Emila Hopper a lunatic was void, and that appellee was not entitled to change its cause of action and recover on a quantum meruit; second, that the interest of Emila Hopper in the property devised to her by her father, and which is sought to be subjected to the payment of appellee's claim, was and is only a life estate, and that the appellee has no right to subject to the payment of its debts anything other than the income derived from this property; third, the plea of the statutes of limitations to all of appellee's claim that was created more than five years prior to the commencement of the action.

This last defense the lower court correctly sustained. The first defense made was settled by this court in the case of *Michaels, &c. v. Central Kentucky Asylum for the Insane*, 26 Ky. Law Rep., 804. In that case this court decided that an asylum could recover on a quantum meruit for the "keep of a lunatic," whether the judgment of the county court committing the luna-

tic was or not void; that the board and treatment were regarded as necessities the same as if furnished to an infant. We are of opinion that appellant is mistaken in the extent of the interest of Emila Hopper in the property devised to her by her father. She took more than a life estate therein. By the will of her father he made all of his children equal, and then added the following in a codicil to the will: "I further will and appoint my son, Garland Hopper, the trustee of my daughter, Emila Hooper, with power to only pay over to my said daughter the income during her life for her comfort and support, unless in case of absolute necessity the trustee may see fit and proper to expend more; then at at her death, with the exception of the \$200 mentioned above, what is left at her death shall be equally divided according to law among my heirs at law."

It is evident from this provision of the will that the testator intended that his daughter should have the benefit of the income, and even principal of this property, if her absolute necessities demanded it. The test, as declared by the decisions of this court as to whether or not a creditor can subject an estate of a cestui que trust, is, can the cestui que trust enforce that claim against the trustee for the estate sought to be subjected? If so, then the creditor can subject it. Certainly if Emila Hopper's necessities had required it and her trustee had declined to contribute any part of the principal of this estate to her relief, she could have maintained an action against him, and a court of equity would have compelled him to contribute the whole of the principal of the estate if necessary. (Wooley v. Breton, 82 Ky., 424; Davidson's Ex'ors v. Kemper, 79 Ky., 5; Samuel v. Salter, 3 Met., 259; Marshall's Trustee v. Rash, 87 Ky., 116; Samuel & Johnson v. Ellis, 12 B. M., 479; section 2355, Kentucky Statutes.)

Wherefore, the judgment of the lower court is affirmed.

K. F. & C. B. DANIEL v. DAY BROS.' LUMBER CO.

(Filed March 25, 1905—Not to be reported.)

B. P. Wooton, Jesse Morgan and R. L. Greene for appellant.

J. J. C. Bach for appellee.

Appeal from Perry Circuit Court.

Judge O'Rear delivered the following modification of opinion:

The opinion in this case directed a particular judgment to be entered upon the theory that the facts sufficiently showed the status of the account of the parties. Both parties complain at the result reached by the court. One of them files with the petition for rehearing what purports to be a copy of a deposition in the case, not considered on the appeal. From these widely divergent claims upon facts that ought to be, and are capable of being, found with reasonable certainty, we are unwilling to rest a judgment. On the contrary, instead of entering the judgment directed, the circuit court will proceed upon the basis indicated in the former opinion, and in addition will hear proof and determine whether the logs on Willard and Pole Road creek, some of which appellants claim were gotten out by appellee after the expiration of the contract, and for which it charged and was

allowed \$142.95, were included in the total number and measurement of logs found by the last opinion to have been accounted for by appellee. If they were, then the judgment indicated in the opinion of November 15, 1904, should be entered. If they were not included, then the court should, from the proof, after scaling them 10 per cent. as provided in the contract, determine whether they had deteriorated any more, and if so, how much. Taking from their contract price such deterioration and the 10 per cent., the difference should be added to the sum found in favor of appellants.

Responding to appellant's petition for rehearing on the branch of the case concerning the validity of the provision for forfeiture, we recognize that liquidated damages may be agreed on in advance by the parties to such a contract as this, and, if not oppressive, and in fact a forfeiture, it may be enforced. Such is the case of *Kilburn v. Burt & Brabb Lumber Co.*, 111 Ky., 698, where half of the purchase price had been paid by the purchaser and the logs delivered. But here no part of the purchase price of the logs claimed to be forfeited had been paid, and the logs had not been delivered. To enforce the contract for forfeiture in this case would be to allow a penalty pure and simple because one party to an executory contract for the sale of personal property failed to comply within the time specified in the agreement. There is no authority that sustains that proposition.

Petitions for further modification of the opinion are overruled.

CITY OF LEXINGTON v. BOWMAN.

(Filed March 25, 1905—Not to be reported.)

Allen & Duncan for appellant.

Maury Kemper for appellee.

Appeal from Fayette Circuit Court.

Judge O'Rear delivered the following response to petition for rehearing:

The petition for rehearing assumes that there is an irreconcilable conflict between the opinion heretofore delivered in this case and the opinion in *City of Lexington v. Crosthwait*, 25 Ky. Law Rep., 1898. It is said in the opinion in this case, distinguishing it from Crosthwait's case: "But no question of estoppel was considered in that case. The opinion proceeds upon the idea that there was in that case no sufficient plea of estoppel."

Appellee parallels the pleas in the two cases, for the plea was attempted in the Crosthwait case, to show that there is really no difference between them. The reason we did not consider the plea of estoppel in the Crosthwait case was, in our opinion, it lacked one or more essentials of a good plea, admitting that it was available. We felt it unnecessary to discuss the question whether a plea of estoppel would avail as a defense when no such plea was in fact presented. The essentials of estoppel are too well known to require their being set out here. In the Crosthwait case the plea fell short of being good in at least this particular. It nowhere charged that the city had been induced by Crosthwait's conduct to alter its position, or to forego any right whatever. While a tax liability may be created by estoppel, as to manner of payment, when the statute admits of alternative

methods, it does not follow that the liability can be created by a mere admission of the lot owner. Such admission may be evidence, to be weighed in deciding the fact, that the lot owner had made the request for the assessment to be levied in the manner claimed, but it is rebuttable. But where the city has acted to the prejudice of some other right it had, in reliance upon the request or the admission, the lot owner will not be heard to deny that he in fact made the request where he induced or knowingly suffered the city to act under that belief. A taxpayer has no more right to be dishonest toward the government than toward other persons. There is a marked distinction between the cases. They are in no sense in conflict.

Petition overruled.

BONNER v. COMMONWEALTH.

(Filed March 25, 1905—Not to be reported.)

1. Bail—Forfeiture of bail bond—Illness of defendant—The fact that an accused under bond for his appearance to answer an indictment was sick in a hospital, and unable to appear, does not release the bail, which will stand until accused is able to appear.

2. Same—Offer to surrender the accused when the latter is not present is unavailing and is not a compliance of section 98, Criminal Code.

Fontaine T. Fox and Albert S. White for appellant.

N. B. Hays and Lorraine Mix for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge O'Rear.

The undertaking of the bail in a felony recognizance before an examining magistrate is that the accused will appear not only to answer any indictment on the day it may be returned into court, but that he will surrender himself to that court under such indictment as may be found upon the investigation of the charge. The failure of the accused to enter his appearance to the indictment and surrender himself to the circuit court is a breach of the recognizance. That the accused was confined with a serious illness in a hospital, physically incapacitating him from appearing on the day the indictment was returned, does not release the bail. Bail will stand bound until the accused is able to appear, and his failure thereafter to appear and surrender himself in answer to the indictment is a breach of the recognizance. If before final judgment on the forfeited recognizance the bail had shown by his answer, or amended answer, that the accused had died as a result of his illness, and that because of such illness and death he had alone been prevented from complying with the undertaking of his bail, the defense would have been good.

An offer to the court by the bail to surrender the accused, when the latter was not present, is unavailing, and is in no sense a compliance with section 98, Criminal Code.

Judgment affirmed, with damages.

BARIES v. LOUISVILLE ELECTRIC LIGHT CO.

(Filed March 25, 1905—Not to be reported.)

Bennett H. Young and Alfred Seligman for appellant.

O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Judge Paynter delivered the following response to petition for rehearing:

Counsel seems to think the court was in error in stating that appellee introduced evidence showing that it had notice the day before the accident that the painters were at work on the house where it happened. This is substantially correct, because John Showalter, an employe of appellee, whose business it was to look after the matter of having the electric current taken from houses that were being painted, testified that the day before the accident that he knew the painters were at work on the house. His knowledge was the knowledge of the company, and the knowledge it had was equivalent to notice. The court does not want to be understood as holding that it is not competent to prove the general custom which existed in Louisville, which required painters or their foreman to give the electric light company notice that they are engaged in painting a house to which its wires are attached. The court simply held that in view of the fact that it had notice that the painters were at work on the house, and the further fact that Mr. Kinhead, the company's electrician, testified that it was a rule of the company to take the electric current from a house when it had notice that the painters were at work on it, rendered the proof of custom incompetent. .

THE TRAVELERS INSURANCE CO. v. HENDERSON COTTON MILLS.

(Filed March 25, 1905.)

1. Indemnity insurance—Pleading—Age of insured—In an action on a policy of employees' indemnity insurance, which provides that the employee should be over twelve years of age, it is not necessary that the petition should allege that the person injured was over twelve years of age.

2. Conditions in policy—Against public policy—Void—A condition in a policy of employees' indemnity insurance that no action shall be maintained thereon unless it is brought within thirty days after payment of loss by the insured, is contrary to public policy and is void.

3. Age of insured—Evidence—The age of a member of a family may be proven by proof of declarations of other members since deceased.

4. Interest—Prayer for relief—Under a prayer for general relief interest may be allowed on a claim from the filing of the suit, although not specially prayed for in the petition.

5. Costs—Liability for—Where the indemnity insurance company did not defend the suit of the insured against the appellee and appellee had to defend it, the court properly held the insurance company liable for the costs of the action upon its policy of indemnity.

J. A. Dean and J. F. Lockett for appellant.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Hobson.

On February 22, 1901, John Warren, an employe of the Henderson Cotton Mills, was killed. Suit was brought by his administrator against it and a judgment was recovered for \$2,944.40 and costs, which was affirmed by this court. (Henderson Cotton Mills v. Warren's Adm'r, 24 Ky. Law Rep., 1080.) The Henderson Cotton Mills paid the judgment and then instituted this suit against the Travelers Insurance Co. on a policy issued to it on the 4th of April, 1900, indemnifying it for the period of one year against such losses. The policy reads as follows: "In consideration of the warranties in the application for this policy, a copy of which is hereto attached and which is made a part of this contract, and of \$210 premium, the Travelers Insurance Co., of Hartford, Connecticut (hereinafter called 'the company'), does hereby agree to indemnify Henderson Cotton Mills of Henderson, county of Henderson, State of Kentucky (hereinafter called 'the assured'), for the period of twelve months, beginning on the 4th day of April, 1900, at noon, and ending on the 4th day of April, 1901, at noon, standard time, at the place where this policy has been countersigned, against loss from common law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy, by any employe or employes of the assured while on duty within the factory, shop, or yards mentioned in said application, or upon the ways immediately adjacent thereto provided for the use of such employes or the public, in and during the operation of the trade or business described in the said application, subject to the following agreements, which are to be construed as conditions."

Here follow sixteen conditions, the 1st, 9th, 10th, 11th and 14th of which are as follows:

"1st. The company's liability for an accident resulting in injuries to, or in the death of, one person is limited to \$1,500, and subject to the same limit for each person, the total liability for any one accident resulting in injuries to, or in the death of, several persons is limited to \$10,000.

"9th. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the home office of the company every summons or other process as soon as the same shall have been served on him, and the company will at its own cost defend against such proceeding, in the name and on behalf of the assured, or settle the same unless it shall elect to pay to the assured the indemnity provided for in clause '1' of the foregoing provisions, as limited therein.

"10th. The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information, evidence and the attendance of witnesses, and in effecting settlements and in prosecuting appeals.

"11th. This policy does not cover loss from liability for injuries to, or caused wholly or in part by, any child employed by the assured contrary to law, nor to, or caused wholly or in part by, any child employed under twelve years of age where no statute restricts the age of employment.

"14th. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy."

The plaintiff did not allege in its petition that John Warren, the person injured, was over twelve years of age, and the defendant demurred to the petition on this ground. The court overruled the demurrer, holding this matter of defense to be pleaded by the defendant. In this ruling we concur. To require the plaintiff to set out all sixteen conditions of the policy and to negative the existence of all the exceptions therein contained would be to require too great prolixity of pleading, and would be in conflict with the rule that where exceptions are stated in separate clauses of an instrument and not in the promising or contracting clause, the plaintiff may in his petition set up only so much of the contract as he relies on. (*Ætna Life Insurance Co. v. Glasgow Power Co.*, 21 Ky. Law Rep., 726; *Gardner v. Continental Insurance Co.*, 25 Ky. Law Rep., 426.)

The action was not brought within thirty days after the plaintiff paid the judgment in favor of Warren's administrator, but was brought on the thirty-first day thereafter. The provisions of the 14th clause above quoted are relied on to defeat the action. The validity of such clauses was recently considered by this court in *Union Central Life Insurance Co. v. Spinks*, 36 Ky. Law Rep., 1205, and it was there held that contract limitations of the time in which an action may be brought are contrary to public policy, and void. The previous cases are collected in that opinion, which is conclusive of the question.

The defendant pleaded that John Warren was under twelve years of age. This was denied by the reply. The defendant introduced the mother of John Warren and two of his brothers, who testified that he was born on September 8, 1889, and was about eleven years and five months old at the time of his death on February 2, 1901. The mother testified that she kept a record in her family Bible of the ages of her children, but that the Bible was lost when they moved to Kentucky several years before John's death. She also said that her son, Paschal, was two years and seven months older than John. Paschal also stated the same.

On the other hand, the plaintiff proved that John Warren was as large as Paschal, and they looked so alike as to appear to be twins; that John said at different times that he was thirteen and going on fourteen; that the father of John, who was also dead, declared on different occasions that this

was John's age. This evidence was objected to by the defendant, and it is insisted that the objection should have been sustained. The testimony of the mother was only based on her recollection of the date of John's birth. The testimony of her children seems to have been based on the information they had received in the family. John had the same means of knowledge as they, and the father had the same means of knowledge as the mother. But they spoke under oath while the declarations of John and his father were not made under oath. The rule excluding hearsay evidence does not apply to pedigree, and in stating what this exception means in 1 Greenleaf on Evidence, section 104, the learned author says: "The term pedigree, however, embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened. These facts, therefore, may be proved in the manner above mentioned, in all cases where they occur incidentally, and in relation to pedigree. Thus an entry by a deceased parent or other relative, made in a Bible, family missal, or any other book, or in any document or paper, stating the fact and date of the birth, marriage or death of a child, or other relative, is regarded as a declaration of such parent or relative in a matter of pedigree."

It will be observed from this that an entry in a family Bible is not admitted on the ground that it was made at the time of the transaction, but as the declaration of the deceased parent or relative in a matter of pedigree. In *Swink v. French*, 11 Lea, 78, the question was whether Olivia Swink was twenty-one years of age at the time the contract relied on was made. Her husband, she being dead, was allowed to state that she had told him that she was born on July 17, 1850, although it was shown in that case there was a record of her birth in a family Bible, which was in the possession of another member of the family in another county than the one in which the trial was had. (*Cope's Adm'r v. Pearce*, 7 Gill, Md., 247; *Clements v. Hunt*, 1 Jones, N. C., 400)

A person may testify to his own age, although his information is based entirely on hearsay from members of the family. (*Cheever v. Congdon*, 34 Mich., 296; *Hill v. Eldridge*, 126 Mass., 224; *Cherry v. State*, 68 Ala., 29; *Railway Co. v. Coggin*, 73 Ga., 689.)

The declarations of the father and John Warren were not self-serving, but were made in the usual course of things. The recollections of the father and the boy himself are as much to be trusted as the recollection of the physician, the midwife, the nurse or the neighbor, and, therefore, their admission did not infringe the rule that the best evidence must be produced. The verdict is not against the weight of the evidence. The jury were warranted in finding interest from the bringing of the suit under the prayer of the petition for all proper relief, although such interest was not specifically prayed in the petition. As the insurance company did not defend the suit, and the cotton mills company had to defend it and could not make a settlement, the court properly held the insurance company liable for the costs of the action upon its policy of indemnity.

Judgment affirmed.

KENTUCKY MUTUAL INVESTMENT CO.'S ASS'EE, &c. v.
SCHAEFER, &c.

(Filed March 25, 1905.)

1. Stockholders—Signing subscription—Liability—Under Kentucky Statutes, section 549, it is not necessary for a stockholder to sign a subscription in order to render himself liable to creditors for the full amount of unpaid subscription where he accepted the certificate of stock.

2. Surrendering old stock—Under Kentucky Statutes, section 547, the liability of stockholders for unpaid subscriptions is not affected by the fact that their subscriptions were to be paid by the surrender of their old stock, but they should be held liable for the difference in the amount they actually paid and the amount of stock they received at its par value.

3. Fraud—Inducing subscription—Where fraudulent representations are made to induce a subscription to the stock of a corporation it is not ground for the avoidance of the contract of subscription either as against the corporation or its assignee, after its insolvency and assignment for creditors, where there was laches in failing to discover it.

Thum & Clark and R. L. Greene for appellants.

Dodd & Dodd and O'Neal & O'Neal for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

Charles G. Schaefer bought shares of stock of the par value of \$6,000 in a West Virginia corporation called the Union Finance and Investment Co., whose chief place of business was in the city of Louisville, and its officers resided there. The Kentucky Mutual Investment Co. was organized under the laws of the State of Kentucky about January 2, 1900. H. W. Richardson was its president, and Purnell Johnson and one Bennett were among its officers and stockholders. These three bought the controlling number of shares of stock in the Union Finance and Investment Co. and elected themselves president, vice-president and treasurer of the company, assuming charge of its affairs, they having at the same time control of the affairs of the Kentucky Mutual Investment Co. This was in December, 1900. Sometime in February, 1901, they made an exchange with Schaefer and those whom he represented, giving them an equal amount of stock at par value in the Kentucky Mutual Investment Co. for their stock in the Union Finance and Investment Co., and also exchanged with them certificate of deposit called bonds, giving them Kentucky Mutual certificates for the Union Finance certificates, which they held and upon which they had paid a considerable sum. A few months after this the Kentucky Mutual Investment Co. made an assignment for the benefit of its creditors, and this action was brought by the assignee against Schaefer and those whom he represented to hold them liable for \$6,000 upon an alleged subscription to the capital stock of that company under section 547, Kentucky Statutes.

The defendants can not escape liability on the idea that they did not subscribe for stock in the Kentucky Mutual Investment Co. The signing of a subscription is not necessary. They accepted the certificates of stock, and

their liability is not affected by the fact that it was understood that they took the new stock in lieu of their old, and that the new was paid for by their surrender of the old. If this would defeat the statute it would be rendered largely nugatory. They must be held liable for the difference between the amount they actually paid and the amount of stock they received at par value. The fact that they did not pay any money, but paid in something else, is immaterial.

It is charged by the defendants and shown that they were induced to make the exchange by false and fraudulent representations made to them by the officers of the new corporation, and that these fraudulent representations were known to be untrue, and were made for the purpose of misleading and deceiving them, and that they believing the representations to be true, and relying thereon, were induced to make the exchange thereby. As between the defendants and the corporation it is clear that the defendants are entitled to have the transaction canceled on account of the fraud which was practiced upon them, but it is insisted that after the insolvency of the corporation a subscriber of stock can not have a rescission of his subscription for fraud practiced upon him and inducing him to make the subscription. The rule was so stated in *German American Title Co.*, 24 Ky. Law Rep., 1110, but on a reconsideration of the case this part of the opinion was withdrawn. (*Deppen v. German-American Title Co.*, 24 Ky. Law Rep., 1876.)

The rule is held in England and in some of the States of this country that a subscription can not be repudiated on the ground of fraud after the corporation has become insolvent and made an assignment, though the fraud was not discovered before insolvency and there was no laches in failing to discover it. (10 Cyc., 440; Cook on Corporations, section 164.) But this rule rests on the doctrine which is maintained in many jurisdictions that an assignee for the benefit of creditors stands as a bona fide purchaser without notice. We do not see any other foundation for the rule to rest on under statutes like ours. But in this State an assignee for the benefit of creditor, simply stands in the shoes of his assignor, and any defense which may be made against the assignor may be made against him. (*Ky. National Bank v. Louisville Bagging Co.*, 98 Ky., 371; *Wren v. Parish's Ass'ee*, 19 Ky. Law Rep., 208.)

In *Wright v. Geo. W. McAlpin Co.*, 18 Ky. Law Rep., 226, an action by a seller to recover goods sold on the ground of false representations was held not affected by the assignment for the benefit of creditors made by the purchaser. We do not see that there can be any sound distinction between a sale of stock and a sale of goods, or that it is material that the seller is a corporation and not an individual. Where there has been a failure to exercise care to discover the fraud and the rights of innocent parties will suffer, then he whose negligence has caused the loss should bear it; but where a subscriber for stock is in no fault, and is himself the innocent victim of a fraud which he did not and could not discover before the perpetrator of the fraud failed, he is entitled to make any defense against the assignee which he could make against the assignor.

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. v. REID.

(Filed March 25, 1905.)

Negligence—Failure to send telegram—Damage—Who entitled to—Where a telegram is sent for a sick person summoning medical aid for him, the meritorious cause of action is in the sick person for the negligence in the sending. He may recover for his pain and suffering endured by reason of the negligence in sending the message, but no recovery can be had by his father or other relative by reason of such suffering.

Richards & Ronald and Geo. H. Fearons for appellant.

Wells & Wells for appellee.

Appeal from Calloway Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee. Jobe A. Reid, resides near Dexter, in Calloway county. On the morning of July 29, 1903, between 7 and 8 o'clock, his little son, Cecil, about fifteen months old, was taken violently sick with some affection of his bladder. Dr. Clayton, a physician at Dexter, was called in, and found that the child was suffering with suppressed urine. He tried to relieve the child by inserting a catheter, and by local applications, but failed. About 10 o'clock Dr. Covington, another physician, was called, who also failed to relieve the child. The two doctors then suggested to Mr. Reid that he telegraph for Dr. Hart, of Murray, to come, as they did not have the instruments needed to operate on the child. The following telegram was then sent:

"Dr. J. G. Hart, Murray, Ky.:

"Come to Jobe Reid's immediately. Child suppressed urine. Bring instruments.

"CLAYTON & COVINGTON."

The message was delivered to the telegraph company about 11:35 a. m., and was not delivered to Dr. Hart until 5:30 p. m. If it had been delivered promptly he should have reached the child by 1:30 p. m., and by reason of the delay in sending the message he did not reach it until 7:30 p. m., when he used the proper instruments and relieved the bladder of the child. The child died at 11 a. m. the next day. He suffered excruciatingly from 1:30 to 7:30, and this action was brought by the father, charging that there was gross negligence on the part of the defendant in failing to deliver the message, and that by reason of this the child suffered great agony during the delay in relieving him, and that thereby the father was caused to suffer great inconvenience, annoyance and mental anguish. The case was submitted to a jury, who found for the plaintiff, and fixed the damages at \$500. Judgment having been entered upon the verdict, and the defendant's motion for a new trial having been overruled, the defendant appeals.

The evidence shows that the message was sent for the plaintiff and at his instance and request. The court instructed the jury that if they found for the plaintiff, they "should find for him the actual damages he sustained on account of his own mental pain and anguish produced by witnessing the suffering of his child, which was caused by defendant's negligence, not exceeding \$1,999, the amount sued for."

The propriety of this instruction is the only question we deem it necessary to consider upon the appeal.

In *Western Union Telegraph Co. v. Henderson*, 18 Am. State Rep., 148, the Supreme Court of Alabama held that in a case like this the father might recover for his own mental distress and anxiety in witnessing the suffering of his child. This case was followed by the Supreme Court of Texas in *Gulf, &c., Telegraph Co. v. Richardson*, 15 S. W., 689, and by the Civil Court of Appeals of the same State in *Western Union Telegraph Co. v. Cavin*, 70 S. W., 129. In *Western Union Telegraph Co. v. Robinson*, 84 L. R. A., 481, the Supreme Court of Tennessee held that the father might recover for his mental anguish where a telegram was sent by him and was by negligence delayed summoning a minister to baptize and receive into the church a sick daughter who died before the minister arrived in consequence of the delay in delivering the telegram.

On the other hand, it was held by the Supreme Court of Texas in *Western Union Telegraph Co. v. Cooper*, 71 Tex., 507, where a telegram was sent for a physician to attend a wife who was in labor, that a recovery might be had for the suffering of the wife by reason of the delay in delivering the message, but that no recovery could be had for the mental anguish of the husband. The same rule was followed by the Supreme Court of Indiana in *Western Union Telegraph Co. v. Stratemeler*, 32 N. E., 871, and by the Court of Appeals of Michigan in *Howard v. Adams*, 16 Mich., 180. In *Black v. Railway Co.*, 10 La. Ann., 88, it was held that the father could not recover for his mental anguish in witnessing the agony of his son who was injured in a railway accident. The Texas cases do not seem to us reconcilable, and in the conflict of authority on the subject we are left to deduce that conclusion which seems to us most in accord with legal principles.

The reason upon which recovery for mental pain and suffering is allowed for negligence in the delivery of social telegrams is that such damages are within the reasonable contemplation of the parties, and the rule is never applied where a telegram does not on its face apprise the telegraph company of its importance, or show that such damages should be anticipated.

The rule that only the natural results which may be reasonably anticipated from the defendant's wrongful act may be recovered runs through the entire law of torts. The telegram which was sent in this case apprised the company simply that the child was suffering from suppressed urine and that the physician must come to Jube Reid's immediately. There was nothing on the face of the telegram to show that the child had relatives who would suffer mental anguish, or to apprise the company that a failure to deliver the telegram would naturally bring about a claim for such damages. The sufferings of the father from seeing the child suffer are too remote. If he might recover, we see no reason why the mother, under similar averments, might not also recover, and it is hard to see to what extent this cause of action might be ramified, or how many actions might be brought, and, as was well said by the Supreme Court of Texas, the father's suffering could only be from alarm and sympathy for the suffering of the sick person. His distress would be merely a reflection of the child's distress, and is too remote and consequential to be the subject of a legal action. Not only so, but where a message is sent for a sick person summoning medical aid for

him, the meritorious cause of action for the negligent delay in sending the message is in the sick person. He may recover for his pain and suffering which he endured by reason of the negligence of the defendant, but the cause of action is not to be split up, and a recovery allowed by his relatives about his bedside.

We, therefore, conclude that the instruction should not have been given, and that the evidence did not warrant a recovery by the father.

Judgment reversed and cause remanded for a new trial.

MORTON'S GUARDIAN v. MORTON, &c.

(Filed March 25, 1905.)

1. Wills—Construction—Life estate—Remainder—W. F. Norton, Jr., by his will devised to his two cousins, Mary Morton and Gabriel Morton, his "family home," on Fourth street, in Louisville, Ky., and everything contained therein, also two stores in Paducah, Ky., the income from the stores to be used in paying taxes on the stores and on the family home, and the remainder of said income for the maintenance of the family home, and, if deemed necessary by his executors, said Paducah stores should be sold and the proceeds deposited as a fund to be used only for the maintenance of said family home, and in the event of the death of either of the devisees, Gabriel Morton or Mary Morton, the interest of the one dying to belong to the other, and if Gabriel should be the last to die, said home should go to his daughter, Gabrielle, and if Mary Morton should be the last to die, said home should go to her half-sister, Aldine Morton. In an action by Mary Morton, one of the two devisees, against Gabriel Morton, Aldine Morton, Gabrielle Morton, who is an infant under fourteen years of age, and the Fidelity Trust and Safety Vault Co., guardian for Gabrielle Morton, for a construction of the will and a sale of the real estate devised, Held—That under the will Mary Morton and Gabriel Morton took a joint life estate in the property devised, the interest of the one first dying to go to the other for life only, with the remainder in fee as to the whole, to Aldine Morton in case Mary Morton should survive Gabriel Morton, but to Gabrielle Morton if Gabriel Morton should survive Mary Morton.

2. Alienation — Prohibiting — Intention — Effect — Where the testator further provided in his will that the "said family home must never be mortgaged or sold" if he intended thereby to forever prevent alienation by any of the devisees, or by those who may take it as heirs at law of any of them, such provision is violative of Kentucky Statutes, section 2360, against perpetuities, and is to that extent void, but as it was manifestly the purpose of the testator to prevent the alienation of the family home and the Paducah stores as well (unless an earlier sale of the latter should become necessary for the maintenance of the family home), during the life tenancy of Mary Morton and Gabriel Morton, to that extent it was reasonable and should be upheld.

3. Sale of the real estate—Forbidden by will—Proviso—As the will does not authorize a sale of the Paducah stores except upon the ground that it should become necessary in order to provide a fund for the maintenance of the family home, and its sale for any other purpose is forbidden by the will during the life tenancy, under Civil Code, section 492, subsections 3, 4 and 5, such sale can not be made.

L. R. Yeaman for appellant.

Humphrey, Hines & Humphrey for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle.

The will of W. F. Norton, Jr., contains the following devise:

"I give to my nearest kin on earth, my two double cousins, Mary Morton and Gabriel Morton, my house (the family home), 817 Fourth street, between Broadway and York, Louisville, Ky., and everything of every nature contained therein, and also my two stores in Paducah, Ky.—one occupied by the Hart Hardware Co., and one by Friedman, Kieler & Co.—the income from said two stores, which is payable monthly, to be used in the first place in paying all taxes on said two stores and all taxes on the family home, above named, in Louisville, Ky., and the remainder of such income to go toward the maintenance of said aforesaid family home. In case it should be found out that the income from said two Paducah stores, after paying all the taxes named above, there should not be left sufficient money to properly maintain the family home, then in that case, under the advice of the executors named in my will, said two valuable Paducah stores can be sold for the best possible price, for cash, and the proceeds of such sale must be deposited in the Fidelity Trust and Safety Vault Co., as a fund to be used only for the maintenance of the family home, 817 Fourth street, Louisville, Ky., which family home must never be mortgaged or sold. (My suite in said home, consisting of my room, my mother's room and bathroom, must be kept intact and never be used or occupied by any one.) In the event of the death of either one of the two cousins named above, the interest of that one to belong to the other of the two cousins. If Gabriel Morton should be the last to die, then the said family home to be the property of his daughter, Gabrielle Morton for her own use, and absolutely free from the use of her husband, if then married or to be married thereafter; then, on the other hand, if Mary Morton should be the last to die, then the family home to be the property of her half sister, Aldine N. Morton, in her own right and absolutely free and clear of the use of any husband she might then have, or ever to have thereafter."

This action was instituted by Mary Morton, one of the devisees under the will of W. F. Norton, Jr., against her codevisees, Gabriel Morton, Aldine Morton, and Gabrielle Morton, the latter being an infant under fourteen years of age, to obtain a construction of the above clause and a sale of the real estate devised. The Fidelity Trust Co., statutory guardian of Gabrielle Morton, was also made a defendant.

It was averred in the petition that by the devise in question the property therein named vested absolutely in fee simple in Mary Morton and Gabriel Morton upon the death of W. F. Norton, Jr., and that neither Aldine Morton nor the infant, Gabrielle Morton, had any interest whatever in any of the property devised. This view of the matter was based on the theory that the provisions of the devise as to how the property should go in the event of the death of Mary Morton or Gabriel Morton, or both of them, ought to be construed as contemplating such death as occurring before that of the testator. The parties named asked that the will be declared to vest the fee-simple title to all the property in Mary Morton and Gabriel Morton, and by

an amended petition it was averred that the property (except the household furniture) could not be divided without materially impairing its value, the court was, therefore, asked to adjudge that all of it, other than the household furniture, be sold and the proceeds divided equally between Mary Morton and Gabriel Morton.

The answers of Gabriel Morton and Aldine Morton adopted the construction of the devise contended for by Mary Morton, and concurred in the statements and prayer of the petition as amended.

From the averments of the answer of Gabriel Morton and that of the Fidelity Trust Co., guardian of Gabrielle Morton, it appears that Gabriel Morton, though denying that his daughter had any interest in the property in question, in order to avoid any complication arising from the assertion of such interest in her behalf by the guardian, proposed to the latter that if her claim to the entire property was released, and it was allowed to be sold as the property of Mary Morton and himself exclusively, he would give to Gabrielle Morton one-half of his half of the proceeds of the sale, and in any event not less than \$25,000, which sum was to go into the hands of her guardian for investment on her account and for her benefit. The compromise thus proposed was accepted by the guardian upon the supposed authority conferred by section 2030, Kentucky Statutes, which provides that a guardian, "with leave of the court, may compound a debt or demand, or settle or compromise any controversy concerning the lands of his ward, when the interests of the ward will be subserved thereby."

This compromise the guardian presented to the court in its answer, averring that it was highly beneficial to Gabrielle Morton to "secure an immediate and vested and sole interest in such a substantial amount of money in lieu of her uncertain, contingent and remote interest in the property devised by the will," and the court's approval of the compromise was asked by the guardian. In view of the agreement existing between the guardian and the other parties to the action as to the propriety of an adjustment on the basis of the compromise, and in order to insure disinterested representation of the infant, it was thought proper to have a guardian ad litem appointed for her, which was done.

It appears from the depositions of John W. Barr, Jr., and George W. Norton, executors of the will of W. F. Norton, and wholly disinterested witnesses, that the two Paducah stores are worth \$45,000, the family residence \$18,500, and that the contents of the family residence consists of a library valued at \$26,000, and other personal property valued at \$7,818.98, making the total value of the real and personal property \$96,818.03.

The witnesses were also of opinion that the proposed compromise would prove very beneficial to Gabrielle Morton. The chancellor, by the decree entered, approved the compromise, and in accordance therewith and the agreement of all the parties in interest, adjudged that Gabrielle Morton had no interest whatever in the property in question, but that the whole thereof by the devise in the will of W. F. Norton, Jr., went and belonged absolutely, in fee simple, to Mary Morton and Gabriel Morton. The decree directed that the personal property in the family residence, other than the library, be divided equally between Mary Morton and Gabriel Morton; that the library, family residence and the two stores and lots in Paducah be sold,

and the proceeds divided by giving one-half to Mary Morton and the other half to the Fidelity Trust Co., as guardian, out of which it should retain one-half, and in any event not less than \$25,000 for Gabrielle Morton, and pay the balance to Gabriel Morton.

The guardian ad litem being in doubt as to the correctness of the chancellor's construction of the devise made by the will of W. F. Norton, Jr., to the Mortons, prosecutes this appeal in behalf of the infant, Gabrielle Morton, to obtain the decision of this court upon the questions involved. Numerous cases have been decided by this court in which it was held that where an estate is given by will, which may be defeated upon the happening of a contingency, and there is no other period apparent or intended in which the event shall occur, it shall refer to an event happening within the lifetime of the testator. (Wren v. Hynes, 2 Met., 129; Wills v. Wills, 85 Ky., 486; Crozier v. Crandall, 99 Ky., 202; Carpenter v. Hazelrigg, 103 Ky., 538.) But this rule does not obtain when the will shows on its face that the event to which the contingency refers is, in contemplation of the testator, to occur after his own death. (Hart v. Thompson, 3 B. Mon., 488; Moore v. Moore, 12 B. Mon., 660; McKay v. Merrifield, 14 B. M., 260; Harris v. Berry, 7 Bush, 114; Montgomery v. Montgomery, 11 Ky. Law Rep., 88; Varble, Jr. v. Phillips, 14 Ky. Law Rep., 364; Harvey v. Bell, &c., 26 Ky. Law Rep., 381.)

If the words of survivorship contained in the clause of the will under consideration be construed as referring to the period of the testator's death, then, since both Mary Morton and Gabriel Morton survived the testator, the result would of course be to vest in them the title to all the property in fee simple, which would necessarily exclude the appellant, Gabrielle Morton, from taking any interest whatever therein. But as was said in Wren v. Hynes, supra: "No fixed rule of interpretation can be established as applicable to words of survivorship; but that construction should be adopted which, considering the particular devise upon which the question arises, in connection with all the other provisions contained in the instrument, will be most likely to promote and effectuate the intention of the testator."

We think the language of this devise clearly indicates that the testator intended the words of survivorship to refer, not to the period of his death, but to that time when one of his double first cousins actually survived the other. The words "if Gabriel Morton should be the last to die" prove that the testator intended that the infant appellant should have the home place upon the death of her father, Gabriel Morton, if he survived Mary Morton, without any regard to when that survivorship took place. And this view is supported in the same way by the words "if Mary Morton should be the last to die."

In other words, Mary Morton and Gabriel Morton took a joint life estate under the will in the property devised, the interest of the one first dying to go to the other for life only, with remainder in fee as to the whole to Aldine Morton, in case Mary Morton should survive Gabriel Morton, but to Gabrielle Morton if Gabriel Morton should survive Mary Morton. While it is true that the interest of appellant, Gabrielle Morton, under the will is contingent upon her father, Gabriel Morton's, surviving Mary Morton, it is such an interest as would in the event of her death,

before her father and before coming into possession of the property, go to her children; or if none, to her heirs at law at the death of Gabriel Morton, if he should survive Mary Morton. Being of the opinion, therefore, that Gabrielle Morton has a contingent interest in remainder under the will of W. F. Norton, Jr., that is, a defeasible fee in remainder liable to be defeated by the death of Gabriel Morton before that of Mary Morton, it becomes necessary to determine whether that interest is confined to what the testator calls his "family home," or whether it extends to the contents of the home place and the Paducah store houses and lots as well. This question is not free from difficulty. The language of the devise in so far as it affects the appellant, Gabrielle Morton, is "if Gabriel Morton should be the last to die (i. e., if he survives Mary Morton), then the said family home to be the property of his daughter, Gabrielle Morton, for her own use," etc.

While the above language does not in express terms include in the property devised appellant the Paducah storehouses, or the contents of the family home, yet when the clause is read and considered as a whole it is manifest that the testator desired and intended to provide a way and a means by which the family home should be maintained, at least while it remains in the possession of his own relatives and devisees, for which reason he dedicated the income from the Paducah stores; and if the need therefor should occur, the proceeds of the sale of that property, to the maintenance of the family home and "every thing of every nature contained therein."

We think, therefore, that the home, its contents and the Paducah storehouses and lots were linked together in the mind of the testator as one gift, and that it was his intention that the appellant, Gabrielle Morton, should have a contingent interest in all. Furthermore, that such was the intention of the testator is demonstrated by the fact that the provisions of the will requiring the income of the Paducah property to be used for the maintenance of the family home could not, as he well knew, be carried out without giving Gabrielle the use and enjoyment of it if she become the owner of the home.

If by the use of the language "which family home must never be mortgaged or sold" the testator intended to forever prevent its alienation by any of his devisees or those who may take it as heirs at law of any of them, that provision of the will is violative of the statute against perpetuities (section 2360, Kentucky Statutes), which declares that "the absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter."

To the extent, therefore, that the inhibition as to alienation of the property may have been intended to go beyond the vesting of the estate in Gabrielle Morton, or Aldine Morton, if it was so intended by the testator, we think it is void. But it was manifestly the purpose of the testator to at least prevent the alienation of the family home and of the Paducah stores as well (unless an earlier sale of the latter should become necessary for the maintenance of the family home), during the life tenancy of Mary Morton and Gabriel Morton, and as we are not prepared to say that the restriction to that extent would be unreasonable, we think it should be upheld. (Stew-

art v. Brady, 3 Bush, 623; Stewart v. Barrow, 7 Bush, 368; Rice v. Hall, 18 Ky. Law Rep., 814; Kean v. Kean, 18 Ky. Law Rep., 956; Johnson v. Dumeyer, 23 Ky. Law Rep., 2248; Wallace, &c. v. Smith, 24 Ky. Law Rep., 189; Lawson v. Lightfoot, &c., 27 Ky. Law Rep., 217.)

The next question to be considered is, should the sale adjudged by the chancellor be approved by this court? Obviously a sale of real estate owned as in this case would have to be made under section 491, Civil Code. And subsection 1 of section 492 of the Code provides that in the actions mentioned in subsections 3, 4 and 5 of section 489, and in section 491, "no sale shall be ordered if forbidden by the deed, will or contract under which the property is held."

The provisions of section 492, supra, are mandatory, and must, therefore, be obeyed. (Moore v. Thompson, 80 Ky., 424.) So in view of the fact that the sale of the property in question is expressly forbidden by the will of W. F. Norton, Jr., at last during the life tenancy of Mary Morton and Gabriel Morton, we are constrained to hold that the judgment of the chancellor directing its sale was unauthorized and improper. As the will does not authorize a sale of the Paducah property except upon the ground that it should become necessary to do so in order to provide a fund for the maintenance of the "family home," we think its sale for any other purpose is also forbidden by the provisions of the will.

In arriving at the conclusions herein expressed we are not unmindful of the benefits that would doubtless result to the infant appellant from the sale of the property in question and compromise agreed upon by the father and guardian, but to allow such a disposition of the property devised would be to utterly disregard the wishes and purpose of the testator and in effect set aside his will without the form of a contest. As, in our opinion, the sale of the property should not be permitted, it is unnecessary to determine whether the statutory guardian of appellant had authority to effect the compromise made in her behalf.

For the reasons indicated the judgment is reversed and cause remanded for a dismissal of the petition.

Whole court sitting.

HUGHES v. MCCREARY, &c.

(Filed April 12, 1905—Not to be reported.)

1. Taxation—Construction of statutes—Assessment of land for taxation—The appellant on the 28th of July, 1902, having contracted with appellees for land which they conveyed under the contract, by the provisions of section 4023, Kentucky Statutes, he was liable for the taxes thereon for the year beginning September 15, 1902. He did not own the legal title at the time of the making of the contract, but its effect was to vest him with the equitable title.

2. Same—Appellees were not obliged to pay the taxes because they conveyed in terms of general warranty, because a lien then existed upon the property for the taxes, and it was appellant's duty to discharge it.

J. D. & G. R. Hunt for appellant.

Morton, Webb & Wilson for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

On July 28, 1903, the appellees entered into a writing with the appellant by which they sold him a certain tract of land in Fayette county for an agreed price, and the terms of the contract were fully stated, to wit: The amount of money to be paid; the time when to be paid and the date when the deed was to be made and when the possession of the land was to be surrendered. The first payment was to be made on March 1 following the execution of the contract. Notes were then to be executed for the balance of the purchase money and a deed with covenants of general warranty was then to be delivered and possession of the land given. The parties carried out the contract according to its terms. Under the statute then in existence property was to be assessed of the date of September 15th for the purpose of levying and collecting taxes for the ensuing year. The question here for consideration is whether appellees Hughes should pay the taxes under the assessment of September 15, 1902.

Section 4023, Kentucky Statutes, provides that "the holder of the legal title and the holder of the equitable title, and the claimant and bailee in possession of the property on the 15th day of September of the year the assessment is made, shall be liable for taxes thereon; and as between themselves it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment."

By the terms of this section the holder of the equitable title should list the property and pay the taxes thereon. On the 15th of September the legal title to the property was in the appellee, S. C. McCreary, and the equitable title was in Hughes. In equity he had the right to compel the appellee to convey the property to him by a compliance upon his part with the terms of the sale. Hughes did not have the legal title to the property, and the effect of the transaction was to vest him with the equitable title thereto. It is our opinion that Hughes held the equitable title to the property, and he should have listed it for taxation and paid the taxes thereon. This conclusion is supported not only by the plain terms of the statute, but by the case of *Bond v. Brand*, Trustee, 25 Ky. Law Rep., 26.

It is urged that as the appellees executed a deed to Hughes for the land in compliance with the contract, which contained a covenant of general warranty, that they were thereby obligated to pay the taxes, as a lien then existed upon the property therefor. While this lien existed to secure the taxes due the county and State, still the law made it a liability of Hughes, and it was his duty to discharge it. The covenant of warranty could only protect Hughes against a liability of appellees secured by lien upon the land. If we were to take appellant's view of the effect of the warranty we would hold that the appellees thereby assumed the liability of Hughes and thus require him to pay his debt. Suppose Hughes between the 28th of July and the 1st of March had executed a mortgage upon the land, no one would seriously contend that the covenant in appellee's deed required them to relieve Hughes of his own liability thus created. The question at bar does not differ from the one in the case supposed.

The judgment is affirmed.

DINWIDDIE & CO. v. NASH.

(Filed April 12, 1905—Not to be reported.)

1. Finding of chancellor—Weight given to—While the finding of a chancellor upon a judgment of fact is not given the same weight as the verdict of a properly instructed jury, still some weight is given to it, and it will not be disturbed on the facts where under all the evidence the mind is left in doubt as to its truth.

2. Same—Where appellee had a man to count the staves in controversy, who kept an account of the count of staves in a book which he testified was correct, and appellants being acquainted with the arrangement, employed the same man to make the count, no other count being produced, the chancellor was authorized to uphold this count and to hold that the book was the best evidence of the staves delivered.

J. S. Wortham and J. C. Graham for appellants.

O'Meara & James for appellees.

Appeal from Grayson Circuit Court.

Opinion of the court by Chief Justice Hobson.

On October 18, 1900, a written contract was entered into by which appellee, Palestine Nash, agreed to saw staves for appellants, R. Dinwiddie & Co., and place them on board the cars at the price of \$18 per thousand for whisky staves, four and one-half inches wide, clear of sap, thirty-four inches long, and \$12 per thousand for oil staves, four and one-half inches wide, the sap included. Nash sawed and delivered a large number of staves, and on August 11, 1902, filed this suit against Dinwiddie & Co., claiming that there was a balance due him on the account of \$1,174. An answer was filed by the defendants controverting the allegations of the petition, and the case was referred to a commissioner to report a settlement of the account between the parties, the account being too complicated for a jury trial. The commissioner reported that Nash had been paid \$7,775.67, and that the staves which he had delivered and certain other credits which he was entitled to amounted to \$7,702.09. Upon exceptions to the commissioner's report the court held that Nash had delivered 29,005 more oil staves than the commissioner credited him by and 15,600 more whisky staves than he was credited by, these two items amounting to \$619.23 at the contract price. The court deducted from this the balance found due by Nash in the commissioner's report, \$73.58, and gave judgment in favor of Nash for \$545.65. From this judgment Dinwiddie & Co. appeal.

The whole case turns upon the number of staves which Nash delivered.

The judgment of the chancellor on a question of fact is not given the same weight as the verdict of a properly instructed jury. Still some weight is given to it, and it will not be disturbed on the facts where, under all the evidence, the mind is left in doubt as to the truth. Nash had the staves hauled from his mill to the railroad station, where they were loaded on the cars. He employed a man named Willis to count them as they were loaded, and Willis kept a record of the count in a book which he produced in evidence and testified was correct. Dinwiddie & Co. were acquainted with the arrangement, and also employed Willis to count other staves for them. The staves were shipped from time to time in carload lots. No

other count of the staves is produced except that made by Willis, and we concur with the circuit court in holding that his book is the best evidence in the case as to the number of staves delivered. No complaint appears to have been made as to the count as the cars went in from time to time. Dinwiddie & Co. seem to have assumed that he would make a correct count, and the evidence which they now offer to show that his count was not correct is far from conclusive. The parties throughout the whole transaction evidently acted upon the idea that they were to settle by Willis' count. The chief contention in the case is that the oil staves were not four and one-half inches wide; that Willis simply counted the pieces, and that Nash should be credited by the amount of staves he furnished, scaling the number of pieces by a sufficient percentage to cover the deficit in width. In other words, it is contended that if the staves had been of the proper width it would have taken only eighteen to make a barrel, but that by reason of the narrowness of the staves it took twenty-one to make a barrel, and it is insisted that, therefore, the number of pieces should be scaled in the ratio of twenty-one to eighteen. But the staves were accepted under the contract. Carload after carload was shipped, and no complaint was made that the staves did not come up to the contract. The rule is that where an article is contracted for, and is accepted, after reasonable opportunity for inspection, the purchaser will not be heard to say that it did not come up to the contract. The only evidence as to the narrowness of the staves is the testimony of Dinwiddie, who confesses that he did not measure them and whose statements are very general and indefinite. His partner also testifies substantially to the same effect. In addition to this, they filed bills rendered to them by the persons to whom they sold the staves in which the staves were scaled for not being wide enough. The testimony of the persons who measured the staves and scaled them was not taken, and the bills are not evidence against Nash.

In addition to this, after the staves had all been delivered Dinwiddie made a settlement with Nash, or a tentative settlement, by which it appeared that he owed Nash \$600, and while it would seem that he did not agree to this as a final settlement, and only looked upon it as a settlement of Nash's account, still he himself says he would then have settled finally on this basis but for one car being out, and he also admits that he then said to Nash that he was short of money and asked him to wait upon him for the amount. He then knew as much about the shortage of the staves as he does now, or had as full reason to know, and he said nothing to Nash about it. His conduct on that occasion is in keeping with his conduct throughout the whole transaction, and shows the construction which he himself placed upon the contract between them, and the effect which he contemplated should be given the count made by Willis. Under all the evidence we are satisfied there would have been no trouble between Dinwiddie and Nash but for the fact that the staves were scaled by the persons to whom Dinwiddie sold them, but Nash was not a party to these transactions or bound by them.

Judgment affirmed.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW
YORK v. DEES, GUARDIAN, &c.

(Filed April 12, 1905.)

1. Life insurance—Beneficiary named—Additional beneficiary subsequently added—Notice to company—Effect—A life policy was issued by appellant for \$10,000 on the life of W. P. Gatlin, in which insured's daughter, Gray A. Gatlin, was named as beneficiary. When the policy was produced after the death of insured it contained the additional name of Geo. O. Gatlin, a son of insured, as one of the beneficiaries, which latter name there was evidence tending to show was in the handwriting of the insured. Both the son and daughter were infants, and by their guardian brought this suit on the policy. The company pleaded the alteration in bar of the action. Held—If the application was in fact accepted by the company, and the policy issued with Gray A. Gatlin as the sole beneficiary, her rights then became fixed, and neither the insured nor the company could affect her rights except as provided in the policy, which provided that the insured might change the beneficiary with the consent of the company.

2. Trial—Instructions to jury—On the trial of the action the court should have told the jury that they should find for the plaintiff, Gray A. Gatlin, alone, if the alteration of the contract was made by the insured after the policy was delivered and accepted, and without the consent of the company, but that they should find in favor of both the plaintiffs if the alteration was made before the delivery and acceptance of the policy, or with the consent of the company.

3. Use of intoxicants by insured—False statements in application—Where it is pleaded that insured had made false statements in his application for insurance as to his habits as to drinking whisky, the court should have set out in an instruction the questions and answers contained in the application in reference thereto, and should have told the jury that they should find for the plaintiffs if the answers were substantially true, but otherwise they should find for defendant, although there was no intention to mislead or deceive the company, and that the answers were not substantially true if the assured drank materially more than as stated.

Reed & Berry and Frank P. Poston for appellant.

Hendrick & Miller for appellees.

Appeal from Calloway Circuit Court.

Opinion of the court by Chief Justice Hobson.

On September 6, 1899, the Provident Savings Life Assurance Society of New York issued a policy on the life of William P. Gatlin, of Murray, Ky., for the sum of \$10,000. In his application for the policy Gatlin stated the beneficiary was his daughter, Gray A. Gatlin, and the policy was so issued in New York and mailed to the agent of the company in Cincinnati. Gatlin paid the premiums on the policy until his death on April 19, 1901, and when the policy was produced after his death it contained, in addition to the name of Gray A. Gatlin, the name of George O. Gatlin, his son, as one of the beneficiaries. When and by whom this change was made does not appear, except that there was evidence tending to show that the additional words were in the handwriting of the insured, William P. Gatlin. Both the son and the daughter were infants, and brought suit by their guardian upon the policy. The company, among other things, pleaded the alteration

of the policy in bar of the action. It also pleaded that Gatlin had made false statements in his application as to his habits as to drinking whisky. The application contained, among other things, the following questions and answers:

"7. Have you ever used spirits, wine or malt liquors?"

"Yes."

"8. Have you ever used them in excess?"

"No."

"9. Do you now use them? If so, state definitely what is the form, how much and how often, i. e. What is your practice? Don't say moderately, etc. Such answers will not be accepted." (See No. 2, on back.)

"Yes, whisky. Three drinks a month."

The defendant introduced proof on the trial which, while not conclusive, was sufficient to warrant the jury in concluding that the assured drank much more whisky than stated. We do not mean to say that the evidence would have required the jury to so find, but only that there was evidence sufficient to submit the issue to the jury. The question is, therefore, presented whether the instructions of the court properly presented the matter to the jury. The court, by instruction 1, told the jury that if the answers of Gatlin, above quoted, were "honestly made without any intention to deceive or defraud the defendant company, and that said answers were substantially true," then they should find for the plaintiff. He also told them in instruction 3 that if either of the answers was "in fact untrue, and was made with the fraudulent intent to deceive or mislead defendant company, and with intent that defendant should rely, and it did rely, on said answers in issuing the policy," they should find for the defendant. The court also, by another instruction, directed the jury to find for the defendant if the policy had been altered by William P. Gatlin by the addition of the name of George O. Gatlin, without the knowledge or consent of the company, although the alteration was made without any fraudulent intent on the part of William P. Gatlin. The jury found for the plaintiffs, and the defendant appeals.

As to the alteration of the policy we think the instruction was more favorable to the defendant than it should have been. If the application was in fact accepted by the company, and the policy issued with Gray A. Gatlin as the sole beneficiary, her rights then became fixed, and neither the insured nor the company could affect her rights, except as provided in the policy. It is true it is provided in the policy that the insured might change the beneficiary with the consent of the company, but he could not effect this end in any way not provided by the contract. If he had scratched out her name in the policy after it reached his hands and inserted his own name this would not have affected her rights. She could have shown the mutilation and recovered upon the contract as it was before it was mutilated. If instead of scratching out her name he let her name remain and added another as a joint beneficiary in the policy, no greater effect can be given his wrongful act than if he had scratched out her name and inserted in lieu of it the name of her brother. If the alteration was made before the policy was delivered or became effective, or with the consent of the company, a different question would be presented. In lieu of the instruction

which the court gave as to the alteration of the contract the court should have told the jury that they should find in favor of the plaintiff, Gray A. Gatlin, alone if the alteration of the contract was made by W. P. Gatlin after the policy was delivered and accepted and without the consent of the company, but that they should find in favor of both of the plaintiffs if the alteration was made before the delivery and acceptance of the policy, or with the consent of the company. The question of the correctness of the instructions as to the statements made in the application turns on section 639, Kentucky Statutes: "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy."

While the court has had the statute before it in several cases, it has not construed it further than to hold that a misrepresentation will not avoid the policy unless fraudulent or material to the risk. (*Germania Insurance Co. v. Rudwig*, 80 Ky., 231; *Mutual Life Insurance Co. v. Thompson*, 94 Ky., 258; *Lancashire Insurance Co. v. Monroe*, 101 Ky., 12.) In 16 Am. & Eng. Ency. of Law, 921, it is said: "In a number of the United States statutes have been enacted which, while varying considerably in phraseology, provide in effect that the representations and statements of the insured shall not avoid the contract unless material to the risk. These statutes have been held to be remedial in character and within the police power of the State. Under these statutes a misrepresentation will not, of course, avoid a policy unless it relates to a matter which is material to the risk. And it has been held that unless qualified by words restricting their operation to representations made in good faith, such statutory provisions apply as well to representations fraudulently made as to those made in good faith. But if the provision of the statute is that misrepresentations or statements made by the insured in good faith shall not avoid the policy unless material to the risk, an immaterial representation will avoid the policy if not made in good faith."

Our statute belongs to the class first above indicated.

At common law the warranty of the truth of an answer in the application implies an agreement that the subject-matter of the question is to be regarded as material, and that an untrue answer avoids the policy whether made in good faith or not. The purpose of the statute was to prevent the insurer escaping liability on grounds having no real merit. To avoid the policy the misrepresentation must be material or fraudulent. It was not the purpose of the statute to enable the insurer to avoid his liability by reason of immaterial misstatements. In the sense in which the statute uses the words no misstatement is fraudulent which is immaterial. In other words, if the statement is substantially true, it can not be fraudulent. If the statement is not substantially true, then there is a material misstatement within the meaning of the statute. If the insured, when called upon to answer the questions, does not state substantially the truth, his statement is constructively fraudulent if it is not fraudulent in fact. The word "fraudulent" is added in the statute after the word "material" to bring out this idea and not to express the idea that the policy might be avoided by the misstatement of a fact wholly immaterial. The substance of the statute

is that no misrepresentation unless material or fraudulent shall avoid the policy. It does not refer simply to a misstatement on a material subject, that is, on a subject material to the risk. It refers to material misstatements. The misstatement itself must be material, that is, the insured must not materially misstate the facts, and when he makes a substantial misstatement about anything material to the risk the policy is avoided. It is not necessary that he should intend to deceive. The instructions given by the court were misleading.

There was no question that the assured made the answers contained in the application. In lieu of instructions 1 and 3 given by the court he should have set out in an instruction the questions and answers above quoted, and should have told the jury that they should find for the plaintiffs if the answers were substantially true; that otherwise they should find for the defendant, although there was no intention to mislead or deceive the company, and that the answers were not substantially true if the assured drank materially more whisky than as stated.

The habits of the assured as to drinking intoxicants are a material matter to the insurer. In *Mutual Life Insurance Co. v. Thompson*, 94 Ky., 253, the questions related to the former habits of the assured. But in that case the court said: "It is of vital importance for an insurance company to know before issuing a life policy whether the applicant is thus temperate in his habits, for obviously he would not be a fit subject for insurance, nor could a company prudently issue to him a life policy if he was not then temperate in his habits of drinking intoxicating liquor; and, consequently, if he had made a false statement in that particular, it would be no answer to say the habits were not such as to impair his health, because insurers have a right to protect themselves by guarding against the risk of pernicious habits."

The questions here related to his habits at the time the insurance was taken, and if the answers contained a material misrepresentation there can be no recovery.

Judgment reversed and cause remanded for a new trial.

GRAY v. SODEN, &c.

(Filed April 12, 1905.)

1. Land—Title bond—Purchase by husband—Subsequent patent to widow—Effect—Where the husband took possession of a tract of land under a title bond, and held it adversely and continuously for thirty years, the fact that his widow after his death procured a patent for it from the Commonwealth does not affect the interest of the husband's children therein, who claim as his heirs subject to the widow's life estate; and a sale of said land by the widow passed to the purchaser only the use of same during the life of the widow.

2. Improvements—A purchaser of land from a widow who has only a life estate therein is not entitled to recover for improvements made thereon and make the heirs responsible therefor.

E. H. James for appellant.

Newton W. Utley for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Paynter.

Jacob Stephens died some years ago, leaving a widow, Nancy Stephens, and some children and descendants of deceased children. The intestate left a tract of land containing 93 acres. After his death the widow continued to hold it for some time, and then sold it to the appellant. Gray claimed title to it by virtue of that sale, whereupon the appellees, heirs at law of the intestate, instituted this action to recover it.

The evidence shows that Jacob Stephens purchased the land from one Hillman and received a title bond therefor, under which he occupied and claimed it until his death. The appellees and those through whom they claim were in the adverse possession of the land for more than thirty years, claiming it as their own. The widow was entitled to a homestead in the land, and at her death it went to the heirs at law of the intestate. This is denied, however, because it is averred by the appellant that no patent was ever issued for the land until one was issued to the widow after the death of her husband, and by reason of that fact she became the owner of the fee-simple title to the land, and that her conveyance to him vested him therewith. It is urged that the long possession by the appellees and those through whom they claim does not avail them. The statute of limitations never runs against the Commonwealth unless the statute expressly provides that it may do so. The statute authorized the application of the statute of limitations against the Commonwealth.

Section 2523, Kentucky Statutes, reads as follows: "The limitations prescribed in this chapter shall apply to actions brought by or in the name of the Commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter in this revision."

This statute was part of the revised statute at the time *Hartley v. Hartley*, 3 Met., 53, was decided. In that case this court announced the same rule that was announced in *Chiles v. Calk*, 4 Bibb., 554, wherein it is held that no one can acquire a seizin in possession adverse to the Commonwealth, and that the lapse of time can not operate as a bar to the Commonwealth's right to enter upon land not granted by her. The statute we have quoted was in effect when the opinion in *Hartley v. Hartley* was delivered, but the court does not seem to have taken any notice of it. The section quoted is part of the chapter containing the law of limitation as to real property, and by its terms it must apply to the Commonwealth the same as an individual. Our attention has not been called to any opinion of this court wherein the statute to which reference is made has been applied. If the statute of limitations does not apply, then the appellant failed to sustain the issue tendered by him that there had not been a grant to any one by the Commonwealth previous to the one made to the widow. No proof was taken upon this issue. The appellant was not entitled to recover for improvements because the widow simply had a life estate, and he could not make improvements on the land any more than the widow could have done

and make the heirs responsible therefor. The appellant did not have any greater interest in the title to the land than did the widow, and that was to the use of it during her life.

The judgment is affirmed.

GARTH, GUARDIAN v. CITY SAVINGS BANK, GUARDIAN.

(Filed April 12, 1905.)

Infants—Domicile—Guardian—Appointment—Where, after the death of her husband in Kentucky, the widow moved from Kentucky to Tennessee and took her infant child with her, intending to make Tennessee her future home, and died there after having so resided for about three years, her domicile was the domicile of her infant child, and said infant having reached the age of fourteen years had the right, under the laws of the State of Tennessee, to choose a guardian in said State, and such guardian is entitled to recover the personal estate of said infant from a guardian previously appointed in the State of Kentucky.

Samuel D. Hines and W. E. Garth for appellant.

John L. Stout and J. P. Atkinson for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Barker.

This record involves a controversy between appellant and appellee as guardian of Virgil Thomas for the possession of his personal estate.

The father of the infant, Sam C. Thomas, died in 1888, domiciled in Warren county, Kentucky, leaving a wife, Mrs. Fannie Thomas, and the infant, Virgil Thomas, surviving him. His only estate appears to have been a policy of insurance on his life, which the company for some reason refused to pay, and which thereupon became a subject of litigation. Pending this controversy a guardian was appointed for the infant and before the policy was finally collected the widow with her infant son, then about three years old, moved to Nashville, Tenn., and became a resident there. When the policy was paid the portion of the infant, amounting to about \$500, was turned over to his guardian, appointed by order of the Warren County Court, and by successive devolution from one guardian to another it has reached the hands of the appellant, who now holds it.

After moving in 1890 to Nashville, Mrs. Fannie Thomas died domiciled there in 1893, on her deathbed giving her son, Virgil, to her mother, Mrs. Annie Law, with whom he has since lived. In 1902, when he had reached the age of fourteen years, Virgil Thomas, by virtue of the laws of Tennessee, chose the appellee as his guardian, and this corporation was duly appointed and qualified as such. Afterwards it instituted these proceedings under section 2043, Kentucky Statutes, to recover from appellant the personal estate belonging to the infant. In the circuit court the chancellor rendered a judgment in accordance with the prayer of the petition, of which appellant now complains. It is conceded in the argument by appellant, as we understand it, that if the domicile of the infant is in Nashville the appointment of appellee is valid and the judgment of the chancellor must be affirmed, and by the appellee that if his domicile is in Warren county the

order of appointment of appellee for want of jurisdiction is void, and the judgment must be reversed.

We have no doubt that when Mrs. Thomas moved to Nashville, in 1890, that it was with the intention of making it her permanent residence, and that she became legally domiciled there. The question of law then arises, did the domicile of the mother become the domicile of her infant son? This must be answered in the affirmative. The domicile of the father at his death is the domicile of his infant children. (*City of Louisville v. Sherley*, 80 Kentucky, 71; *Munday v. Baldwin*, 79 Ky., 121; *Mills v. Hopkinsville*, 11 Ky. Law Rep., 166.) On the death of the father the mother as long as she remains unmarried is the natural guardian of the infant children, and her domicile becomes theirs, she in the matter of controlling the domicile taking the place of the father. (*School Directors v. James*, 37 Am. Dec., 525; *Allen, Adm'r v. Thomasson*, 54 Am. Dec., 55; A. & E. Encyclopedia of Law, 2d edition, volume 10, page 80; "Cyc," volume 14, page 844; Schouler's Domestic Relations, section 230.) The reasoning of the court in the case of *Munday v. Baldwin*, sought to be applied by appellant to the case at bar, is in nowise inconsistent with the principle that the domicile of the infant after the death of the father follows the mother. In the case cited an aunt of the infant orphan took him to her home out of this State, and the court held that the aunt had no power to change the domicile of the infant, and it, therefore, remained where his parents resided at their death. Nor does it follow, as appellant contends, that because section 2032, Kentucky Statutes, gives the custody of the ward's person as well as his estate to the guardian that, therefore, the latter has the power to control the domicile of the infant. In *Louisville v. Sherley* it was held that the residence of the ward was not necessarily that of the guardian. And in *School Directors v. James* Chief Justice Gibson said: "When an infant has no parent the law remits him to his domicile of origin, or to the last domicile of his surviving parent; and why should this natural and wholesome relation be disturbed by the coming in of a guardian, when a change in the infant's domicile is not necessary to the accomplishment of any purpose of the guardianship? The appointment of a new residence may be necessary for the purposes of education or health, but such a residence being essentially temporary, was held in *Cutts v. Haskins*, 9 Mass., 543, insufficient to constitute a domicile. * * * A guardian has indeed power over his ward's person and residence; but it follows not that the ward's domicile must attend that of his guardian, for there is nothing in a State of pupilage which requires it to do so."

We think the evidence clearly shows that the mother of the infant, after the death of her husband, permanently removed from Bowling Green to Nashville, and became domiciled in the latter city; that she never afterwards changed this domicile, and under the principle of law announced above the domicile of her infant son, Virgil Thomas, in 1890 was in Nashville, Tenn., where it now is. It, therefore, follows that the judgment of the chancellor must be affirmed, and it is so ordered.

BRIGHT v. COMMONWEALTH.

(Filed April 18, 1905.)

1. Homicide—Dying declarations—Proof of by widow of deceased—Competency—On the trial of one for homicide the widow of the deceased is a competent witness to prove the dying declarations of her deceased husband made under a sense of impending death.

2. Witnesses—Infant twelve years of age—Capacity—Competency—A boy twelve years of age, while not able to define the legal obligation of an oath, but did know that by being sworn he was required to tell the truth and would be punished for it if he did not do so, is a competent witness on the trial of one for homicide.

3. Religious belief—Whether one's religious training has been so developed that he comprehended his responsibility to God for lying is not material as affecting his competency as a witness in a court of justice. His disbelief or unbelief in deity may affect his credibility, but not his competency as a witness.

Ben. Spalding, W. H. Sweeny and S. A. Russell for appellant.

N. B. Hays and Charles H. Morris for appellee.

Appeal from Marlon Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant appeals from a judgment upon a verdict convicting him of manslaughter. There were no objections to the instructions of the court to the jury, nor do they appear to us to have been objectionable from appellant's point of interest. The instructions offered by appellant, and rejected by the court, except one to the jury to peremptorily find him not guilty, were embodied in those actually given. There was evidence of appellant's guilt, and it would, therefore, have been improper to have given the peremptory instruction.

There are but two questions presented in the brief for appellant, which seem to be the only two relied upon in the grounds for a new trial, that are reviewable by this court on the state of the record. These are questions of evidence. The first is an objection to the testimony of Mrs. Stayton, the widow of the murdered man. No eyewitness testified in the case except appellant. Stayton, whom appellant killed, was stabbed mortally by appellant, and died within a few minutes thereafter. Before his death he stated to his wife that he was dying; that appellant and his son had killed him. This statement was not admitted as a part of the *res gestæ*, as seems to be assumed in argument, but as proof of a dying declaration. That the wounded man was then under a sense of his impending death is evident, as well as that he made the statement to his wife of the manner in which he had received his fatal wounds in contemplation of that immediate event.

We held in the case of *Arnett v. Commonwealth*, 114 Ky., 598, 24 Ky. Law Rep., 1440, that the wife of a declarant was a competent witness to prove his dying declaration under such circumstances. The other question is as to the competency of the witness, Tommy Ewing, a lad twelve years of age. The point is made that he was too immature to know the binding obligation of an oath, and that consequently he was incompetent as a witness. By the Civil Code every person is competent to testify for himself or

another (subject to certain exceptions not material in this inquiry) unless he be found by the court incapable of understanding the facts concerning which his testimony is offered. The Criminal Code contains no such provision. Indeed it is silent on this point, which leaves in force in this State as to criminal prosecutions the common law as it affects the competency of witnesses. On the subject of interest and the like the legislature has made certain changes in this respect as to such competency, but these changes do not touch upon the question of understanding or religious or moral comprehension of the witness. In Greenleaf on Evidence, section 867, it is said that if a child offered as a witness appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify whatever his age may be. This witness stated that he realized that it was wrong to tell a lie; that while he did not understand what an oath meant, yet he knew that by being sworn he was required to tell the truth, and that if he did not do so he would be punished for it, but he did not know how, nor by whom. As to a future punishment he naively said that "the bad man would get him if he told a lie." His evidence was clear, and showed mental capacity, understanding and memory sufficient to qualify him. It appears that he was conscious that the oath bound him to speak the truth, and he knew the difference between telling the truth and telling a lie. It did not disqualify him as a witness that he was not able to define the legal obligation of an oath. Whether his religious training had been so developed that he comprehended his responsibility to God for lying was not made clear, nor was it material as affecting his competency. In *Bush v. Commonwealth*, 80 Ky., 244, it was held that under the Constitution of this State the civil capacity belonging to or enjoyed by citizens generally shall not be taken from or denied to any citizen on account of his opinions in regard to religious matters. Otherwise the constitutional guaranty that "the civil rights, privileges or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion" would be violated when one class of citizens is held to have civil capacity to testify in a court of justice because they entertained a certain opinion in regard to religion, while another class is denied to possess that capacity because they do not conform to a prescribed belief. "Free governments deal with the acts of the citizen, and not with his thoughts." If disbelief in deity does not disqualify one from being a witness here, unbelief could not do so. The question becomes one of credibility, and not of competency.

We perceive no error in the record, and the judgment is, therefore, affirmed.

NEVELL'S ADM'R v. DUNAWAY, &c.

(Filed April 13, 1905—Not to be reported.)

Wills—Devise to infant—Primary purpose—Trustees—Failure to execute trust—Death of devisee—Action to recover devise—By the will of Margaret Nevill this devise was made: "I desire that \$300 be paid to my executors and held in trust by them for the use and benefit of John William Nevill, son of John and Mary Nevill, to be used in educating said John William

Nevill." The executors named were residuary legatees under the will. Nothing was paid to John William Nevill, or on account of his education. He was under fourteen years of age when the will was probated, and died about three years thereafter. In a suit brought by his administrator to recover the legacy, Held—That the devise, though made to trustees, was expressly for the use of John William Nevill; that the primary purpose of the will was to give the money to the boy, and that it might help him to get an education seems to be secondary. The testatrix did not intend that the legacy should lapse or that it should go to the other legatees. His education was not made as a condition precedent or subsequent to the gift. The demurrer to the petition should have been overruled.

W. M. Finley for appellant.

John S. Gaunt and James Hemphill for appellees.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge O'Rear.

John W. Nevell was an infant under fourteen years of age. By the will of Margaret Nevell this devise was made: "I desire that \$300 be paid to said executors, and held in trust by them for the use and benefit of John William Nevell, son of John and Mary Nevell, to be used in educating said John William Nevell."

The executors named were also the residuary legatees under the will, and are appellees here.

Nothing was paid to John William Nevell, or on account of his education by the executors. Some three years after the probating of the will John William Nevell died. This suit was brought by his administrator to recover the legacy of \$300 mentioned. It is charged in the petition that his mother, a widow, who was very poor, had been unable to clothe and board him with her own means, and that she had expended certain sums toward his education since the death of the testatrix, and had incurred liability for his board, clothing, physician's bills and funeral expenses in addition, to the amount of about \$300. A demurrer was sustained to the petition. The devise, though made to trustees, was expressly for the use and benefit of John William Nevell. There was no condition to the devise taking effect. It, therefore, became vested upon the death of the testatrix. (Jarman on Wills, page 653; Williams on Executors, pages 1035 and 1053.)

The argument of appellees is that the fund was not given to John William Nevell, but was given to the trustees to be applied by them as an active trust toward the education of the beneficiary, and that as he died before the trust could be executed, the fund reverted to the estate of the testatrix, and passed under the residuary clause of the will. The testatrix undoubtedly contemplated that John William Nevell should be the sole beneficiary under this clause. The money was devised for his use and benefit. It is true she further expressed the purpose that it should be applied to his education. This was not made, though, as a condition to the gift, either precedent or subsequent. It was more in the nature of a direction to the trustees as to the manner of use to which it was to be primarily adopted. If for any reason it would become impracticable to have expended it for the education of the boy, or unnecessary to have done so, it would not have lapsed or reverted. It could not have been possible that the testatrix contemplated

that \$900 could have conferred opportunities for a collegiate education. A common school education might be had in this State, and in that community, without any charge whatever to the child. His poverty and that of his parent, may, however, have prevented his applying his time solely and sufficiently to even acquire that but for some assistance. This assistance was not in paying tuition, or even necessarily in buying books, for the State also furnishes books to indigent pupils in its common schools. If, then, by clothing and maintenance they kept the boy in the condition that he might devote his time to attending schools, the real object of the testatrix would have been furthered practically and substantially. The use and benefit of the money was given to the boy. That was the primary purpose. That it might help him to get an education seems to have been secondary. If because of ill health or because of mental malady it would have been impracticable to have attempted to educate the boy in the sense of putting him through a scholastic course, it can not be gathered from the will that the testatrix intended in that event that the legacy should lapse, or that the fund should go to other legatees, already otherwise bountifully provided for by her providence. It was nearly four years after testatrix's death before the death of this devisee. Nothing was spent upon him, or upon his education, by the trustees during that time. Whether this was their neglect or not it ought not to add to their estate, and change the obvious purpose of the testatrix in making some provision for the well-being of this chosen subject. Had the trustees done what the will commanded should be done the fund might properly have been expended in the very items set out in the petition, unless it be the funeral expenses incurred. The demurrer to the petition should have been overruled.

The judgment is reversed and cause remanded for further proceedings not inconsistent herewith.

BARGO v. BARGO, ADM'R.

(Filed April 18, 1905—Not to be reported.)

Land—Lien for purchase money—Estoppel—Limitation—In an action by the administrator and heirs of a deceased vendor of land to enforce against the vendee a lien for the unpaid purchase money due thereon, to which the defendant pleads a counterclaim for failure to get possession of part of the land purchased, evidence considered and held that defendant failed to sustain his plea, and is estopped by the admissions and averments of his answer to rely on the statute of limitations of fifteen years as a bar to the action.

B. B. Golden for appellant.

James D. Black and Pitzer D. Black for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Larkin Bargo, on June 8, 1882, bought of his father, John Bargo, a tract of land and executed to him his note of that date, payable one day after date, for \$100, which sum was what remained unpaid of the consideration. At the same time he received of his father a bond for title

wherein the land was fully described, and a lien retained to secure the payment of the note of \$100. The bond also stipulated that the vendor would, by proper deed, convey the land therein described to the vendee upon the payment by the latter of the balance of the consideration expressed in the note.

Some years after this transaction the father died without having made to appellant a deed to the land, as the latter had not paid the note given therefor. The appellee, Robert Bargo, who is also a son of John Bargo, was appointed and duly qualified as administrator of the decedent's estate, following which this action was instituted by him as administrator and heir at law of John Bargo against appellant in the circuit court to recover personal judgment for the amount of the note and interest, and an enforcement of the lien retained on the land by the title bond to secure its payment. The other heirs at law of John Bargo, except the appellant, united with the administrator as plaintiffs in the action.

The petition set forth appellant's purchase of the land, the terms of the sale, the execution of the note and title bond, a particular description of the land, the failure of appellant to pay the note, and the readiness and ability of the heirs at law to make a deed conveying him a good and sufficient title to the land upon the payment of the same, but in the event of his failure to do so judgment was asked in behalf of the administrator against him for the amount of the note and for the sale of the land to pay same and costs of the action. The petition also contained the averment that appellant at the time of his purchase of the land in question was placed in possession thereof by his vendor and that such possession has been actual and continuous ever since; that he has all the time of such possession claimed it, and yet claims it, under the purchase from his father, and "looked to the said John Bargo for a deed of conveyance to it when he, said defendant, should pay the purchase money aforesaid for it."

The answer of the appellant contained several paragraphs. In the first a plea of the statute of limitation of fifteen years was relied on. In another, he admitted his purchase of the land described in the petition from his father, and that the contract therefor was correctly set forth in the title bond which his vendor executed and delivered to him; also that he had not paid the note sued on which he executed for what remained unpaid of the consideration for the land. It was in substance also alleged in the answer that appellant's father and vendor, John Bargo, did not have or own title to about forty acres of the land appellant purchased of him; that this forty acres was then and is now in the possession of and owned by one Thomas Mills, and has never been in the possession of appellant; that on account of the loss of this forty acres of the land purchased by him of his father appellant has never paid the note sued on, and same was and is without consideration; that the forty acres of land in the possession of Mills was at the time of its alleged purchase of appellant, and is now, worth \$500, and by its loss and the inability of his vendor and his heirs at law to convey and give him possession of same as the former contracted to do, he has been damaged in that sum, to recover which the answer was made a cross petition and counterclaim against the appellees, administrator and heirs at law of John Bargo, and judgment asked against them.

The affirmative matter of the answer was denied by reply. The circuit court upon hearing dismissed appellant's counterclaim and gave appellees judgment against him for the amount of the note and interest, and for the sale of the land in controversy to pay same and the costs of the action. It is insisted for appellant that the judgment should be reversed upon the ground that the action was barred by the statute of limitation, as the same was not instituted for more than fifteen years after the maturity of the note. This contention would have had much more force if appellant's answer had confined his defense to a traverse of the averments of the petition, except as to the execution of the note and a reliance upon the plea of the statute of limitation, but this he did not do. His answer does not contain a denial of the averments of the petition that his vendor by title bond agreed to make him a deed conveying him the title to the land for which the note was executed, or that the vendor died without executing such deed, nor does it sufficiently deny the further averment of the petition that appellant acquired possession of the land under the contract of purchase, evidenced by the title bond, and continued in the possession thereof, all the time looking to his vendor for a deed of conveyance to it when he should pay the note sued on. Upon the contrary, the appellant, by the averments of his answer, confirms the statements of the petition as to his purchase of the land and his possession by virtue thereof, and attempts to avail himself of the benefit of the contract by seeking to recover by way of counterclaim of the heirs at law of his vendor damages for a breach thereof, occasioned by the alleged loss of forty acres of the land sold to him which he claims is held by Mills under a claim of title or possessory right superior to his. So, according to his own showing, appellants' possession is not adverse, but that of a vendee in possession. As such he is not, it is true, demanding a conveyance of the title as stipulated in the bond for title received from his vendor, but is looking to the heirs of his deceased vendor for indemnity for the loss arising from the shortage in quantity of the land he claims to have purchased, which is in the nature of an action for a specific performance in part of the contract against which he pleads the statute of limitation.

Section 2543, Kentucky Statutes, declares: "The provisions of this chapter (as to limitation of actions) shall not apply in case of a continuing and subsisting trust, nor to an action by a vendee of real property in possession thereof, to obtain a conveyance." We are of opinion that appellant was estopped by the admissions and averments of his answer to rely upon the statute of limitation as a bar to the action. (Howard v Howard, &c., 96 Ky., 445.)

The action is in equity, and under the issues made by the pleadings the appellant should not have been permitted to avoid the payment of the balance of the purchase money and yet retain the land. Appellees still hold the legal title to the land, though willing to convey it upon the payment by appellant of the note. Appellant is unwilling to pay the note, but insists upon holding the land, and asks damages for the alleged shortage of the forty acres in the boundary sold him. His attitude is neither consistent nor equitable. If he would avail himself of the contract to recover for the shortage in the land he must submit to the enforcement of the lien for the balance of purchase money as provided by the same contract. (Singleton, &c.

v. McQuerry, 8 Ky. Law Rep., 710; Henderson v. Dupree, &c., 82 Ky., 678).

Appellant's contention that he did not get all the land purchased of his father, and which is embraced by the description in the title bond, is not sustained by the evidence. He alone testified on that subject in his behalf, and as his testimony is made up in the main of conversations between himself and his father and vendor, the subsequent death of the latter rendered that much, and nearly all, of his testimony incompetent, consequently the chancellor could not have considered that part of appellant's deposition. (Civil Code, section 606; Elliott v. Campbell, 25 Ky. Law Rep., 1841.)

On the other hand, it appears from the depositions of the several witnesses introduced by appellees that appellant received at the time of the execution of the note and title bond evidencing his consent of purchase all the land bought by him of his father and described in the title bond, and that he is yet in the possession of the whole thereof. According to the testimony, which was practically uncontradicted by other competent evidence, there was no deficiency in the land bought by appellant, and the chancellor properly so found. In fact we find no reason for disagreeing with any of the chancellor's conclusions in the case.

Wherefore, the judgment is affirmed.

HORNSEY v. ADAMS.

(Filed April 13, 1905—Not to be reported.)

Easement—Obstructing private alley—Defense—Sufficiency—In an action by appellant claiming an easement by prescription over an adjacent private alley as an appurtenant to his lot, and charging that appellee had obstructed it by building a fence across it, an answer by appellee denying that appellant owned or had ever used the passway as a matter of right, or at all, and that as agent of the owners of the fee in the passway he had built the fence across it, presented a good defense to the action.

Z. Gibbons, J. S. Smith, W. G. Wigglesworth and Thornton & Kerr for appellant.

Morton, Webb & Wilson for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant claimed as an appurtenant to a lot in the city of Lexington an easement over an adjacent, private alley way. In this suit he charged that appellee had, by building a fence across the way, obstructed his use of it. Appellant claimed the use by prescription. Appellee, in answer, denied that appellant owned, or had ever used, the passway as a matter of right or at all. He further answered that as the agent of the owners of the fee, over which the passway was claimed, he had built the fence across it. The law and facts were submitted to the judge without a jury. There is no separation of the court's conclusions of law and of fact, nor is there a bill of exceptions in the record. The sole question then is, did the answer present a defense? Appellant contends that the answer is in the nature of a plea in confession and avoidance; that it admitted the wrongful closing of the passway, and sought to justify it. We do not so understand it. Under our

Code a defendant may present as many defenses in his answer as he may have, so long as they are not inconsistent, one with the other.

In this action for damages against appellee for the alleged wrongful obstruction of the passway claimed to be owned by appellant, it was a good and complete defense that appellant did not in fact own the passway, and had no right to an easement over it, for if appellant had no right to use it in any event, he had no cause of action against any one who so obstructed it. Whether or not appellee showed a sufficient justification from the owners of the land in building the fence is immaterial, for if either paragraph of the answer constituted a complete defense to the cause of action set out in the petition the case is at an end. We think it did, and the judgment is, therefore, affirmed.

COMMONWEALTH v. TERRY.

(Filed April 13, 1905—Not to be reported.)

1. Indictment—Shooting at random—Public highway—Under an indictment for shooting at random in a public highway the defendant may be found guilty where it is shown by the evidence that the highway in which the shooting occurred had been continuously used by the traveling public as a matter of right for more than fifteen years, although it may not have been formally dedicated and accepted by the county court as a public county road.

Wm. Lewis, N. B. Hays and C. H. Morris for appellant.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Settle.

Appellee was indicted by the grand jury of Owsley county and tried in the circuit court of the same county for the offense of shooting a pistol at random upon a public highway. Upon the conclusion of the Commonwealth's testimony the court, upon appellee's motion, peremptorily instructed the jury to find him not guilty, which was done accordingly. The Commonwealth having objected and excepted to the giving of the peremptory instruction, prayed an appeal for the purpose of having this court pass upon the action of the lower court in that behalf.

The peremptory instruction was granted upon the ground that the Commonwealth failed to prove that the road upon which appellee discharged his pistol had been established by an order of the county court, or that it had been maintained by an order of such court appointing a surveyor and allotting hands to keep it in condition for use as a public highway. The guilt of the appellee fully appears from the evidence, which proved with equal certainty that the road in question has been used by the public for travel for forty years or more.

Two ex-county judges, Moore and Hogg, both old residents of Owsley county, were introduced as witnesses by the Commonwealth. The former testified in part as follows: "It's a road leading up Sugar Camp creek, and there are two forks to the creek, and there is a road leading up each fork of the creek; that road up the right hand fork of the creek (the one upon which appellee committed the offense charged) goes to the head of the creek and

across the hill and intersects with the main road on the South Fork river. It has been used by the public ever since I have known it. People walk over it, ride over it, and haul over it, and have for many years."

In reply to the question "How long has it been so used?" The witness said: "For forty years or more."

Judge Moore was fully corroborated by Judge Hogg. In brief, the testimony as a whole established beyond a doubt the fact that the road in question has been continuously used by the public as a highway, and for every purpose for which a public road, established by an order of the county court, is used, more than fifteen years; that such use has been adverse to and free of interference from any owner of the land over which the road runs, and while it is true that no proof was offered to show its establishment as a public road or highway by an order of court, it is likewise true that the uninterrupted use of a highway by the public as a right for fifteen years constitutes it a public road by prescription. (Lou., Hen. & St. L. Ry. Co. v. Commonwealth, 104 Ky., 35; Witt v. Hughes, 23 Ky. Law Rep., 1886; Gatewood v. Cooper, 18 Ky. Law Rep., 869.)

In *Riley v. Buchanan*, 25 Ky. Law Rep., 863, the question of whether the public can acquire the right to a highway by prescriptive use is elaborately discussed (opinion by Judge O'Rear) and all the authorities carefully considered. In that case the conclusion was reached that a highway may be acquired in that way by the public. As to the manner in which this is effected it is said in the opinion supra: "Its establishment is by the dedication of the land to the use of the public as a highway, and its acceptance and use by the public for that purpose. Ordinarily the dedication is by statutory proceedings, showing both the dedication and the acceptance. But it is not essential that the evidence of either should be established by the records. If the owner of the fee sets apart to the use of the public a passway over his land, intending to dedicate it to the public use, it is not required to be in writing. A dedication of land to public use may be by parol. It is sufficient if his intention and express act are clear and coincide. In that event the dedication will be effective immediately upon its acceptance by the public. (Elliott on Roads and Streets, 127.) If, however, there is not an express dedication, but the owner suffers the public to use the passway, knowing it is claiming it as a matter of right, the law presumes the dedicator's intention to be in accord with the public's use. This does not depend on whether there has in fact been an actual dedication to the public, but it is founded upon the principles of estoppel in pais. * * * A dedication by the owner to the public use is not alone sufficient. * * * It is, therefore, necessary that there should be an acceptance by the public as well as a dedication by the owner. * * * We feel constrained by reason and authority to hold that while an acceptance by the public is essential to a complete dedication of a public highway or passway, the acceptance may be either by formal ratification by the proper official board of the municipality, or by implication by it, where it takes charge of the road by directing improvements on behalf of the public, or otherwise by overt act recognizes it as a public road; or it may be by the public by such protracted and continued use as to clearly indicate its acceptance when the road dedicated is a benefit to the public and not a burden. In the last-named state of case

a formal acceptance by the proper legal authority will be conclusively presumed to have taken place."

Applying the principles announced by the case *supra* to the facts of the case at bar the conclusion is inevitable that the road upon which appellee discharged his pistol was a public road or highway within the meaning of the statute under which he was indicted. It follows, therefore, that the trial court erred in granting the peremptory instruction by which the jury were directed to find appellee not guilty.

Wherefore, the conclusions of law herein expressed are certified to the lower court.

COMMONWEALTH v. TERRY.

(Filed April 13, 1905—Not to be reported.)

Certifying the law to lower court—The law of this case is certified to the lower court upon the authority of opinion in same case this day decided.

Wm. Lewis, N. B. Hays and C. H. Morris for appellant.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Settle.

In this case the appellee was indicted by the grand jury of Owsley county for the offense of discharging a pistol at random upon the public highway. Upon his trial for the offense in question the lower court at the conclusion of the testimony introduced by the Commonwealth peremptorily instructed the jury to find appellee not guilty, which they did. To that ruling the Commonwealth at the time objected and excepted, hence this appeal.

In another case of the Commonwealth against appellee, in which he was indicted and tried in the same court for an offense similar to that here charged, this court, upon a similar state of facts, decided in an opinion this day handed down, ante, 684, that the trial court erred in giving a peremptory instruction directing the acquittal of appellee by the jury. The opinion in that case being conclusive of the questions presented by this appeal, it is unnecessary to again enter upon a discussion of the same questions of law and fact. We, therefore, adopt that opinion as the opinion of the court in this case, and it is so certified to the lower court.

CHAMBERLAIN v. GOLDEN.

(Filed April 13, 1905—Not to be reported.)

Lien—Materialmen — Failure of proof — Attempted compromise—In an action to enforce a lien for lumber furnished for the erection of a dwelling house, which was controverted, and on the trial was dismissed by the court on the evidence, the appellant is not entitled to the favorable consideration of the court in alleging that appellee while intoxicated, in consideration of \$5 paid to him by appellant, agreed to withdraw his defense, while at the said time appellee was not the owner of the house nor in possession of it, and this fact was known to appellant.

John H. Wilson and J. N. Bradford for appellant.

James D. Black and Pitzer D. Black for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by the appellant in the lower court to enforce a lien for lumber furnished appellee in the erection of a dwelling house in the town of Barbourville, Ky., amounting to the sum of \$47.12 balance. The account produced by appellant and filed with his petition begins with items of lumber sold December, 1889, and continues to April 30, 1890. The total value of the lumber alleged to have been furnished to appellee in the erection of this house amounted to \$182.12, and deducting the amount paid, \$85, left the balance of \$47.12 due appellant.

The appellee presented several defenses to appellant's cause of action, but we will notice only one. He denied that the items in the account sued on, beginning with January 21 and ending April 30, 1890, amounting to the balance claimed, were furnished to him in the erection of this house or that they were so used. He alleged that the ceiling and the other items specified in this contested part of the account, used in the erection of the building named, were purchased from others. The appellant controverted this, proof was heard and upon a trial the lower court dismissed appellant's action. The evidence preponderates in favor of the appellee that the lumber referred to in that part of the account contested was not used in the erection of this dwelling, but that the lumber was purchased from three other parties.

Appellant contends that the appellee, some time after the institution of his action and after appellee had filed his answer, in consideration of \$5, paid to appellee, executed a writing agreeing to withdraw his defense to the action and permit appellant to enforce the lien on the dwelling for the payment of the amount of the balance claimed by him. Appellee did not deny the execution of the writing or of receiving the \$5 in consideration therefor, but says that at the time of the execution thereof his counsel was absent and that he was so much under the influence of intoxicating liquors that he was not capable of protecting himself. It appears that at the time appellee, for the consideration of \$5, agreed to abandon his defense to appellant's action that he was not the owner of the dwelling house; that he had sold it to one Bowman, who had sold it to Black, and Black was then in possession thereof; that these facts were known to both appellee and appellant. Neither Bowman nor Black had been made parties to the action. Appellant knew that Black was the owner of the dwelling, was interested in the question as to whether or not his alleged lien should be enforced upon this property and his action in securing this writing from appellee under the circumstances is not entitled to the favorable consideration of the court, and especially when it is shown under the proof that he had a good defense to the action.

Wherefore, the judgment is affirmed.

FRAZER v. THE FRISBIE FURNITURE CO., &c.

(Filed April 18, 1905—Not to be reported.)

Husband and wife—Voluntary conveyance by husband—Creditors—Effect—Under Kentucky Statutes, section 1907, a voluntary conveyance of land by the husband to his wife without valuable consideration is void as to all debts owing by the husband at the time of such conveyance, but no evidence being shown of a fraudulent intent of the husband to defeat his subsequent debts, such conveyance was not fraudulent as to his subsequent debts.

J. T. Simon and Byrne & Read for appellant.

M. C. Swinford for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Settle.

In December, 1899, W. D. Frazer died in Harrison county testate. His will was admitted to probate by the Harrison County Court, and soon thereafter T. E. King was appointed and duly qualified as administrator with the will annexed of his estate.

Shortly before his death W. D. Frazer, by two deeds duly executed to T. E. King, one in August and the other in September, 1899, conveyed to him in trust, to be immediately thereafter conveyed by King to the grantor's wife, Jane B. Frazer, for life, two parcels of land, containing in the aggregate about fifty-two acres, lying near the city of Cynthiana. A life estate in these lands King, by proper deed, conveyed at once to Jane B. Frazer, as provided by the deed from W. D. Frazer to him. The only consideration expressed in the several deeds mentioned was \$1, the payment of which was acknowledged. The grantor was insolvent at the time of making the conveyances.

On January 16, 1902, this action was instituted by appellees, D. B. Veech, A. J. Carroll and the Frisbie Furniture Co., in the court below against the appellant, Jane B. Frazer, T. E. King, as administrator, with the will annexed of the estate of W. D. Frazer, deceased, and Jesse W. Frazer, infant, the only child and heir at law of W. D. Frazer. The object of the action was to obtain a settlement of the estate of W. D. Frazer, and set aside the deeds from W. D. Frazer to T. E. King, and from him to Jane B. Frazer, whereby the latter was conveyed the life estate in the lands before mentioned, upon the ground that the conveyances were voluntary, without consideration and fraudulent as to the appellees, who were creditors of W. D. Frazer, and that he was insolvent at the time. For these reasons the court was asked to subject the lands to the satisfaction of appellee's debts. It appears from the statements of the petition that the claims of appellees, Carroll & Veech, against the estate of W. D. Frazer (that of the former being an account of \$100 for legal services and of the latter a note of \$137, subject to a credit that reduced it to \$111.10) were created before and existed at the time of the conveyances from W. D. Frazer through King to his wife, but that the claim of the Frisbie Furniture Co. was an account for the burial expenses of W. D. Frazer, which was created of course after his death.

The appellant, Jane B. Frazer, filed answer, which merely traversed the averments of the petition as amended. The case was referred by the court

to the master commissioner. The order of reference directed him to report all debts against the estate of W. D. Frazer that were created before the conveyance of the lands by W. D. Frazer to his wife. The commissioner reported not only the debts existing at the time of the conveyances in question, but also all debts of the decedent created after that time that were filed with him. Among the debts reported by him was one of \$6,600, due upon a judgment in favor of Kate Frazer, widow of W. D. Frazer's father. The total indebtedness shown by the commissioner's report was \$7,048.04.

Upon submission of the case a decree was rendered by the chancellor declaring the deeds from W. D. Frazer to T. E. King, and that from the latter to appellant, Jane B. Frazer, fraudulent as to the debts of W. D. Frazer antecedently created, and directed the sale of the fifty-two acres of land to pay same, but the decree made no appropriation of the proceeds of sale, that and other questions not then decided by the court being expressly reserved for future adjudication. Upon the second sale of the land (the first having been set aside by the court) it brought \$4,825. Out of this sum a supplemental decree entered by the court directed the commissioner to pay certain fees to attorneys, the commissioner and costs amounting to \$459.27, and the balance, \$4,469.89, he was ordered to distribute as follows: One hundred and sixty-eight dollars and fifty-eight cents to the Frisbie Furniture Co., in satisfaction of its debt; \$4,311.58 to Kate Frazer as a credit on her claim of \$6,600. It being the opinion and judgment of the court that these two debts were in law preferred claims against the estate of W. D. Frazer, deceased. In view of this disposition of the proceeds of the land it appears that nothing was received by the appellees, Carroll & Veech, upon their claims.

It is contended by counsel for appellant that upon the pleadings and proof in this case it was error to set aside the deeds by which she derived title to a life estate in the lands in controversy, and also that the judgment directing the sale of the land was unauthorized because the debts of appellees, and especially those to the payment of which the proceeds of the land were applied, were created after the execution of the several deeds in question, and that in the absence of proof of actual fraud a voluntary conveyance cannot be declared void as to the subsequently created debts of the grantor.

The proof found in the record shows that the debts of appellees, Carroll & Veech, were created before the conveyances in question were made. We think the same is true of the demand asserted by Kate Frazer. It is true her judgment against W. D. Frazer was not rendered until after the date of the conveyances, but the debt itself upon which she obtained the judgment was owing by W. D. Frazer as the executor of his father's will to her prior to the voluntary conveyances, and at the date thereof was a valid, subsisting demand against him. The fact that it was later merged in the judgment did not make it any less a valid debt at the time of the conveyances from W. D. Frazer to appellant.

This action was brought under section 1907, Kentucky Statutes, which provides: "Every gift, conveyance, assignment, transfer or charge made by a debtor of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on

that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not, therefore, be deemed to be void as to such subsequent creditors or purchasers."

In *O'Kane v. Vinnedge & Co.*, 21 Ky. Law Rep., 1551. it is said: "If a party be indebted at the time of a voluntary conveyance of his property, such conveyance is presumed to be fraudulent as to those debts, and this presumption as to prior debts does not depend upon the intentions or circumstances of the party conveying, or the amount conveyed. The law will not permit an inquiry into these matters, or give them any weight or influence. As to subsequent debts, the creditor who assails a voluntary conveyance must show, in addition, circumstances justifying the presumption that the intent of the conveyance was fraudulent before the land conveyed could be properly subjected to the payment of such debts." (*Rose v. Campbell, &c.*, 25 Ky. Law Rep., 885.)

Applying the rule announced in the authorities supra to this case we find no evidence in the record conducing to show a fraudulent intent upon the part of W. D. Frazer to defeat subsequent debts in making the conveyance to his wife, consequently the debts against his estate reported by the commissioner and allowed by the court, including the claim of the Frisbie Furniture Co., that were created after the date of the conveyances in question, were not entitled to share in the proceeds of the land, but the conveyances were and are fraudulent and void as to the grantor's antecedent and then existing debts. It appears that the judgment in favor of Kate Frazer is preferred by statute, and its payment will consume the entire proceeds of the land after the payment of allowances and costs. The only error in the judgment of distribution was the order to pay out of such proceeds the claim of the Frisbie Furniture Co. as a preferred and the first debt. This error was not, however, prejudicial to appellant, as the entire proceeds of the land would in any event have been consumed by the judgment debt of Kate Frazer. Only Kate Frazer, or the appellees, Carroll & Veech, were prejudiced by the payment of the debt of the Frisbie Furniture Co., and as they do not complain of the error, a reversal therefor will not be granted.

Wherefore, the judgment is affirmed.

NICKOLS v. COMMONWEALTH.

(Filed April 13, 1905—Not to be reported.)

Liquors—Instructions—An instruction to the effect that a sale of whisky on a boat in Barren river at any point where the river is the boundary of Barren county is a sale in that county, is authorized by section 20 of the Criminal Code, and an instruction in substance advising the jury that defendant was guilty if he was interested in the whisky sold, and had a clerk or partner at the boat where it was sold, making sales in quantities of less than five gallons, and that such sales were made with his approval, correctly states the law.

Duff & Hutcheson for appellant.

N. B. Hays and Chas. H. Morris for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Nunn.

The appellant was indicted and tried for the offense of unlawfully selling spirituous liquors in violation of the local option law and was convicted and fined \$60, from which judgment he has appealed. On his motion for a new trial he stated three reasons why a new trial should be granted: First, because the verdict was not sustained by sufficient evidence and was contrary to law; second, because the court refused to grant him a peremptory instruction; third, because the court erroneously gave to the jury instructions Nos. 2 and 4, to which he excepted at the time.

The evidence shows that the prosecuting witness received the whisky and paid for it through a small hole in a boat in Barren river, which was located near the house of appellant, with a slick path leading from the house to the boat. While the prosecuting witness did not see the party who actually delivered the whisky to him, yet from all the facts and circumstances proven in the case the jury was authorized to conclude that the appellant either delivered the liquor to him in person or was interested in the sale, and that it was made with his knowledge, approval or consent, and we can not say that there was not any evidence to support the finding of the jury.

Instruction No. 2, complained of by appellant, is as follows: "A sale of whisky on a boat on Barren river at any point where the river is a boundary of Barren county is a sale in said county." This instruction was authorized under section 20 of the Criminal Code, which reads as follows: "If a river be the boundary between two counties, the criminal jurisdiction of each county shall embrace the offenses committed on the river, or any island thereof."

Instruction No. 4 is as follows: "If you believe from the evidence to the exclusion of a reasonable doubt that in Barren county, within twelve months before the finding of the indictment herein, any agent, clerk, employe or partner of defendant sold to E. A. Berry whisky in a quantity less than five gallons at one time, and that defendant was owner in whole or in part of said whisky, or was interested in the sale thereof, and that said sale was made in the regular course of business, or was made with the knowledge and approval of defendant, then such sale was in law a sale by defendant to said Berry."

By this instruction the court in substance told the jury that if defendant was interested in this whisky, and had a clerk or a partner at the boat making sales in quantities less than five gallons, and that it was done in the usual course of business and with the knowledge and approval of the appellant, then he was guilty. This the jury evidently believed.

For these reasons the judgment of the lower court is affirmed.

F. WEIKEL CHAIR CO. v. NAPPER.

(Filed April 18, 1905—Not to be reported.)

Affirming case upon the evidence—The facts in this case examined and held insufficient to disturb the finding of the chancellor.

Chas. Carroll for appellant.

J. T. Combs for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Nunn.

The question at issue in this case is one of fact, and is whether appellant purchased of appellee the timber on a boundary of land in Bullitt county or in Nelson county. The appellant claims that the timber was on seventy acres of land located in Bullitt county. Appellee that it purchased the timber on a like number of acres in Nelson county.

It appears that appellee gave to appellant an option on the timber on both tracts of land, but it appears from the preponderance of the evidence that on the 24th of February, 1908, the appellee, with the consent of the appellant, withdrew the option on the Bullitt county land and appellant at that time agreed to accept the timber on the land in Nelson county. On the next day, the 25th of February, 1908, they met at Boston, and appellee executed a conveyance, as appellee understood it, for the timber in Nelson county. The description, as given in the conveyance, does not describe the land on which the timber is situated in either county. A part of the description fits the land in Nelson county alone and a part of it suits that in Bullitt. The deed, as originally prepared, referred to land as in Nelson county. The word "Nelson" was erased and the word "Bullitt" was written above it. Appellee claims that this was not the condition of the deed when he signed it, while appellant claims that it was. Appellee and two other witnesses stated that at the time of the execution of the deed it was then stated that the timber appellee conveyed was on land in Nelson county. Appellee controverts this.

There were many facts and circumstances proven to corroborate the contention of each, but it would be of no benefit to any one to recite them. We are of opinion upon the consideration of the whole case that the evidence slightly preponderates in favor of the claim of the appellee. At least we are unwilling to disturb the finding of the chancellor.

Judgment affirmed.

COMMONWEALTH v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed April 18, 1905—Not to be reported.)

Affirmed upon the authority of the case of Commonwealth v. L. & N. R. R. Co., 26 Ky. Law Rep., 498.

Ed. Daum, N. B. Hays and C. H. Morris for appellant.

Benjamin D. Warfield and W. H. Wadsworth for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from an order of the Fleming Circuit Court sustaining a demurrer to an indictment against the appellee, charging it with having suffered and committed a nuisance by the improper erection and maintenance of a bridge and approaches thereto on a public highway, either under or over the right of way of the railroad in Elizaville, Ky.

The indictment in this case is similar to the one against appellee passed upon by this court in 26 Ky. Law Rep., 493, the only difference being in this case the time when the offense was committed is stated. It also appears that this indictment was found before the opinion referred to was rendered.

For the reasons given in that opinion the judgment of the lower court sustaining the demurrer to the indictment is sustained.

COMMONWEALTH v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed April 18, 1905—Not to be reported.)

Affirmed for the reasons stated in case of above style decided of this date.

N. B. Hays, C. H. Morris and Ed. Daum for appellant.

Benjamin D. Warfield and W. H. Wadsworth for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Nunn.

This appeal presents the identical question as in the case of the same style this day decided by this court and the opinion in that case is he referred to, and for the reasons therein stated the judgment of the lower court is affirmed.

CITIZENS SAVINGS BANK v. LANDRUM, &c.

(Filed April 18, 1905—Not to be reported.)

Stocks—Insurance—Judgment—The controversy in this action being between M. B. Landrum and the administratrix of J. H. Boswell, and the proof showing that the stocks sought to be reached belonged to Mrs. Boswell; that she collected her husband's insurance and paid his debts, in this way redeeming the stocks, and there was no effort to recover any judgment against her, nor was the insurance company made a party, and there is no allegation that the company paid her the insurance after having received notice from any creditor of J. H. Boswell as required by section 655, Kentucky Statutes, nor is there any allegation that the premiums paid by Boswell were paid in fraud of the rights of creditors, the judgment in favor of Mrs. Boswell will not be disturbed.

Lee & Hester, D. G. Parks and Thos. E. Moss for appellant.

W. J. Webb and L. R. Smith for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Nunn.

In the month of November, 1902, the appellant recovered a judgment in

the Graves Circuit Court against W. L. Landrum and James H. Boswell jointly for the sum of \$2,000, with interest and costs. In the month of December thereafter an execution was issued in appellant's behalf on this judgment, which was placed in the hands of the sheriff for execution and was by him returned endorsed "no property found." On the 23d of April, 1903, this action was instituted by the appellant against W. L. Landrum, M. B. Landrum, his wife, J. L. Stunston and James H. Boswell. The action was in the nature of a bill of discovery, and the petition alleged that W. L. Landrum, in connection with his wife, with the fraudulent purpose and intent to defeat his creditors in the collection of their debts, conveyed valuable real estate to the defendant, J. L. Stunston, which was afterward by him conveyed to appellee, M. B. Landrum, the wife of W. L. Landrum; that all these parties had knowledge of the fraudulent purpose of W. L. Landrum, and participated therein. Appellant asked the court to declare these conveyances void and adjudge the property to be sold and out of the proceeds pay a couple of mortgage debts against it, and the balance to be applied to the payment of appellant's debt and costs.

In appellant's petition the following allegations were made against the defendant, James H. Boswell: "Plaintiff further says that the defendant, James H. Boswell, owns stock in the Exchange Bank, Merit Manufacturing Co., a Texas oil company, and other corporations, and other personal property of greater value than the amount of plaintiff's debt, which can not be reached by an execution."

Landrum and wife and Stunston all answered, controverting the allegations of the petition. Boswell died without having answered the petition. His wife administered upon his estate, and she as such administratrix filed an answer, controverting the petition in so far as it related to her deceased husband. The evidence was taken, the court tried the case and dismissed the petition, and appellant has appealed. Since the appeal was filed in this court the following agreement was entered into by the appellant and appellee, M. B. Landrum: "The judgments in favor of the Citizens Savings Bank against W. L. Landrum and J. H. Boswell, sought to be collected by this appealed suit, having been sold and assigned to appellee, M. B. Landrum, by agreement this appeal is dismissed as to appellee, M. B. Landrum, and the branch of the appealed suit against W. L. Landrum and J. H. Boswell is hereby transferred to her, and this appealed suit as against them is to proceed for her use, but without liability on the Citizens Savings Bank for future costs. The Court of Appeals of Kentucky is hereby requested and authorized to file this agreement and make such orders in this case as necessary to carry into effect the provisions contained therein." This agreement was dated and signed by the parties, and this court made an order in conformity with this agreement.

The matter in issue as it now stands is M. B. Landrum against the administratrix of J. H. Boswell. The proof in the case with reference to the issue with Boswell shows that the stocks in the bank, the manufacturing company and the oil company belonged to Mrs. Boswell, his wife; that he sold her real estate and purchased these stocks and erected her a dwelling with the balance of the proceeds. It appears also that her husband borrowed money of the banks in the city of Mayfield, and she suffered and per-

mitted her husband to deposit these individual stocks of hers as collateral to secure the loans made to him; that she collected these two insurance policies, which were made payable to her, amounting to \$7,500, with which he paid the debts due by her husband to the banks, and in this way redeemed her stocks; that it took in addition to these sums \$1,000 of her individual means. This is admitted by the appellant in its brief, but it contends that her husband paid the premiums on these policies and that his creditors are entitled to recover from her or to receive from the insurance companies the amount of the premiums which he had paid. It will be noted that she was not made a party to the action individually. There was no effort to recover any judgment against her, neither was the insurance company made a party. It appears that the insurance company paid to her the policies, but there is no allegation or proof that it paid her the amount of these policies after having received written notice by any creditor of J. H. Boswell as required by section 655 of the Kentucky Statutes, nor is there any allegation in appellant's petition that the premiums paid by J. H. Boswell on these policies were paid in fraud of the rights of the creditors or with any intent to injure or affect their rights in any respect, nor was there any proof introduced on the trial to that effect. There is not any pretense that she has any funds in her hands belonging to the estate of J. H. Boswell, as administratrix, or otherwise, with which to pay the debts of her deceased husband.

For these reasons the judgment of the lower court with reference to the appellee, Boswell, is affirmed.

COMMONWEALTH v. WILLIAMS.

(Filed April 14, 1905.)

1. Ordinances—Validity—Adoption—Publication—Approval by mayor—Under Kentucky Statutes, section 3638, part of charter of cities of the fourth class, which provides that "an ordinance shall be signed by the mayor, attested by the clerk, and published at least once in a newspaper in said city. * * * and shall be in force from and after the publication thereof," it appearing that the mayor of cities of the fourth class has no veto power, the council is the legislative body of the city, and an ordinance of such city is valid when passed by a vote of at least three members of the council and published, although it may not have been signed or approved by the mayor.

2. Making up record of council—Tardiness of clerk—An ordinance of a city of the fourth class takes effect upon its passage by the votes of at least three members of the council and its publication, and it is not material at what date it was made up and regularly approved by the council. The will of the council can not be defeated by the tardiness of the clerk in making out the record on the books of the city council.

3. Physicians—Prescriptions for liquors—Only as a medicine—Penalty—Good faith—An ordinance of a city of the fourth class making it unlawful for any physician to make or give a prescription for any spirituous, vinous, or malt liquors in said city to enable him to purchase same, unless such person is sick, or such liquor is required as a medicine, and fixing a fine of from \$25 to \$100 for its violation, is not void because it undertakes to punish the physician for giving a prescription where he makes an honest mistake as to the whisky being required as a medicine. The rule is that a statute

will not make an act criminal unless the offender's intent concurred with his act, and whether he acted in good faith or not is a question for the jury.

4. Jurisdiction—The criminal jurisdiction of the Court of Appeals is governed by the Criminal Code of Practice. An appeal may be taken by the Commonwealth if a fine exceeding \$50 might have been inflicted.

R. C. Cherry for appellant.

C. T. Atkinson and J. D. Wickliffe for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Hobson.

The city of Bardstown adopted an ordinance making it unlawful for any druggist to sell spirituous, vinous or malt liquors on Sunday, or an election day, or between the hours of 10 o'clock p. m. and 5 o'clock a. m. of any other day except upon the written prescription of a regular practicing physician. The second paragraph of the ordinance is in these words: "That it shall be unlawful for any physician to make or give to any person a prescription for any spirituous, vinous or malt liquors, or enable him to purchase same, unless such person to whom such prescription is given is sick, or such liquor is absolutely required as a medicine. Such prescriptions can only be given by a regular practicing physician, legally authorized to practice medicine, and must state the date thereof, the quantity prescribed and the name of the person to whom prescribed. Any physician who makes or signs any prescriptions for said liquors to enable same to be purchased, unless such person to whom it is given is sick, or such liquor is absolutely required as a medicine, shall, upon conviction, be fined in any sum not less than \$25 nor more than \$100 for each offense: Provided, The provisions of this ordinance shall not apply to the procurement and use of such liquors for sacramental purposes."

The ordinance was introduced in the council on the 28d of August, 1904, and was passed on September 18, 1904. It was published in Nelson County Record on September 21. On October 8 a warrant was issued against appellee, T. D. Williams, charging him with having given a prescription on September 25 to Frank Cox for spirituous liquors when he was not sick, and when the whisky was not required as a medicine. There was a trial before the police judge; the defendant was found guilty and his fine fixed at \$25. He appealed to the circuit court. In the circuit court he entered a motion to quash the warrant and dismiss the prosecution because there was no ordinance in force at the time the offense was alleged to have been committed. The court having heard the evidence on the motion, sustained it, and the plaintiff appeals.

The evidence heard by the court showed that John W. Sisoo, mayor of the city, did not sign the ordinance until October 5, and that it was not attested by the clerk until that day; that the ordinance was adopted by the council by a unanimous vote at its regular monthly meeting on September 18, and was duly recorded in the council's record book, signed by the mayor and attested by the clerk. But this record on the book was made up and signed after September 25, the clerk not having written up his minutes sooner, he having a large number of ordinances to record, was making out his record as his custom was, and had not completed it at that time.

The act for the government of cities of the fifth class, including Bardstown, contains these provisions: "The mayor shall preside at all meetings of the council, and may vote in case of a tie vote of the council, and in case of the absence of the clerk the mayor or mayor pro tem shall appoint one of the members of the board clerk pro tem. (Section 8684, Kentucky Statutes.)

"The city council shall judge of the qualifications and election of its members. They shall establish rules for the conduct of their proceedings, and punish any member or other person for disorderly behavior at any meeting. They shall cause the clerk to keep a correct journal of all their proceedings, and at the desire of any member shall cause the yeas and nays to be taken on any question and entered on the journal. (Kentucky Statutes, section 8685.)

"And no ordinance, resolution or order shall have any validity or effect unless passed by the votes of at least three members of the city council. (Kentucky Statutes, section 8496.)

"Every ordinance shall be signed by the mayor, attested by the clerk and published at least once in a newspaper published in such city, or written or printed, and posted in at least three public places therein, and shall be in force from and after the publication thereof." (Kentucky Statutes, section 8688.)

The ordinance was published in the county paper as though attested by the clerk and signed by the mayor, but it had not been in fact signed by the mayor. It is insisted for appellee that although the ordinance had been adopted by the council and published in the county paper, still as it had not been signed by the mayor, when the offense charged was committed, the ordinance was not then in force. The rule on this subject is thus stated in 21 Am. & Eng. Ency. of Law, page 964: "There is a broad distinction between a requirement of the mayor's approval in order to give effect to ordinances and a mere requirement that he shall sign all ordinances, for while his signature may be, and usually is, the means adopted to designate his approval when his approval is required, if his signature alone is required the element of approval is absent. The true rule undoubtedly is that where the mayor or presiding officer of the city council is required simply to sign ordinances, and it is apparent that his act is ministerial in its nature and required merely to furnish evidence of the authenticity of the enactment, and the idea of approval is not involved, the requirement is directory only, and an omission to comply therewith will not render an ordinance invalid. But where a requirement that the mayor shall sign ordinances is couched in such language as appears in such a connection as to make it apparent that such signature is required as evidence of his approval, the requirement is mandatory." (1 Smith on Municipal Corporations, section 509.)

It will be observed from the provisions of the statute above quoted that the veto power is not conferred upon the mayor. His only power is to preside at the meetings of the council and to vote in case of a tie. The council is the legislative body of the city. Ordinances have validity or effect when passed by the vote of at least three members of the council and published. To hold that the failure of the mayor to sign an ordinance destroys its

validity would be in effect to confer on him the veto power withheld from him by the statute, for he could, in any case by withholding his signature, accomplish the same result as by a veto of the ordinance. This is not the meaning or purpose of the statute. Its purpose is simply to provide an evidence of the authenticity of the ordinance by the signature of the mayor, and is as to this directory only.

It is also insisted that there being no record of the passage of the ordinance approved on the books of the city council at the time the offense was committed the defendant can not be convicted. The ordinance takes effect upon its passage by the votes of at least three members of the council and its publication. When the validity of an ordinance is questioned the only proper evidence of the action of the council is the journal of their proceedings, which they cause the clerk to keep. When this journal is produced at the trial, and is regular on its face, it is not material at what date it was made up and regularly approved by the council, there being nothing in the statute so requiring. If the rule were otherwise the tardiness of the clerk in making out the record might defeat the will of the council altogether. There are many cases in which it is important for the protection of the interests of the city or the public health or safety that ordinances should take effect immediately upon their adoption and publication. To hold that they can not so take effect if the clerk had been remiss in making out the record would be to add to the terms of the statute. This question was fully considered in *McNulty v. Toopf*, 25 Ky. Law Rep., 430; *Reed v. Louisville*, 23 Ky. Law Rep., 1636; *Looke v. Commonwealth*, 15 Ky. Law Rep., 843; *Dillon on Municipal Corporations*, section 293.)

It is further insisted that the ordinance is void because it undertakes to punish the physician for giving a prescription where he makes an honest mistake as to the whisky being required as a medicine. The rule is that a statute will not make an act criminal unless the offender's intent concurred with his act. A case of honest mistake will be excepted out of the general statutory prohibition. (*Bishop on Statutory Crimes*, section 132; *C. & O. R. R. Co. v. Commonwealth*, 27 Ky. Law Rep., 176; *Thacker v. Commonwealth*, ante, 620.) If the defendant gave the prescription complained of in good faith as a physician, believing the whisky to be absolutely necessary as a medicine, he is not guilty; but if he did not act in good faith or upon reasonable grounds he is guilty. Whether he acted in good faith or not, or made an honest mistake of fact, is a question for the jury under the evidence, and for the determination of this question any evidence is competent which is admissible in other cases where intent is material.

The criminal jurisdiction of this court is governed by the Criminal Code of Practice. An appeal may be taken by the Commonwealth if a fine exceeding \$50 might have been inflicted. (Criminal Code, section 347.)

Judgment reversed and cause remanded for further proceedings consistent herewith.

PORTER v. PORTER'S EX'OR, &c.

(Filed April 14, 1905.)

1. Wills—Construction—Afterborn children—Pretermitted—Testator died in 1899, leaving a wife and seven infant children. His will was written January 24, 1887, and at that time he had but three children, one by a former marriage and two by his last wife, all boys. At his death he owned his home place of 297 acres, and a tract of 40 acres, known as the "Hall Place." His personal estate was not sufficient to pay his debts. He devised the 297 acres to his wife until her two sons became of age, when it was to go to them. By another clause one-third of his personal estate was to be held in trust for his wife and at her death such as remained was to go to her two sons and such other children, if any, he might have by her, and all of his personal estate not given to his wife to go to her two sons and such other children, if any, which he might have by her. In another clause he gave to his son M., who was a child by his first wife, the 40 acres, known as the "Hall Place," and if said son died before he was twenty one years of age it should go to testator's other children. After the will was probated the widow renounced its provisions as to her, and dower was assigned her in the land, and the executor brought this suit for a construction of the will, making the widow and all the seven children parties. The chancellor rendered a judgment holding that the four children born to decedent after the date of the will were "pretermitted," and entitled under Kentucky Statutes, section 4848, to participate in their father's estate, as if he had died intestate. From this judgment M., the son by testator's first marriage, has appealed. Held—That the will clearly indicates that testator's afterborn children were in his mind when his will was made, and he made such provision for them as he then thought proper, and under the language of Kentucky Statutes, section 4848, only "such afterborn children as are not provided for by any settlement, and neither provided for nor expressly excluded by the will, are pretermitted."

2. Same—The word "pretermitted" means "to pass by," "to omit," "to disregard." The statute (section 4848) was enacted not to control the right of the testator to dispose of his estate according to a plan of his own, but to guard against carelessness and oversight in those who, having written their wills, afterwards have children born unto them and fail to make provision for them. But if there be in the language of the testament a clear indication that there has been no oversight or omission, and that the testator has chosen to distribute his estate unequally among his children, or even to exclude some of them entirely, it is not the policy of the law to interfere with his right to do so.

Wm. J. Cox for appellant.

Pratt & Waddill for appellees.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Barker.

T. B. Porter died testate at his residence in Hopkins county, Kentucky, on the 18th day of June, 1899, leaving a wife, Elizabeth Porter, and seven infant children surviving him. His will was written on the 24th day of January, 1887, and at that time he had only three children, Murriss Porter, the appellant, Bradford Lawrence and Willie Morgan Porter. After his death the will was admitted to probate. His estate consisted of his home place, containing 297 acres, and a tract called the Hall Place, containing 40

acres. His personal estate at the time of his death seems not to have been sufficient to pay his debts and the costs of settlement. By the second clause of the will the home place of 297 acres of land was devised to the wife of the testator, Elizabeth Porter, until her two sons, Bradford Lawrence and Willie Morgan, arrived at the age of twenty-one years, or during her widowhood. If the widow married before her two children arrived at twenty-one years, the land was to go to them at once. When the youngest arrived at the age of twenty-one years they were to receive it at that date. The third and fourth clauses of the will are as follows:

"8d. I also give and bequeath to my said wife, Elizabeth Porter, one-third of my personal estate that may remain for distribution after the payment of my debts and the costs of administration. Said estate to be held in trust for her use by my executor, and the interest and profits thereof to be paid to her annually. At the death of my wife the personal estate devised to her which may remain shall go to my sons, Bradford Lawrence and Willie Morgan Porter, and such children, if any, as I may have by her, giving to each child an equal share.

"4th. All of my personal estate not bequeathed to my wife shall go to my sons, Bradford Lawrence and Willie Morgan Porter, and such other children, if any, as I may have by said wife, giving to each an equal share."

In the fifth clause of his will the testator gave to his son, Murris Porter, who was a child by a former wife, his tract of 40 acres, known as the "Hall Place," with the condition that if he died before he reached the age of twenty-one years it should go to the other children of the testator, giving to each an equal share. H. F. Porter, a brother of the testator, was nominated in the will as its executor. Within the time allowed by law the widow, Elizabeth Porter, renounced the provision of the will in her favor, and elected to take under the statute. Her dower was thereupon set aside to her in accordance with its provisions. After duly and legally qualifying, the executor, H. F. Porter, instituted this action in the Hopkins Circuit Court for the purpose of obtaining from the chancellor a construction of the provisions of the will, and a judgment dividing the estate among the beneficiaries in accordance with its terms. The widow and the seven children of the decedent were made parties defendant, and brought before the court, and the interests of the infants safeguarded by the appointment of guardians ad litem. The action was then submitted for judgment upon the pleadings, there being no controversy as to any material fact. Whereupon the chancellor entered a judgment, holding that the four children born to the decedent after January 24, 1887, which was the date of the will, were "pretermitted," and entitled under the provisions of section 4848, Kentucky Statutes, to participate in the estate of their father as if he had died intestate. So much of the statute as is pertinent to the subject in hand is as follows: "If a will is made when a testator has a child living, and a child is born afterward, such afterborn child, or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate, toward raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute ratably, either

in kind or money, as a court of equity in the particular case may deem most proper."

By the judgment commissioners were appointed to divide the estate among the seven children, giving to those called pretermitted such share in their father's estate as they would have taken had he died intestate, and to the three specially named devisees the remainder in the same proportion they would have taken had there been no pretermitted children. These commissioners divided the estate according to the terms of the judgment, and made report thereon in writing, which was afterwards approved by the chancellor, to all of which the appellant, Murris Porter, by his guardian ad litem, excepted and appealed.

The conclusion we have reached as to the children born after the date of the will being pretermitted within the terms of the statute renders it unnecessary that we should examine the various exceptions filed to the commissioner's report. It will be observed that by the language of the statute only such afterborn children as are "not provided for by any settlement, and neither provided for nor expressly excluded by the will," are pretermitted. The word "pretermitted," according to Webster, means "to pass by," "to omit," "to disregard." The statute was enacted not to control the right of the testator to dispose of his estate among the beneficiaries of his bounty according to a plan of his own, but to guard against the hardship frequently arising from oversight and carelessness in those who, having written their wills, afterward have children born unto them, and fail to make provision for them. But if there be in the language of the testament a clear indication that there has been no oversight or omission, and that the testator has chosen to distribute his estate unequally among his children, or even to exclude some of them entirely, it is not the policy of the law to interfere with his right to distribute his estate according to his pleasure. An examination of the will in question shows that the testator had in mind the possibility or even probability of there being other children born to him after its date. By sections 8 and 4 he provides that such afterborn children shall participate in such personal property as is disposed of under its terms after his death. This clearly indicates that these afterborn children were in the mind of the testator at the time his will was written, and he made such provision for them as he thought proper. It does not alter the principle of law that by the accidents of time the testator at his death had little or no personal property to divide among his children. The will must be construed in this case, where the testator left no personal property, just as if he had left a large personal estate. This being true, it follows that the chancellor erred in holding that the afterborn children were pretermitted under the terms of the statute, and in permitting them to participate in the division of their father's real estate, which was specially devised to his three sons.

For the reasons indicated the judgment is reversed and cause remanded for proceedings consistent herewith.

Whole court sitting, except Judge Nunn.

JONES v. DULANEY & MITCHELL, &c.

(Filed April 14, 1905—Not to be reported.)

1. Liens—Subrogations — Partnership estate—Seeley, being a surviving partner, brought suit against Robinson for debt due the firm, and before the commissioner's report of indebtedness was confirmed the latter made a deed to Jones of his entire interest in his father's estate (his father being deceased partner of Seeley), but paid the lawyers, who had a lien upon the judgment, their fee. Having done this he was entitled to credit to that extent upon the judgment which had been assigned by Seeley.

2. Same—The surviving partner holds the assets of the firm as the trustee of an express trust, and the assignee of such partner takes no greater rights than such partner, knowing that Seeley held the judgment as surviving partner.

W. B. Gaines and S. D. Hines for appellant.

Dulaney & Mitchell and Lewis McQuown for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Hobson.

Robinson & Seeley were partners in business at Bowling Green, selling, among other things, ice and beer. John A. Robinson, Jr., a son of the senior member of the firm, was its agent to sell ice and beer, and collected as such a considerable sum of money, which he did not pay over to the firm. His father died and the business of the firm was in the hands of Seeley as surviving partner, who brought suit against him to recover the balance in his hands due the firm. On October 3, 1894, a commissioner's report was filed in the action showing that he was indebted to the firm in the sum of \$658.31. After the filing of this report he made a deed to appellee, W. H. Jones, who was his brother-in law and also the administrator of his father's estate, by which he conveyed to Jones his entire interest in the estate. On October 6, 1894, the commissioner's report referred to was confirmed and judgment was rendered in favor of Seeley in accordance therewith. A lien was given Seeley's attorneys, Dulaney & Mitchell, for a fee of \$100 for their services in the action and the benefit of the judgment, except as to this and the costs, was transferred to William L. Dulaney, one of the firm of Dulaney & Mitchell. Execution was issued on the judgment and returned no property found and thereupon this suit was brought by Dulaney & Mitchell against Robinson and Jones to set aside the deed which Robinson had made to Jones, and to subject the property thereby conveyed to the debt on the ground that the conveyance was made to cheat and delay Robinson's creditors after it was ascertained that a judgment would go against him in the action referred to. Robinson filed an answer in which he denied the allegations of fraud, and Jones also filed a similar answer. They also denied the title of Dulaney & Mitchell to the judgment, charging that Seeley, as surviving partner, had no authority to transfer the judgment to them. During the progress of the action Jones, as administrator of the estate of the elder Robinson, was made, on his motion, a party defendant to the action, his petition being taken as his answer. He alleged that Seeley had made no settlement as surviving partner and was bankrupt; that he, as administrator, had been compelled to pay the fee of Dulaney & Mitchell of \$100, and

to this extent was entitled to be substituted to the benefit of the judgment. He also alleged that the transfer of the judgment by Seeley to Dulaney was made as an attempt to pay an individual claim due Dulaney from Seeley by the use of the partnership funds; that the transfer was void as Dulaney well knew the facts, and he asserted a right to the judgment on behalf of the estate of Robinson, Sr. On final hearing the court set aside the deed which Robinson had made to Seeley, and subjected the property to the plaintiff's claim.

Dulaney & Mitchell had a lien upon the judgment for their fee of \$100. When Robinson's estate was compelled to pay, and did pay, Dulaney & Mitchell, as between him and Seeley he was entitled to subrogation to the lien of Dulaney & Mitchell, and to this extent the judgment should have been treated in equity as the property of Robinson, Sr. Dulaney & Mitchell only took by their assignment the balance of the judgment over and above the liens endorsed, and their interest under the assignment was in nowise increased by the fact that the estate of the elder Robinson afterwards paid them their fee. The court, therefore, erred in adjudging them the full amount of the judgment, and should, upon the petition of Jones as administrator of Robinson, have adjudged to him the benefit of the judgment to the extent of the attorneys' fee, which he had paid.

The surviving partner holds the assets of the firm as the trustee of an express trust. Like other trustees, he has no power to apply the trust fund to the payment of his individual debt, and if he does so the transferee, taking the fund with notice of the trust, simply succeeds to his rights and stands in his shoes. Dulaney was the attorney of Seeley in the action, and knew he held the judgment as surviving partner. He, therefore, took by the assignment no greater rights than Seeley had, and stood in this action just as Seeley would stand if he had brought the action. If there are creditors of the firm they must be first paid out of the firm assets; if there are no creditors, and either partner has received more than his share, they must be made equal on the settlement of the partnership accounts. If it does not appear that either has overdrawn, then the fund should be adjudged to them equally.

It is shown by the evidence that after the death of the elder Robinson, Jones, who was the administrator, went security for John A. Robinson, Jr., upon an agreement that his part of the estate should stand as security to protect Jones; that under this agreement he went security for him to the Warren Deposit Bank for \$700, to P. J. Potter & Co. for \$163.50, to Potter, Barclay & Co. for \$200, and stood responsible for him to the Bowling Green Ice and Cold Storage Co. for about \$700. The deed which John A. Robinson, Jr., made to Jones was made to carry out the verbal agreement, and to the extent of the debts above referred to it was not fraudulent, but should have been treated as a mortgage. It was fraudulent to the extent that the property conveyed exceeded these debts. The court properly ordered a sale of the property and the subjection of the entire interest of Robinson, Jr., in his father's interest, but Jones should have been adjudged a prior lien for the debts above referred to, and only the surplus of the property, after the payment of the debts for which Jones was liable, should have been subjected to the plaintiff's claim. If it should turn out that there is any part of the

property on which the plaintiffs have not a lien by reason of their attachment Jones should be required to exhaust first all the property covered by his lien which is not covered by the attachment.

Judgment reversed and cause remanded for a judgment and further proceedings consistent herewith. On the return of the case a settlement of the partnership accounts may be had, and the parties will be allowed to plead further and take additional proof on this subject if desired.

METCALFE v. COMMONWEALTH.

(Filed April 14, 1905—Not to be reported.)

1. Indictment—Homicide—Designation of offense—An indictment is not bad because it charges the defendant with "murder" instead of "willful murder," as it is designated in section 1149, Kentucky Statutes. The statute does not create the crime of murder or manslaughter, but only fixes the punishment for the common-law offense. The word "willful" in the statute may be considered tautological as willfulness is an essential constituent of murder.

2. Instructions—Antagonistic terms—An instruction to the jury covering the offense of voluntary manslaughter, which uses the two expressions, "in sudden heat and passion," and "without previous malice," are not so antagonistic as that the existence of one excludes the other as a motive for crime, both being proper to make clear to the minds of the jury that to reduce homicide from murder to manslaughter there must not exist "malice aforethought."

3. Passion—Excited beyond control—The use of the expression in the instruction, "and which did then and there excite the passions of defendant beyond control," was not prejudicial to appellant's substantial rights, as requiring the jury to perform a psychological task in measuring the effect of the provocation. The law requires the jury to ascertain or measure the effect of the provocation upon the mind of the defendant in order to believe the killing was done in sudden heat and passion.

4. Contradictory statement—Oral admonition by court—An admonition by the court to the jury as to the effect and purpose of a contradictory statement made by a witness, "that it must not be considered for any other purpose except to impeach the witness," need not be in writing, but may be made orally.

5. Commonwealth's attorney—Misconduct in argument—The fact that the attorney for the Commonwealth, in order to show that the killing was unnecessary, said to the jury in his closing argument that "the appellant could have withdrawn into the house and thus escaped from his brother's knife," and when objected to the court told the jury they must be governed by the instructions and not by the statement of counsel, was sufficient, and it was not error in the court to refuse to give the instructions then tendered by appellant, to the effect that he was not bound to retreat.

6. Evidence—Letters—It was not error in the court to refuse to admit as evidence that appellant, while in Missouri, received letters from his father inviting him to his home in Kentucky, as all the evidence showed that defendant was there with his father's consent and approval.

7. Questions for jury—In this case, where the actors were brothers, the scene of the tragedy their father's home, the witnesses the immediate family, the evidence being entirely contradictory, it was simply a question of

which set of witnesses were to be believed.

Bradley & Batson, M. C. Saufley and L. L. Walker for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Barker.

The appellant, John Metcalfe, was indicted by the grand jury of Garrard county, charged with the crime of murdering his brother, Ben Metcalfe, by shooting him with a pistol. A trial resulted in the conviction of the accused, and his punishment being fixed at confinement in the penitentiary for the term of his natural life.

The facts, briefly, are these: The deceased, Ben Metcalfe, was living with his father and mother in the father's home in Garrard county, Kentucky. John, for nine years, had been living in the State of Missouri, and we infer from the evidence that he was not prosperous.

Some three months prior to the homicide, upon invitation of his father, he and his family, consisting of a wife and three children, returned to Kentucky, and took up their abode in the same house with his father and mother, his brother Ben, and the latter's family. The relations between the brothers seem not to have been cordial, and there was constant friction between the three families. On the day before the killing John went to Richmond, Ky., as he says, to attend a cattle sale held there, for the purpose of obtaining such information as would enable him to safely invest in a cattle venture which he was contemplating with his father. While in the city he claims to have accidentally entered a hardware store to obtain a drink of water, and was persuaded by the proprietor to purchase a Smith & Wesson revolver, which he carried home with him.

Just prior to the tragedy the mother and Ben's wife had a quarrel about a matter not necessary to relate, and when Ben returned to the house from the barn where he was at the time of the quarrel he found his wife in tears. Being informed of the quarrel, he made some angry statement with reference to it. Here the evidence diverged. The Commonwealth insisted that he only said that he wished those who desired to quarrel would quarrel with him, and not with his family; that thereupon John, who heard the remark, took up the matter, rebuked Ben, and, without any provocation therefor, shot him through the heart, instantly killing him. The defense insisted, and introduced evidence to show, that Ben spoke of his mother in an angry way, and applied to her vile and insulting epithets; that thereupon John reproved him for so speaking of their mother; that Ben assaulted him with a knife, and the latter then fired the fatal shot in self-defense.

We have not undertaken to give the evidence in detail, or to do more than to set it forth in such outline as will serve to illustrate the questions of law arising upon the record necessary to be decided. It is said by the appellant that the indictment is bad because it charges him with the crime of "murder," instead of "willful murder," as it is designated in section 1149, Kentucky Statutes, and it is insisted that the crime mentioned in the statute is not common-law murder because it is called willful murder, and

thereby becomes a different offense. The statute does not create the crime of murder or manslaughter, but only fixes the punishment for the common-law offense. (*Conner v. Commonwealth*, 18 Bush, 714.) The statute in designating the crime as "willful murder" only appends one of the elements of the crime, and this, in a certain sense, may be considered tautological, as willfulness is an essential constituent of murder. But the addition of the word "willful" in the statute to "murder" does not, in any sense, change it from a common law to a statutory crime. Blackstone in his Commentaries, volume 4, page 194, says: "We are next to consider the crime of deliberate and willful murder." From which it appears that at common law the crime was known and spoken of as willful murder.

The second instruction given by the court is as follows: "However, if you believe from the evidence, beyond a reasonable doubt, that in the county, with the weapon and before the date aforesaid, the defendant in sudden heat and passion, created by such provocation as is ordinarily calculated to excite the passions beyond control, and which did then and there excite the passions of defendant beyond control, and without previous malice, willfully shot Ben Metcalfe, from which shooting said Ben Metcalfe then and there presently died, you should find defendant guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for not less than two nor more than twenty one years."

This instruction is criticised because it contains the expression "without previous malice," it being said that the absence of malice is necessarily included in the expression "in sudden heat and passion," and, therefore, the use of the former was supererogatory and prejudicial. Admitting for the purposes of this case that the two expressions "in sudden heat and passion" and "without previous malice" are so antagonistic that the existence of one excludes the other as a motive for crime, the use of the one after the other was only surplusage, and not prejudicial to the substantial rights of the accused. But we think the use of both was proper to make clear to the minds of the jury that to reduce homicide from murder to manslaughter there must not exist "malice aforethought." Frequently tautology is useful when clearness of meaning rather than logical refinement is desired.

It is also urged that the expression in the instruction, "and which did then and there excite the passions of defendant beyond control," was prejudicial to appellant's substantial rights, it being said that this placed before the jury a problem which they could not solve, because it required them to enter the mind of the defendant, and to accurately measure the effect of the provocation upon his passions, a psychological task which no jury could perform, but this is precisely what the law requires that they should perform. They were required, before being warranted to reduce the offense from murder to manslaughter, to believe that the killing was done in sudden heat and passion, created by provocation. How could they believe that the killing was done in sudden heat and passion without ascertaining or measuring the effect of the provocation upon the mind of appellant? The existence of crime universally depends upon the status of the mind of the actor with reference to his acts, and in this sense the determination whether a given act constitutes a crime is a psychological problem, to be solved by ascertaining and measuring the intent of the mind of the actor at the time

of the performance. It is complained that the court failed to define the word "feloniously" as used in the instructions. This point was made in the case of *Hutsell v. Commonwealth*, 25 Ky. Law Rep., 262, and decided adversely to appellant.

On the trial Adrian Metcalfe, the father of the brothers, testified to a state of facts strongly tending to establish the plea of self-defense. He was asked on cross-examination if he had not previously said to one Kuykendall that it was the "most cold-blooded murder ever committed in Kentucky," to which he answered no. Kuykendall was allowed to testify, over the objections of appellant, that the father did make the statement in question. The court orally admonished the jury that the purpose of the contradictory evidence was to impeach the testimony of the witness in so far as it had a tendency so to do, and they must not consider it for any other purpose. It is now urged that this admonition of the court was an instruction within the meaning of section 225, Criminal Code, and should have been in writing. This was ruled to the contrary in *Green v. Commonwealth*, 17 Ky. Law Rep., 943, and *Aiken v. Commonwealth*, 24 Ky. Law Rep., 523.

In his closing argument the Commonwealth's attorney said to the jury, to show that the killing was unnecessary, that the appellant could have withdrawn into the house, and thus escaped from his brother's knife. Upon objection to this statement the court told the jury they must be governed by the instructions, and not by the statement of counsel. This, in our opinion, was sufficient for the necessities of the occasion, and it was not error to refuse to give the instruction then tendered by appellant, to the effect that he was not required to retreat. Nor was it error to refuse to admit as evidence the letters that appellant received while in Missouri from his father, inviting him to the latter's home. All the testimony showed that he was there with his father's consent and approval, no question being made to the contrary throughout the trial, and the admission of the letters could not have placed him in a more favorable light with reference to the paternal welcome than was established by the testimony. Certainly he was not prejudiced by the ruling of the court in this regard.

In conclusion, without going into the details of the testimony, we are impressed with the facts that this was not a case, the merits of which were likely to be influenced or obscured by minor or technical questions. The actors were brothers, the scene of the tragedy the father's home, and the witnesses the immediate family of the parties. The evidence for the two sides was entirely contradictory, the facts as to the final occurrence being few and simple. There was no room for mistake on the crucial points; it was simply a question of which set of witnesses were to be believed. The jury believed those of the Commonwealth, and this conclusion is fully warranted by the record.

Judgment affirmed.

BUTLER, &c. v. TAGGART'S TRUSTEE.

(Filed April 18, 1905—Not to be reported.)

Wills--Devise—Life estate—Power of devisee to select trustee—Executor—Authority to require bond of trustee—Where a testator by his will directs that certain real estate in the city of Louisville shall be conveyed by his executor to a trustee to be selected by his daughter, who is the beneficiary, and who under the will is to have the income of such real estate and other property devised during her life free from the debts, liabilities or control of her husband, with remainder in fee as she may by will appoint, and in default of such appointment then to her heirs at law, where the daughter selected her husband as such trustee, who was a nonresident of this State, the executor of the will properly refused to convey or turn over the property to him unless he executed bond with security, and procured an order of the court directing the property to be conveyed to him as trustee.

Gibson, Marshall & Gibson for appellant.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Hobson.

John D. Taggart died testate a resident of Jefferson county. Among other things he provided by his will as follows:

"3d. All the rest and residue of my estate, real and personal, including insurance on my life, I devise and bequeath to the Fidelity Trust and Safety Vault Co., of Louisville, Ky., in trust to hold, manage and control as a whole until the 1st day of January, 1902; to collect the income, and after paying taxes, repairs, insurance and charges to divide the net income at least quarterly between my six now living children, or the survivors, the issue of any child who may then be dead leaving issue to take its parent's share.

"4th. As soon after the said 1st day of January, 1902, as convenient my said executor shall select three disinterested commissioners, who shall appraise and value all my real and personal estate, and after said valuation my daughter, Annie, shall have the right, if she so elects, to take my house and lot on the south side of Market, between Second and Third streets, at the value so fixed upon it. My daughters, Ella and Sally, may, in the same way, take my house and lot on the east side of Fourth street, known as the New York Store, at its value so fixed, and my daughter, Lilly, may take my house and lot on the east side of Fifth street, between Market and Jefferson, at its value so fixed. My executor shall divide the residue of my estate so as to make all of my six children exactly equal, and shall convey my daughters' shares to a trustee to be selected by them, and in default of such selection by them, or any of them, to itself as a trustee for my said daughter or daughters, during her or their natural lives, the net income to be paid to them in monthly or quarterly installments as they shall elect, with remainder in fee as they shall respectively by will appoint, and in default of such appointment to their respective issue, if any; if none, then their heirs at law.

"5th. Any income or estate that any of my daughters shall take under this will shall be their sole and separate estate, free from the debts, liabilities or control or marital rights of any husband any of them may ever have.

"6th. The Fidelity Trust and Safety Vault Co., in its various capacities as executor and trustee under this will, and the trustees that may be selected by my daughters for their several shares, shall all and each have full right, power and authority to sell and convey any real estate, and to sell and transfer any personalty that may be held under any of the trusts herein created, and reinvest the proceeds in other income-yielding real or personal estate, to be held on the same trusts and the same remainders and powers as the property sold was held, and any purchaser for value from any trustee or executor under this will shall not be bound to look to the application of the purchase price.

"7th. I direct that no inventory or appraisement of my estate be filed in any court, and I authorize and empower the present beneficiaries under this will to make settlement with their respective trustees, which, when in writing, shall be as conclusive and final against all remaindermen claiming under this will as though the same were made in a court of proper jurisdiction."

His daughter, Lilly, referred to in the will is the wife of J. F. Butler. They reside in the city of Chicago. The Fidelity Trust and Safety Vault Co. qualified as the executor under the will, and a division of the property was made among the six children as directed in the will. Mrs. Butler, under the power conferred on her by the fourth clause of the will, to select a trustee to whom her share of the testator's estate should be conveyed, selected her husband, J. F. Butler, the selecting having been made by deed executed by her. He accepted the appointment of his wife, and demanded of the trust company that it recognize him as trustee and turn over the property to him, but it doubting its right to do so, refused to turn over the property to him unless he executed a bond with surety, and procured an order of the court directing the property to be conveyed to him. Thereupon he and his wife filed this suit against the trust company, as trustee under the will, praying that it be required to convey the property to him as trustee. The circuit court sustained a demurrer to the petition, and the plaintiffs appeal. Sections 4709-4711, Kentucky Statutes, are as follows:

"Section 4709. Where any person is the beneficiary owner of any personal estate that has to be held and controlled for the benefit of said person, or his or her children or heirs by a trustee, and said person is a nonresident of this State, and has no trustee in this State, his or her trustee, appointed and qualified according to the laws of the place where said person resides, may collect, receive and remove to such place of residence any personal estate of such person or cestui que trust being in this State.

"Section 4710. Upon application by petition in a summary way any circuit or chancery court in this State having jurisdiction to appoint a trustee for said nonresident person or cestui que trust may authorize such foreign trustee to sue for, recover and so remove any such personal estate of said nonresident cestui que trust, or to otherwise act as a trustee appointed in this State.

"Section 4711. But the court in this State shall not grant said petition, or authorize said collection or removal, unless it is satisfied, by documentary evidence, that such foreign trustee has, where he qualified, given bond, with good and sufficient surety, to account for all the estate of such non-

resident cestui que trust that might come into his hands; nor unless the court is satisfied that neither said nonresident cestui que trust, nor any person having a present, future or contingent interest in said personal estate, will be prejudiced by the order."

It is conceded that Mrs. Butler and her husband are nonresidents of the State, and that Mr. Butler has not been appointed or qualified as trustee according to the laws of the place where he resides, and that he has not given bond with good and sufficient surety either in Illinois or in Kentucky. But it is insisted that the statute does not apply because the circuit court of Jefferson county had not jurisdiction to appoint a trustee for Mrs. Butler, but that an appointment under the will is simply to be made by her.

We do not so understand the will. The meaning of the will is that the trustees are to be selected by the daughters to the end that they shall be persons agreeable to them, but we see nothing in the will to take from the court of chancery its power to see to the proper execution of the trust and to require the trustee to execute such covenants as in his judgment are necessary to protect the interests of all the cestui que trustent. To allow the husband of the daughter to act as trustee without bond would be to defeat the plain purpose of the testator, which was to secure to his daughters the income of their estate and place it beyond the control of their husbands or the claims of their creditors.

Judgment affirmed.

HAGER, AUDITOR v. LUCAS.

(Filed April 18, 1905.)

Auditor's agents—Appointment—Term of office—Removal—Under Kentucky Statutes, section 4259, providing that "the auditor of public accounts may appoint a revenue agent in each county of the State, and may in addition appoint four revenue agents from the State at large, whose term of office shall be four years," a revenue agent appointed on August 28, 1902, for the State at large by the auditor then in office can not be removed from his office by the successor of the auditor who made the appointment, but is entitled to hold his office for four years from the date of his appointment.

Campbell & Campbell for appellant.

W. H. Holt, Taylor & Lewis and Hazelrigg, Chenault & Hazelrigg for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee Lucas was appointed revenue agent for the State at large by G. G. Coulter as auditor of public accounts on August 28, 1902. Appellant Hager succeeded Coulter as auditor in January, 1904, and the only question presented by the appeal is whether Lucas holds for four years from the date of his appointment, or whether he may sooner be removed by the auditor without cause. Section 4258, Kentucky Statutes, is as follows: "The auditor of public accounts may appoint a revenue agent in each county of this Commonwealth, and may, in addition, appoint not exceeding four

revenue agents from the State at large, whose term of office shall be four years."

Section 149, Kentucky Statutes, regulating the assistant auditor and auditor's clerks is as follows: "The term of office of the assistant auditor and clerks shall be the same as that of the auditor, and expire at the same time unless they, or either of them, are sooner removed by him. No one shall be appointed to said offices who has not been a citizen and resident of this State for two years. They shall severally take the oath of office, and may be required by the auditor to execute to him bond, with surety, for the faithful discharge of the duties of the office."

It is insisted for the auditor that the revenue agents are in effect his clerks, appointed by him for the purpose of better discharging his duties in the collection of the State's revenue; that they occupy toward him a personal relation; that one auditor should not have the power to appoint a number of these agents and impose them upon his successor; that section 4258 should be read in connection with section 140, and be construed to mean that the term of the revenue agent expires with the term of the auditor who appointed him, and that it was intended by the legislature in giving them a term of four years to give him the power to appoint them for the full period of his term.

While this is an argument that might be addressed with great force to the legislature, the language of the statute is free from ambiguity and must be enforced according to its plain meaning. The first act creating auditor's agents became a law April 29, 1880. It is provided they should be subject to removal at the pleasure of the auditor. The statute had been several times amended and re-enacted previous to the act of 1902, and in all of these previous acts they were subject to removal by the auditor, but the act of 1902, of which section 4258, Kentucky Statutes, above quoted, is a part, was passed during the term of G. G. Coulter as auditor. The legislature knew that his term would expire in about two years after that act was passed, and with this knowledge it expressly provided that their term of office shall be four years. By section 4259 they are required before entering upon the discharge of the duties of the office to take the oath required of other officers and execute a bond to the Commonwealth of Kentucky. They are thus constituted officers of the Commonwealth, holding for a fixed term and acting under a bond. Their duties are prescribed by law, and in many matters they may act independently of the auditor and without his consent, as in assessing omitted property under section 4241, Kentucky Statutes. The purpose of the legislature seems to have been to make them more independent and to secure a better class of men by giving them a definite term; for a man who is in business will not often feel justified in giving up his business for an office whose term is entirely uncertain. There has been a session of the legislature since the term of appellant began, and the act of 1902 was not amended or modified.

The statute confers upon the auditor of public accounts the power to appoint one revenue agent in each county of the State, and in addition four such agents from the State at large. When the power of appointment has been exercised it is exhausted, and no other appointment can be made during the term of the appointees, except in case of a vacancy.

Judgment affirmed.

COMMONWEALTH v. WILLIAMS.

(Filed April 19, 1905.)

Indictment—Sufficiency—Selling intoxicants—Local option territory—An indictment which charges that the defendants unlawfully and willfully sold by retail a beverage liquid mixture, or decoction, which causes or produces intoxication, in territory, in which the sale of spirituous, vinous or malt liquors is prohibited in accordance with the local option law, is good under Kentucky Statutes, section 2557a, which prohibits the sale of "any beverage, liquid mixture or decoction of any kind which produces or causes intoxication," in such territory, and it is not necessary to name in the indictment the mixture or decoction that was sold.

N. B. Hays for appellant.

Jonson, Wickliffe & Jonson for appellees.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge O'Rear.

Appellees were indicted and tried under the charge of unlawfully and wilfully selling, by retail, a beverage, liquid mixture or decoction which causes or produces intoxication, which acts were alleged to have been committed in territory in which the sale of spirituous, vinous and malt liquors is prohibited in accordance with the local option law. A demurrer was sustained to the indictment.

The indictment is drawn in the language of the statute. Ordinarily for a purely statutory offense as this is the employment of the language of the statute is deemed sufficiently explicit and certain to satisfy the requirements of section 124, Criminal Code of Practice. The main criticism made of the indictment is that it charges one of three offenses, by charging them in the disjunctive.

In *Jones v. Commonwealth*, 104 Ky., 468, 20 Ky. Law Rep., 651, it was held that an indictment charging the accused with selling "spirituous, vinous and malt liquors" is not open to the objection that it charges three offenses. In *Rush v. Commonwealth*, 20 Ky. Law Rep., 775, section 2557a, Kentucky Statutes, under which the indictment in this case was framed, was construed. It was there said: "We are of opinion that the general assembly intended to, and we so hold they did in passing chapter 30, declare that to be an offense that theretofore had been no offense or had been doubtful."

Up to the passage of that act, which is now section 2557a, there was no statute in this State punishing the sale of a liquid mixture or decoction which produced intoxication, unless it was spirituous, vinous or malt liquor. Continuing, the court further, said: "It is said that the term 'any intoxicating beverage' would certainly and necessarily include spirituous, vinous and malt liquor, even if the other two terms, liquid mixture or decoction, did not. We do not think it was so intended. The clear meaning and intention of this act was to provide a penalty for the sale in prohibited districts of the various nostrums, bitters and such like intoxicants sold, and which it is so difficult to show the ingredients, or whether it comes under the strict definitions of spirituous, vinous or malt liquors. This act was to embrace all other intoxicants of a liquid nature."

It is not necessary under the statute to name the decoction or liquid mixture which may produce the intoxication. It is enough if the thing sold is a liquid mixture which produces or would produce intoxications, and is sold in districts where the local option law is in force. The terms beverage, liquid mixture or decoction are used interchangeably, each synonymous with the other, all describing the same thing. We are of opinion that the indictment was good under the statute, and that the demurrer should have been overruled.

Therefore, the judgment is reversed and cause remanded, with directions to overrule the demurrer and for further proceedings consistent herewith.

LOUISVILLE TOBACCO WAREHOUSE CO. v. HARBESON.

(Filed April 19, 1905—Not to be reported.)

Attorney's fee—Where all the testimony in the case supports the claim the judgment of the lower court fixing an attorney's fee should be affirmed.

Stricklett & Arnett and W. A. Price for appellant.

George Doniphan for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge O'Rear.

The sole question presented by this appeal is whether an attorney's fee, sued for and allowed to appellee, is disproportionate to the value of the services rendered by him. All of the testimony in the case supported the claim and the allowance. In addition, the records themselves, in which the services were rendered, were used in the trial in the court below, as is disclosed by the bill of exceptions. By a stipulation of counsel they were not copied into this record, but as they had been appealed to this court it was further stipulated that the records in this court might be placed with this record, and considered by this court upon the appeal. This, however, has not been done.

We are not prepared to say from the record before us that the judgment of the circuit court allowing the fee is not fully sustained by the evidence in the case. Consequently the judgment is affirmed.

ILLINOIS CENTRAL R. R. CO. v. COLLY.

(Filed April 19, 1905—Not to be reported.)

1. Petition for new trial upon ground of newly-discovered evidence—The basis for a new trial in the lower court in this action was the affidavit of Landrum as to what he would testify, which was that he was a passenger upon the train upon which appellee was injured and saw appellee when she got on the train and when she left; that she was then feeble and that the collision by which she claims to have been hurt was not unusual or violent. Appellee and her physician both testified to the contrary, and the affidavit of Landrum, therefore, did not authorize the court to grant a new trial. Moreover, his name was furnished by appellee to appellant's claim agent by

him as having been a passenger at the time, yet he was not summoned as a witness.

2. Same—It is well settled that a new trial should not be granted upon the ground of newly-discovered evidence unless it be of a decisive character, and especially should this rule apply where the proposed evidence is in parol and relates to a point in litigation upon the former trial.

Robbins, Thomas & Carr, J. M. Dickinson and Trabue, Doolan & Cox for appellant.

Lee & Hester for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from a judgment of the court below sustaining a demurrer to and dismissing the petition of appellant for a new trial which had been filed by it upon the ground of newly-discovered evidence.

The case in which the new trial was sought was styled Joe Ann Colly v. Illinois Central R. R. Co., and was an action brought by appellee to recover for personal injuries sustained by her upon one of appellant's trains, through the alleged negligence of its servants in charge thereof. According to the averments of the petition for the new trial, and the affidavit of W. L. Landrum filed therewith, the newly-discovered evidence consists of information in the possession of Landrum as to the manner in which appellee received her injuries, he having been a passenger on the same train and in the same car with her. His affidavit shows that if introduced as a witness for appellant he would testify in substance as follows: "That he saw appellee at the time she got upon the train at Fulton, and when she left it at Mayfield; that she was then in poor health and physically feeble; that the collision of the cars by which she claims to have been hurt was not unusual or violent, and that when she left the train at Mayfield she appeared to be in no worse condition than when she entered the car at Fulton. The affidavit admits that appellee was thrown down by the collision between the cars, though it denies that any other passenger in the coach was thrown down, or that the collision was violent or unusual. This was one of the questions, and the main question, investigated upon the trial.

As to the previous condition of appellee both she and the physician testified. It may be true that appellant did not discover that Landrum was in possession of the facts contained in his affidavit until after the trial of the case. The affidavit of appellee's counsel, however, discloses the fact that Landrum's name was furnished appellant's claim agent, Payne, by him before the institution of the action, as that of a passenger on the train and present at the time appellee was injured. But conceding that the discovery of his testimony was not made, and could not have been made, by appellant until after the trial, we are of opinion that it did not authorize the court to grant the new trial asked in the petition. As already intimated, the newly-discovered testimony is in regard to no new matter in issue in the case, but bears wholly upon a point fully investigated on the former trial. At most it would be but cumulative or corroborative.

In *Mercer & Co. v. Mercer's Adm'r*, 87 Ky., 21, it is said: "It is well settled that a new trial should not be granted upon the ground of newly-dis-

covered evidence unless it be of a decisive character; especially should this rule apply where the newly-discovered evidence is parol and relates to a point in litigation upon the former trial." (Finley v. Curd, 22 Ky. Law Rep., 1914; Richardson Bros. & Co. v. Huff, &c., 19 Ky. Law Rep., 1429; (Price, Adm'r v. Thompson, 84 Ky., 220.)

We are of opinion, therefore, that the lower court properly sustained the demurrer to the petition for a new trial.

Wherefore, the judgment is affirmed.

WILDER, &c. v. WILDER, &c.

(Filed April 19, 1905—Not to be reported.)

Wills—Estates—Trust estate—Under a devise to his daughter-in-law the testator gave her during her life, or so long as she remained unmarried, certain property to be used for herself and her children, as long as any of them live with her, but in the event she marries before the children are of full age, the property shall pass to the children. Held—The children took subject to the rights of their mother as expressed in the will, the residue going into her hands as trustee for the children.

W. O. Harris for appellant, E. V. Wilder.

Peter & Newcomb for appellant Hast and others.

W. O. Harris for appellees, Oscar Wilder and others.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Nunn.

J. B. Wilder, a resident of Louisville, Ky., made and published his will devising a large estate to nearest of kin, namely, the children of his only son, Graham Wilder, and the children of his only daughter, Mrs. Emma Hast, the son and daughter having died before the date of the will. The testator owned two houses and lots on Fourth street in that city. The one on the east side of the street he devised the fee to the children of his deceased daughter. The devise as to the one on the west side of the street is as follows: "Fourth. I also give and devise to my daughter-in-law, Edith V. Wilder, as a special devise an annuity of \$2,000, to be paid to her regularly in quarterly installments during her life, or as long as she remains unmarried. I also devise and bequeath to her, the said Edith V. Wilder, during her life, or so long as she remains unmarried, the lot and house on the west side of Fourth avenue, between Oak and Ormsby avenues (or streets), in Louisville, the same she now occupies, to be a home for herself and children, where they can live together, so long as her children, or any of them, live with her. Each so living shall contribute out of their yearly income herein provided, pro rata with her, toward the expenses of the family, such as taxes, assessments, repairs, insurance, servants' hire and household supplies, but no board is to be charged against any of them. Said children are by my son, Graham Wilder, who are named respectfully Nellie Wilder, James B. Wilder, Jr., Oscar Wilder, Ethel Wilder and Edward Wilder, Jr., but if she marries at any time said annuity shall at once cease, and if she marries before her said children by my son, Graham Wilder, are

all of age, then she shall no longer thereafter have any interest in said house and lot, and the same shall pass to said children by Graham Wilder. If the said Edith deems it advisable she may at any time lease or rent out said residence and secure another, which shall be occupied by herself and children according to the foregoing provisions."

It is the duty of the court in construing the will to construe all its provisions, and if possible arrive at the intention of testator. We are of the opinion, after a careful examination of all the provisions of this will, it was clearly the intention and purpose of the testator to give one of these homes to his Hast grandchildren and the other to his Wilder grandchildren, the latter subject to the rights of their mother as expressed in the will, and to place the residue of his estate in the hands of his daughter-in-law as trustee for his grandchildren. (13 Bush, 536; Davie v. Davie, 26 Ky. Law Rep., 312.)

Wherefore, the judgment of the lower court is affirmed.

CHICAGO, ST. LOUIS & NEW ORLEANS R. R. CO. v. LIEBEL, &c

(Filed April 19, 1905—Not to be reported.)

1. Railroads—Condemnation of land for right of way--Burden of proof—Where in an action for the condemnation of a right of way appellees filed exceptions to the commissioner's report and introduced proof, the burden was upon them and they were entitled to the concluding argument. Had they introduced no proof, manifestly they would have been defeated. Therefore, the burden was upon them.

2. Notice—Judicial knowledge—Courts must take judicial notice of legislative acts incorporating railroads.

Wheeler & Hughes, J. M. Dickinson and Pirtle & Trabue for appellant.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Hobson.

The Chicago, St. Louis & New Orleans R. R. Co. filed its petition in the McCracken County Court to condemn a strip of land one hundred feet wide through appellee's farm for a right of way for its railroad. The court appointed commissioners to assess the damages, who went upon the property and reported that the two acres taken for the right of way were of value \$105, assessing the damages to the adjacent land at \$200. Appellees filed exceptions to the commissioner's report, and a jury was impaneled in the county court who returned a verdict, fixing the value of the land taken at \$200, and the damages to the adjacent land at \$300. Appellants appealed from the judgment of the county court entered upon the verdict to the McCracken Circuit Court, where the case was again heard before a jury, who fixed the value of the land taken at \$150 and the damages to the remainder of the tract at \$400. The circuit court entered judgment upon the verdict, and the railroad company appeals.

The only question made upon the appeal is that the circuit court erred in holding that appellees had the burden of proof and were entitled to the concluding argument before the jury. It is insisted that the burden was

with the plaintiff throughout the case. This precise question was before us in *Chicago, St. Louis & New Orleans R. R. Co. v. Rottgering*, 26 Ky. Law Rep., 1167. In that case the court said: "The only questions of fact in the case were tried by the jury, and those questions were raised by the exceptions filed by the appellees to the report of the commissioners. No exceptions were filed by appellant to the report, and if none had been filed by appellees the report would have been confirmed by the court. Section 538, Kentucky Statutes, provides that 'if no exceptions have been filed by either party, it (the court) shall confirm said report as against the owners not excepting.' If after filing the exceptions appellees failed to introduce proof, the exceptions would have been overruled and the report confirmed. Section 526, Civil Code, provides: 'The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.' Manifestly appellees would have been defeated if no evidence had been given on either side. It follows, therefore, that no error was committed by the court in ruling that appellee had the burden of proof and were entitled to the closing argument to the jury."

It is insisted that the answer and exceptions of the defendants in this case put in issue other matter besides the amount of damages. But the only other matters set up by the defendants were either matters of law for the decision of the court or matters that went to the abatement of the action. If the plaintiff was not in existence as a corporation then this might be relied on to abate the action, but the question would be for the decision of the court, and appellant can not complain that the court treated this part of the answer as raising no issue. The other matters relied on in the answer as to the power of the corporation to condemn the land were purely questions of law, and there was nothing in any of these matters to submit to the jury. The only question under the answer to be submitted to the jury was the amount of damages.

As the commissioners had gone on the ground and examined the property their report was presumptively correct, for it presumed that they did their duty. If no evidence had been offered on either side their report could not have been disturbed, and judgment would have been given upon the report. The court must take judicial notice of the acts of the legislature incorporating appellant, which were properly placed by it, and if proof had been made to show that it was not in existence as a corporation this would only have shown that it had not the capacity to sue. This would have been matter to be passed on by the court and not for the consideration of the jury. No evidence on the subject was introduced on the trial by either party, both treating the question of damages as the only matter to be tried.

Judgment affirmed.

STONE, PETITIONER EX PARTE v. CITY OF PADUCAH.

(Filed April 19, 1905.)

1. Municipal corporations—Police courts—Second class cities—Jurisdiction—Section 142 of the Constitution provides "that the jurisdiction of justices of the peace shall be co-extensive with the county, and equal and uniform throughout the State." Section 143 provides "that a police court

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may be established in each city and town in this State, * * * with such criminal jurisdiction as justices of the peace have." Section 1098, Kentucky Statutes, provides "that justices shall have jurisdiction exclusive of circuit courts in all penal actions the punishment of which is limited to a fine not exceeding \$20, and concurrent with circuit courts of all penal cases the punishment of which is limited to a fine not exceeding \$100, or imprisonment not exceeding fifty days or both." It will thus be seen that the Constitution does not place any limitation upon the jurisdiction that may be granted to justices of the peace by the general assembly, but does limit the jurisdiction that may be given police and city courts to whatever jurisdiction has been given the justice's courts, and as the general assembly has seen proper to limit the jurisdiction of justices to offenses where the penalty does not exceed \$100 fine and fifty days in jail, therefore, the jurisdiction of police and city courts is within the same limits, and section 8148, and that part of section 8147, Kentucky Statutes, which gives to police and city courts jurisdiction in excess of the penalty stated, are void, being in violation of the State Constitution.

2. Labor penalty—Good behavior—Insane persons, etc.—The language in section 8151, Kentucky Statutes: "Persons committed by said (police) court for default of surety for good behavior or to keep the peace and all others whom the city is bound to maintain when committed to jail," does not refer to persons convicted of crime, but includes idiots, insane persons and inebriates, and as to these persons, not in jail because of their conviction of offense, they can not be compelled to labor, for such would be involuntary servitude and in violation of both State and Federal Constitutions.

3. Authority of cities—Under subsections 23 and 25 of section 3058, Kentucky Statutes, cities of the second class have full and complete power to enact any and all ordinances, and fix fines and penalties to maintain the peace, good government and general welfare of the city, the only limitation being that the penalties for a violation of the ordinances shall not be less than that imposed by the statute, and not to exceed the jurisdiction of the police court as fixed by the statutes and Constitution, and not in conflict therewith.

4. Trial by jury—So much of the charter of cities of the second class which deny a right to a trial by a jury where the penalty is \$25 or less, is not unconstitutional, and neither is it in violation of the State or Federal Constitutions to inflict labor penalties on persons convicted of misdemeanors.

J. M. Worten for appellant.

E. H. Puryear and Campbell & Campbell for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Nunn.

In the month of March, 1902, the city of Paducah was transferred from the third to the second class. While a city of the third class it passed the following ordinances:

"Ordinance No. 14, section 1. It shall be the duty of the overseer of the chain gang to take charge during the daytime of all prisoners confined in the city prison under judgment of the police court, when there is work to do and the weather will admit, and work them on the streets, alleys or other public works of the city of Paducah.

"Section 2. The keeper of the city prison shall receive and safely keep

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therein, in close confinement, all persons arrested by the city police officers, and all persons ordered thereto by judgment of the Paducah Police Court, or other court of competent jurisdiction, until discharged by due course of law, except when such persons may be in charge of the street inspector, or other persons duly authorized, at work on the streets or other public works of the city.

"Section 12. In all cases of conviction in the police court of Paducah the defendant shall stand committed to the city prison until the fine and costs in such case shall be paid or replevied, not to exceed, however, one day for each dollar of such fine and costs, and the defendant in such case, if a male, shall be required to work during such period of confinement on the public streets or alleys or at the gravel pits of the city of Paducah, not exceeding ten hours each day. All male persons sentenced to confinement in said prison shall be worked in the same way during the period of imprisonment, and all such persons when in the city prison shall be considered in the custody of the keeper of the city prison, and when taken out for the purpose of being worked to be in the custody of the marshal, street inspector, overseer of the chain gang or policeman, which ever may have them in charge. And to prevent escapes such officer having prisoners in charge may, in his discretion, attach a chain and a ball of fifty pounds weight to any prisoner.

"Ordinance No. 19, section 1. The office of street inspector is hereby created. The street inspector shall be elected by the common council in the month of December in each year. He shall hold his office for one year, and until his successor is duly elected and qualified.

"Section 2. He shall build sewers and bridges, keep same in good repair; see that the streets, alleys and sidewalks are kept clean and in good condition; superintend in person the cleaning thereof; devote his entire time to the duties of his office, and, under the direction of the mayor, employ hands, carts and wagons and other forces necessary to those objects, and in working on any of the streets, alleys, wharfs or other public place in the city he shall use the prisoners of the city confined in the city prison.

"Section 3. The overseer of the chain gang, and the prisoners in his charge in working upon any of the streets, alleys, wharf, or other public place in the city, shall be under and subject to the orders and control of the street inspector. If any such prisoner while on any public work shall behave in a riotous or disorderly manner, or refuse to work or obey the orders of the street inspector, or other person placed over them, or shall attempt to escape, they shall be placed in solitary confinement or subjected to such slight punishment as may be ordered by the inspector, but in no case shall they be cruelly treated."

The appellant brought this action under section 3063 of the Kentucky Statutes, claiming that the charter of cities of the second class does not authorize the officials of cities of that class to enact or enforce such ordinances, and that they are, therefore, void.

By section 3264 of the statutes, which relates to the transfer of cities from one class to another, it is provided, after providing for the transfer, that "thereafter such city shall be governed by and under the general laws relating to the class to which it has been assigned, but the transfer from one class to another shall not in anywise impair or affect any ordinance or by-

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law theretofore enacted by such city unless the same is in conflict with the general laws relating to cities of the class to which it has been assigned, and to such extent only shall any ordinance or by-law be repealed by the transfer, nor shall the powers, rights, duties or obligations of the city be in anywise affected by the transfer or any officer or employe thereof or any debtor or creditor of the city."

The appellant contends that the only provisions contained in charters of cities of the second class with reference to compelling persons to labor are found in section 8148 and section 8151, and that these provisions provide for the work to be done only in the city jail or workhouse, and as the ordinances referred to authorize and require persons to labor upon the streets, alleys and gravel pits, they are, therefore, void. We are of the opinion that the sections of the statutes referred to have no application to the question at issue. By section 8148 the legislature gave to cities of the second class the extraordinary power of giving final trials to persons charged with petit larceny and vagrancy, a power not given to any other class of cities in the Commonwealth, and required that persons convicted of such offenses should be sent to labor in the city prison or workhouse. This section is void. The legislature had no power to grant authority to the police or city court of cities of the second or any class to give a final trial to persons charged with the offenses of petit larceny or vagrancy, the punishment for the one being not less than thirty days nor more than twelve months' confinement in the county jail; the other, upon conviction, could be bound out to labor for a term not longer than twelve months. Section 143 of the present Constitution provides: "A police court may be established in each city and town in this State, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established and such criminal jurisdiction within the said limits as justices of the peace have." We find that justices of the peace have jurisdiction, as provided by section 1093 of the statutes, as follows: "Justices shall have jurisdiction, exclusive of circuit courts, in all penal cases, the punishment of which is limited to a fine not exceeding \$20 and jurisdiction concurrent with circuit courts of all penal cases, the punishment of which is limited to a fine not exceeding \$100 or imprisonment not exceeding fifty days, or both." By section 142 of the Constitution it is provided "that the jurisdiction of justices of the peace shall be co extensive with the county, and shall be equal and uniform throughout the State." It will thus be seen that the Constitution does not place any limitation upon the jurisdiction that may be granted to justices of the peace by the general assembly, but leaves the matter within its discretion; but does limit the jurisdiction that may be given police and city courts to whatever the justices have, and as the general assembly has seen proper to limit the jurisdiction of justices to offenses where the penalty does not exceed \$100 fine and fifty days in jail, therefore, the jurisdiction of police and city courts is within the same limits, and section 8148 and that part of section 8147 which gives to police and city courts jurisdiction in excess of the penalty stated are void, being in violation of the State Constitution.

Section 8151 is as follows: "That all persons committed by said court for default of surety for good behavior or to keep the peace, and all others

whom the city is bound to maintain when committed to jail, shall be confined in the city workhouse or prison, and they may be compelled to labor as many days at such sum per day as may be necessary to defray the reasonable cost of their board, to be from time to time determined by the mayor and general council."

This section has no application to the ordinance in question, as we understand them. The language, "persons committed by said court for default of surety for good behavior or to keep the peace, and all others whom the city is bound to maintain when committed to jail," does not refer, in our opinion, to persons convicted of crimes. By subsection 14 of section 3058 the council of cities of the second class are authorized to provide for the support, maintenance and confinement of idiots, insane persons and inebriates. These persons are the ones meant by the words "all others whom the city is bound to maintain when committed to jail," as used in section 8151. And as these persons are in jail, not because of their conviction of any offense, they can not be compelled to labor, for such would be involuntary servitude and in violation of section 25 of the State Constitution and the thirteenth amendment to the Constitution of the United States. Section 25 of the State Constitution is as follows: "Slavery and involuntary servitude in this State are forbidden, except as a punishment for crime, whereof the party shall have been duly convicted." The thirteenth amendment is to the same effect. But even if section 8151 was valid, it does not compel the persons to labor in the city prison or workhouse.

We are of the opinion that the ordinances in question are not in conflict with the charter of cities of the second class except in so far as they may authorize the working of a person before his conviction of an offense. In fact the city council of second class cities has the power to enact such ordinances by virtue of subsections 23 and 25 of section 3058 of the statutes, which are as follows: "The general council shall have power by ordinance to impose, enforce and collect fines, forfeitures and penalties for the breach of any provision of this act or any ordinance; to punish the violation of any provision of this act, or any ordinance of this city, by fines or imprisonment, or by both fine and imprisonment; and no ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. To pass all such ordinances, not inconsistent with the provisions of this act or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties; and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power."

These provisions construed together show that it was the intention of the general assembly to grant to the council of cities of the second class full and complete power to enact any and all ordinances and fix fines and penalties to maintain the peace, good government and welfare of the city, the only limitation being that they could not fix fines and penalties for violation of the statutes at less than that imposed by the statutes and not to exceed the jurisdiction of the police court as fixed by the statutes and Constitution, and to be not in conflict with the Constitution and statutes.

It is contended, as the powers and duties of the council are, many of

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them, specifically named and defined in section 3058 of the statutes, that its powers are limited to the powers named and defined, and as there is no specific reference giving the council power and authority by ordinance to inflict upon persons convicted of crime the work penalty, upon their failure to pay or replevy same that, therefore, the power of the council to enact such an ordinance is inhibited by the charter.

This is the general rule of construction, and there is also another general rule that the council has no authority to pass an ordinance unless the same is authorized in express terms or by necessary implication. But it appears that the general assembly, fearful that the above rules might be applied, added the following to subsection 25 of section 3058, supra: "And any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon its general power," showing that it was the intention to give the council complete power to pass any and all ordinances and fix penalties to insure the peace, good government and welfare of the city, only to be confined within the limits above referred to. Appellant contends that the ordinances are void because, by them, a person charged with an offense is deprived of the right of trial by jury.

By section 248 of the Constitution it is provided that a jury of six in inferior courts may try a person charged with a misdemeanor. The charter permits a defendant to demand a jury where the penalty which may be assessed can exceed \$25, and this court in the case of *City of Mt. Sterling v. Holly*, 22 Ky. Law Rep., 358, discussed this point fully, and decided the matter contrary to appellant's contention and determined the denial of the right of a trial by jury, in these trivial matters, in no way violates the constitutional rights of the defendant. Appellant also contends that since the adoption of the thirteenth amendment to the Federal Constitution and of the present State Constitution of this State, forbidding involuntary servitude except as a punishment for crime, that it is in violation of the Constitution to inflict labor penalties on conviction of persons charged with misdemeanors.

In volume 12 Cyc. of Law and Pro., 129, it is said: "A crime is an act or omission which is prohibited by law as injurious to the public, and punished by the State in a proceeding in its own name or in the name of the people." In a note on the same page the following appears: "The term 'criminal,' when used in reference to judicial proceedings, is opposed to 'civil,' and in its most comprehensive meaning may be regarded as including all cases for the violation of the penal law. (*Applegate v. Commonwealth*, 7 B. M., 12; *Montee v. Commonwealth*, 3 J. J. M., 132.)" And in another note on the same page is found the following from Blackstone: "A crime or misdemeanor is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though in common usage, the word 'crimes,' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of misdemeanor, only." (4 Bl. Com., 5.) There are numerous other authorities to the same effect. In our opinion when the thirteenth amendment and our own Constitution to the same effect were adopted,

It was understood that the word "crime" was to include misdemeanors and all offenses in violation of the penal laws.

For these reasons the judgment of the lower court must be affirmed.

Whole court sitting.

ROSS, &c. v. MCGRATH'S ADM'R, &c.

(Filed April 19, 1905—Not to be reported.)

1. Warning order—Sufficiency of affidavit—Where the affidavit for a warning order was made on the 27th of January, and the order made on the 30th of January, following, the delay of three days was not an unreasonable one, and it should not be presumed, in the absence of proof to the contrary, that a resident of Chicago, who was at home on the former date, should be in this State on the latter.

2. Lands—Tax claim—Purchase of land under sale—As Oberdorfer, a creditor of Margaret McGrath, in this action to settle her estate, did not set up his tax claim, the presumption is that he purchased the property for the protection of his claim as mortgagee, and as the sale was made within two years after the tax sale, his rights were barred before the expiration of the two years allowed for redemption, and the fee simple vested in him at no time under the statute; and a judgment barring his right is equally conclusive upon his wife because if the title did not vest in him she had no potential right of dower.

Wallace & Miller and Chandler & Norman for appellants.

Matt O'Doherty and J. L. Woodberry for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

Margaret McGrath died intestate a resident of the city of Louisville. The Louisville Trust Co. qualified as the administrator of her estate and filed this suit against her heirs at law and her creditors, alleging that she left no personal estate, and that a sale of the real estate was necessary for the payment of her debts. A judgment was entered for the sale of the land; a sale was made and the purchasers at the sale filed exceptions; their exceptions were overruled, and they appeal. Two questions are made on the appeal.

Frank McGrath, one of the heirs at law, resided in Chicago, Ill. A warning order was made against him, and it is insisted that the warning order is void. The facts in regard to this are as follows: The petition was filed on January 27, 1903. Attached to the petition was an affidavit in proper form for a warning order, in which it was stated, among other things, that Frank McGrath "is a nonresident of this State, and is now absent therefrom." The affidavit was sworn to on January 27. The warning order is in proper form, but was made on January 30, or three days after the affidavit was filed. It was shown that a person may leave Chicago and reach Louisville in twelve hours, and from this it is argued that the affidavit is not sufficient to show that Frank McGrath was absent from the State on January 30, although he was absent on January 27. In support of this position we are referred to New York Baptist Union v. Atwell, 95 Mich., 289, and People v. Huber, 20 Cal., 82, in which a delay of four days was held to render a warn-

ing order bad. On the other hand, in *Cornwall v. Falls City Bank*, 92 Ky., 881, and *Taylor v. Reisch*, 20 Ky. Law Rep., 1599, it was held by this court that an order is sufficient if made within a reasonable time after the affidavit is sworn to, and that the next day is a reasonable time. January 27, 1903, was on Tuesday and January 30, on Friday, so that there was a delay here of three juridical days. We do not see that a delay of three days is such an unreasonable delay as to vitiate the order, nor do we think it should be presumed, in the absence of some showing to the contrary, that a resident of Chicago, who was there on the 27th, was in this State on the 30th. On the contrary, the presumption should, be in the absence of proof, that he was at his place of residence.

L. Oberdorfer, who was made a defendant to the action and held a mortgage on the property for \$600, had bid it in at a tax sale for State taxes for the year 1902, returned delinquent against Margaret McGrath. It is conceded that he is barred by the judgment as he filed an answer setting up only his mortgage lien. But it is insisted that his title became a fee simple after two years under section 4154, Kentucky Statutes, and that the potential right of dower in his wife is not barred as she was not a party to the action. As Oberdorfer did not set up his tax claim, it must be presumed that he purchased the property for the protection of his claim as mortgagee and as trustee for the owner. The judgment for the sale of the property was entered on December 10, 1904, which was within two years after the tax sale, and thereby Oberdorfer's rights were barred before the expiration of the two years allowed for redemption, and so the fee-simple title at no time vested in him under the statute; and while his title was inchoate, he might dispose of it without the consent of his wife, and a judgment barring his right is equally conclusive on her, though she was not party to the action. If the title did not vest in him no potential right of dower existed in her. We, therefore, conclude that neither of the objections to the judgment can be maintained.

Judgment affirmed.

BERRY v. FRISBIE, &c.

(Filed April 19, 1905—Not to be reported.)

1. Option—Leasing contract—Prospecting for minerals, coal, gas, etc.—Deed—When due—Construction of contract—B., in consideration of \$1, leased to F. & Co. the right to go on his land and prospect for oil, coal, gas, and all other minerals, the said F. & Co. to have four months from date of contract to determine whether they would accept the grant, and if accepted to so notify B. in writing, and to have two years from date of acceptance to prospect and locate said minerals, and as compensation to give B. 10 per cent. of the product in the dump at the mine. F. & C. gave notice of acceptance, sunk some wells on adjacent lands, finding some oil and gas, and within the two years applied to B. to make deed of conveyance to said mineral rights, which B. refused. Held—That the contract when accepted bound the lessees to, within two years therefrom, explore the land by actually sinking a well or wells upon it. If oil or gas or coal was found therein in paying quantities then the lessees were bound to diligently work and operate same so as to bring the product to a present market, and so as to

promptly yield to the lessor his royalty; that unless the lessees did so actually develop the land in question, and in good faith and diligence operate it, the lease should be deemed abandoned, and in no event were the lessees entitled to a deed provided for by the option, until, as the result of such actual development within the life of the contract, gas, oil or coal was found in paying quantities.

2. Contracts — Mutuality— Consideration —Validity— Enforcement—Such contracts lack the mutuality essential to their validity. A unilateral executory contract is, in law, nudum pactum, and is unenforceable. Where it is left to one of the parties to an agreement to choose whether he will proceed or abandon it, neither can specifically enforce its execution in equity, nor is a recited consideration of \$1 sufficient to uphold an action for the specific enforcement of a contract otherwise unsupported by consideration.

E. L. Worthington and J. B. Clark for appellant.

W. S. Pryor and George Doniphan for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge O'Rear.

Appellees are oil prospectors. Appellant is the owner of the land upon which appellees had taken options to prospect for oil, gas and other minerals. These options are identical in terms, except descriptions, and read as follows:

"Know all men by these presents that, Leander Berry, for and in consideration of one dollar cash in hand paid, the receipt of which is hereby acknowledged, and for the consideration of the advantages to be derived by the said Leander Berry from the development of the mineral resources of the lands hereinafter described, have this day bargained and sold to H. D. Frisbie, J. T. Sharrard, and their associates, to enter upon and prospect for coals, ores, oils, gases, and all other minerals, and to erect the necessary machinery and sink the necessary shafts, and do any and all other work necessary to carry out the objects of this grant, the right of dump, also the right of ingress and egress to and from said lands or any part thereof, but on the condition that said right is to be used in a reasonable and prudent manner so as to injure the said farm as little as possible.

"This sale is made upon these conditions: Said H. D. Frisbie and his associates shall have four months from the date of this contract to determine and say whether H. D. Frisbie and his associates will accept this grant, and will undertake, according to the terms of same, to locate and prospect for coals, ores, oils, gases and all other minerals on the said lands, and if within the said four months said H. D. Frisbie and his associates shall notify the said Leander Berry of their intention to accept the terms of this grant and prospect for coals, ores, oils, gases and other minerals, he and his associates shall have two years from the date of the acceptance of grant in which to prospect for and locate said minerals, ores, oils, gases, etc. Should minerals, coals, ores, oils, gases, etc., be found on the said land in quantities, which in the judgment of the said H. D. Frisbie and his associates or assigns will pay to work, the said Leander Berry will, on demand, make the said H. D. Frisbie and his associates or assignees a deed to the said mineral, coal, ore, oil and gas privileges on the following described land, with the

privilege and right to open mines or wells, and erect buildings and machinery and make roads or ways, such as in the judgment of the said H. D. Frisbie and his associates is necessary for the successful operation of the said mines or wells, and the said H. D. Frisbie and his associates will timber the said mines and pay to the said Leander Berry as compensation for the privileges granted 10 per cent. of the minerals, etc., in the dump at the mine, or 10 per cent. of the oils and gases, as nearly as it can be ascertained, as it comes from the ground. (Description of land.)" * * *

Within the four months mentioned in the options appellees notified appellant that they accepted the grants," by a written notice as follows:

"Dear Sir—You are hereby notified that the undersigned accept the terms of your lease for the mineral privileges on your lands of date 19th November, 1901."

Within two years thereafter they applied to appellant to make them a deed to the oil, gas, coal and other minerals that might be contained in the land. Appellant refused to make the deed, and this suit was brought by appellees to compel its execution. Appellees had, upon an adjacent tract of land, which probably adjoined appellant's farm, sunk five wells, in which they claim to have found oil and gas in quantities which, in their judgment, would pay to work. There is some conflict in the evidence as to the extent of this find, but be that as it may, appellees' contention is that they have by this manner of development demonstrated to their own satisfaction that there are oil and gas on appellant's nearby lands, embraced in the options. Considerable testimony was adduced by appellees as to the manner in which they satisfied themselves of this fact. They undertook to show that appellee Frisbie was possessed of an unerring discernment in locating such wells, although he had been at the business only three or four years, and had never located any but the five wells above alluded to. He said he had a theory that had never failed to show where paying oil was, as well as where it was not. He did not say, however, what that theory or method was, except it was disclosed that it in part, at least, consisted in the use of a forked hazel switch, called a "water witch," which would, by some phenomenal attraction, incline itself in the hands of Frisbie to the hidden wells of oil, or may be of water, he could not say for certain which. It seems that he used this switch on appellant's land, and in this way in part satisfied himself that there was oil there.

Appellant did not deny to appellees the right to explore his land by sinking wells thereon within the two years given by the contract. On the contrary, he said that he was willing that they should do so. The option contracts are susceptible of two possible constructions. One, that it did not bind the lessees to sink any well upon the land, or to demonstrate by actual, physical tests that oil, gas or coal in paying workable quantities underlaid it. The other is, that the lessees were bound to make such tests. Of the first, which seems to be the construction placed on the contract by appellees, it would result in appellant's being bound to convey by absolute deed a very valuable element of his estate without any consideration whatever, for whether coal or oil or gas existed in his land, the prospect of it was of value to him. If it did exist, of course that fact might become of great value to him, but if his lessees were not bound in fact to sink a well or

wells upon the land to test its mineral properties, yet could keep appellant and all others from doing so, it would be in the power of the lessees to prevent its development indefinitely, or forever. In that way the lessor would get nothing from his lease; would get nothing for even the chance of finding minerals there. In this view of the contract it does not bind the lessees either to sink a well upon the land, nor to work the wells if sunk, and if minerals should be found in paying quantities. They could in that way, though satisfied that the land did contain oil and gas, and though it be a fact that it did, get from it these properties without paying anything, by draining them off through wells tapping the same pools or veins on the adjacent lands. Or they could plug the holes, and indefinitely postpone working the wells. Such contracts lack the mutuality essential to their validity. A unilateral executory contract is in law a nudum pactum, and is unenforcible. Where it is left to one of the parties to an agreement to choose whether he will proceed or abandon it, neither can specifically enforce its execution in equity. (*Litz v. Goosling*, 93 Ky., 165; *Federal Oil Co. v. Western Oil Co.*, 112 Federal Rep., 373; *Marble Co. v. Ripley*, 10 Wall., 339.) Nor is the recited consideration of \$1 sufficient to uphold an action for the specific enforcement of a contract otherwise unsupported by consideration. As was said in *Federal Oil Co. v. Western Oil Co.*, supra, "the consideration would be so trifling, compared with the value of the lease-hold interest, as to shock the moral sense." Any fact showing that the contract is unfair, unjust and against good conscience will justify a court of equity in refusing to decree its performance. On the other hand, where a written contract can, from its context, be construed so as to be binding upon the parties to it, instead of not binding, the former construction is preferred, as it is not to be deemed that the parties have been to so much care to do nothing. The deliberateness of entering into written engagements of itself implies a purpose to become bound by the making of an enforceable agreement, unless the very terms of the paper repel the idea. The purpose of these contracting parties must have been the finding of oil or gas in paying quantities on this land, if to be found, and their being worked so as to make money for each party. That was the point where their minds met. The owner of the soil could not have dreams that he was putting it out of his power to ever develop or have developed the mineral possibilities of his farm; nor, if minerals were found, that it would be left to the exclusive discretion of the other party whether they would be brought into marketable condition.

In construing a somewhat similar lease it was said in *Huggins v. Daley*, 48 L. R. A., 320, 40 C. C. A., 19, 99 Fed., 613: "The land owner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is, therefore, not compensable. No such lease should be so construed as to enable the lessee, who has paid no consideration, to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement."

And in *Conrad v. Morehead*, 89 N. C., 31, it was also held: "It would be unjust and unreasonable, and contravene the nature and spirit of the lease,

to allow the lessee to continue to hold his term a considerable length of time, without making any effort at all to mine for gold and other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself, or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice." Our construction of this contract is, that when accepted, as it was within four months of its date, it bound the lessees to within two years from such acceptance explore the land described by actually sinking a well or wells upon it. If oil or gas or coal were found therein in paying quantities, then the lessees were bound to diligently work and operate same so as to bring the product to a present market, and so as to promptly yield to the lessor his royalty; that unless the lessees did so actually develop the land in question, and in good faith and diligence operate it, the lease should be deemed abandoned. (Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va., 583, 59 L. R. A., 566.) In no event were appellees entitled to the deed provided for by the option till, as the result of such actual development within the life of the contract, gas or oil or coal were found in paying quantities.

The judgment of the circuit court, decreeing a specific execution of the contract by the making and delivery of deeds by appellant, is reversed and cause remanded for a judgment in conformity herewith.

Whole court sitting.

FLOWERS v. MOORMAN & HILL.

(Filed April 19, 1905—Not to be reported.)

1. Mortgages—Execution—Recording—Notice—Priority of lien—Where two mortgages were executed on land by the owner to two different parties on different dates, if the junior mortgage be first put to record in the county court clerk's office, without notice or knowledge by the mortgagee of the prior mortgage, such junior mortgagee thereby acquires priority over the senior mortgage subsequently recorded.

2. Conflicting evidence—Finding of chancellor—Weight—In a controversy between the two mortgagees as to whether or not the junior mortgagee at the time he accepted his mortgage had knowledge of the prior mortgage, where the evidence is conflicting some weight should be given by this court to the chancellor's acquaintance with the parties and witnesses.

Barry & Reld for appellant.

Poston & Moorman for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Settle.

On December 2, 1901, I. T. Plasters and wife executed to appellees, Moorman & Hill, their note for \$130, due one year after date, and at the same time gave them a mortgage on a house and lot in Rineyville, Hardin county, to secure its payment. On February 4, 1902, Plasters and wife executed to appellees a second note for \$58, also payable one year after date, and to secure its payment a second mortgage upon the same house and lot was exe-

cuted by the obligors to appellees, but neither of these mortgages was recorded at the time.

On August 19, 1903, Plasters and wife executed to the appellant, W. M. Flowers, two notes of \$100 each, due in one and two years after date, respectively, and to secure their payment executed and delivered to him a mortgage upon the same house and lot covered by the two prior mortgages in favor of appellees. All three of the mortgages were acknowledged by the mortgagors at the time of their execution, respectively; that held by the appellant was duly recorded in the office of the clerk of the Hardin County Court, October 23, 1903, and the two held by appellees were lodged for record November 9, 1903, in the same office, but were not recorded until November 12, twenty days after that of appellant's was recorded.

Appellees sued Plasters and wife in the circuit court upon the two notes held by them, and to enforce the mortgage liens given to secure their payment. Appellant was made a defendant and called upon to set up his mortgage lien, but it was charged in the petition that his mortgage, though first recorded, was inferior to those of appellees, for the alleged reason that appellant at the time of the execution to him of the mortgage from Plasters and wife had notice of the prior execution to appellees of the two mortgages on the same property from the same parties.

Appellant's answer denied that he had notice of appellees' mortgage liens at the time of the execution of his mortgage, or that he knew of them until after the recording of his mortgage, and averred the superiority of his lien over theirs. The lower court, however, decided this issue of fact in favor of appellees, consequently the house and lot covered by the several mortgages was adjudged to be sold to pay first the two lien debts of appellees, and next those of appellant. If appellant's mortgage was accepted by him without knowledge of those previously executed by the same parties upon the same property to appellees, it follows that he was entitled to priority, as his mortgage was not only properly lodged for record, but also actually recorded before those of appellees. (Kentucky Statutes, sections 494-5-6.)

We find the law on this subject well stated in *Emery v. Vaughn*, 18 Ky. Law Rep., 281: "If the facts and circumstances are such as to either charge the second mortgagee with actual notice of the first mortgage, or such as to have caused a reasonably prudent man to have made such inquiry, then the second mortgagee is chargeable with notice, and is presumed to have accepted the mortgage with full knowledge of the existence of the first mortgage.

A careful reading of the evidence in the case at bar leaves us in doubt as to how the single issue of fact should be decided. Indeed we have rarely found testimony more conflicting or irreconcilable than it appears in this case, for which reason we think it unprofitable to consume time in discussing it. The chancellor was of opinion from the evidence that appellant at the time of accepting the mortgage from Plasters and wife knew of the existence of the two prior mortgages, given by the same parties to appellees, and that the debts they were given to secure were then unsatisfied. His written opinion found in the record manifests the care and industry with which he weighed and considered the evidence upon this issue of fact presented by the parties. We do not concur in some of the reasoning appear-

ing in the opinion, but can find no sufficient reason for rejecting the main conclusion therein expressed. Besides, some weight should be attached to the chancellor's acquaintance with the parties and witnesses.

While it is the rule of practice in this court that in equity cases judgment will be given according to the weight of the evidence and the truth of the matter as it shall appear to the court from the whole record, yet "where the proof is conflicting, and on the whole case the mind is left in doubt as to the truth, the chancellor's judgment will not be disturbed." (Campbell v. Trosper, 22 Ky. Law Rep., 280.)

Being of opinion that the rule last stated must of necessity be applied in this case the judgment is affirmed.

ILLINOIS CENTRAL R. R. CO. v. COLLY.

(Filed April 19, 1905—Not to be reported.)

1. Peremptory instruction—A peremptory instruction should never be given where there is any evidence, however slight, tending to support the plaintiff's cause of action.

2. Offer to compromise—Evidence of an offer to the plaintiff to compromise her claim for damages for an injury received by her while a passenger on defendant's railroad train is incompetent.

3. Misconduct of counsel—Statement to jury—A statement made by plaintiff's counsel in his argument to the jury in an action against a railroad company for damages by a passenger, alleging negligence in defendant's servants in the operation of its train, to the effect that the statistics furnished by the interstate commerce commission show that during last year 60,000 persons were killed and crippled upon the railroads of the United States, can not be said to be improper when made in reply to a statement of counsel for the railroad company that "the railroads employ careful and competent engineers; that it is to their interest to do so to preserve its property and protect its passengers, and if they were not careful and competent men they would not be retained."

4. Passenger—Finding seat—Bumping of car—Injury—Verdict—Excessive—Where the evidence shows that a woman passenger who had just boarded a crowded car and was trying to find a seat was thrown down by another car suddenly and violently striking the one she was in, and injured about her hip and back so as to render her unconscious for a time, and causing her great suffering, which had continued down to the time of the trial, a verdict of \$750 in damages can not be held to be excessive.

Robbins, Thomas & Carr, J. M. Dickinson and Trabue, Doolan & Cox for appellant.

Lee & Hester for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Settle.

The appellee recovered judgment in the lower court against the appellant for \$750 damages for injuries sustained to her person by the alleged negligence of its employes while she was a passenger upon one of its trains. According to the averments of the petition and the evidence introduced by appellee in support thereof her injuries were received as follows: Appellee and her husband purchased tickets at Fulton, and there took passage on ap-

pellant's train at night for the purpose of going to Mayfield to visit their daughter. Upon entering the coach and finding all the seats near them occupied, they went toward the other end in search of a seat, and walked the length of the coach without finding one. Thereupon appellee's husband left her standing in the aisle and retraced his steps, still looking for and hoping to find a vacant seat for her. After her husband left her appellee was offered a seat by a woman near by, who removed a child to her lap to make room for her. As appellee was about to take the seat thus offered her the car in which she was standing, by the alleged negligence of appellant's servants in charge of the train, suddenly, and with unusual and unnecessary force and violence, was struck by another coach attached to the engine, which was backed against and coupled to it, and she was thereby caused to fall against the seat or some part of the car and to the floor, whereby she was jarred and stunned to such an extent as to render her unconscious for a time, and her hip and back so injured as to then, and continuously thereafter, cause her great physical and mental pain and suffering.

The answer denied the negligence complained of, or that the cars were brought together in making the coupling with more than the usual or necessary force, or that appellee was thereby thrown down or injured, and averred contributory negligence on her part, but for which her injuries, if any, would not have been received. The plea of contributory negligence was denied by the reply, which completed the issues. We will notice only such of the grounds for a new trial as are now relied on by appellant for a reversal. It is insisted for appellant that the trial court erred in refusing the peremptory instruction asked by it at the conclusion of appellee's testimony. The peremptory instruction would not have been proper. Though appellee alone testified in support of her cause of action, her statements, if accepted by the jury, sustained the averments of the petition as to the manner of receiving her injuries, and established the fact that they were caused by the negligence of appellants' servants in making the coupling complained of. A peremptory instruction should never be given in behalf of the defendant when there is any evidence, however slight, tending to support the plaintiff's cause of action.

It is further insisted for appellant that the court did not properly instruct the jury that it erred in refusing to give certain instructions asked by appellant. Instruction No. 1, given by the court, was improper, as it authorized the jury to find for appellee if the coach in which she was a passenger was so negligently or recklessly moved by appellant's servants as to cause her injuries, whereas the cause of action was not only the negligent moving of the cars, but also the negligent, unnecessary and violent striking of the coach she was in by or against another in effecting a coupling, and this feature of alleged negligence should also have been presented by the instruction.

The error in this instruction was, however, cured by instruction No. 2, which directed the attention of the jury to the fact that if appellee was entitled to recover at all, it was upon the ground that appellant's servants were guilty of negligence in coupling the cars with such unusual and unnecessary force as to cause her to fall and sustain the injuries complained of, and the same instruction in substance further told the jury that if they

believed from the evidence that appellant's servants handled the coach in which appellee was a passenger in the usual manner, and made the coupling in the ordinary way incidental to railroading, or if appellee was herself guilty of negligence, but for which she would not have been injured, they should find for appellant.

Instruction 2 was unduly favorable to appellant, in that the jury were authorized by it to find for appellant if the coupling of the cars was made in the way that was customary and incidental to railroading, without defining the degree of care with which it should have been done. The manner in which such coupling is usually done by appellant's servants, or other railroad men, may not be a reasonably safe or careful way of doing such work.

Instruction No. 8 was devoted to definitions of negligence and ordinary care.

Considered as a whole the instructions were as favorable to appellant as was proper, but in some respects prejudicial to appellee. As the refused instructions asked by appellant were in effect embraced by those given, appellant has no cause of complaint on that score. Appellant also complains that the court erred in excluding as testimony the fact it offered to prove by appellee that in an effort to settle with appellant before suit her claim against it for the injuries alleged to have been sustained by the negligence of its servants, she fixed the amount thereof at \$500, or offered to settle at that sum, instead of \$2,000, the amount for which she sued.

We think this testimony was properly excluded by the court. The offer of appellee to accept \$500 in settlement of her claim was made before suit was filed, was made doubtless to avoid a suit, and was an offer to compromise, proof of which is never admissible as evidence. Another alleged error complained of is that counsel for appellee was allowed by the court to make certain improper statements in argument to the jury, to the effect that the "statistics furnished by the interstate commerce commission show that during last year 60,000 persons were killed and crippled upon the railroads of the United States, and that the facts of the case at bar proved that the servants of appellant were reckless or careless in the management of the train upon which appellee was injured." The statements in question were made, as shown by the record, in reply to a statement of appellant's counsel in argument to the jury, "that the railroads employ careful and competent engineers; that it was to their interest to do so to preserve its property and protect its passengers, and if they were not competent and careful men they would not be retained, and the fact that engineer Crogan (who was a witness for appellant) had been an engineer for twenty-four years, showed he was a competent and careful engineer and could be trusted in handling trains."

In view of what was said by appellant's counsel we are not prepared to say that the statements of appellee's counsel complained of were improper. While not appearing in the record the facts and figures furnished by the report of the interstate commerce commission became and are a part of the history of the country, and as such are known to the reading public. Ordinarily things well known, especially matters of history, need not be proved, and it would be a harsh rule indeed that would forbid one charged with the duty of instructing others from drawing upon the facts of history

to illustrate a thought or point an argument. At any rate, is not apparent from the record that appellant was prejudiced by the remarks of counsel complained of. Finally, it is complained by appellant that the verdict of the jury is not supported by and is contrary to the evidence; and, further, that it is excessive.

We can not sustain either of these contentions. It is true that appellee stands alone in her testimony as to the manner in which her injuries were received. She seems to have known none of her fellow passengers on the train, and none of them was introduced by her or appellant as witness. Appellee described with particularity the facts and circumstances connected with and leading to the accident. As to the fact that she was thrown down by the striking of the car she was on, and as to the character and extent of her injuries, she was uncontradicted. Appellant introduced its trainmen, who testified that the coupling of the cars on the occasion in question was done in the usual way, and without force or violence. The jury were the triers of the facts, and they had the right to accept the testimony of appellee as to the truth of the matter and reject that of appellant's witnesses. "We can not say that mere numerical superiority of witnesses on one side constitutes preponderance of proof, nor can we disturb the verdict as not being sustained by sufficient evidence." (Alcorn v. Powell, & Co., 22 Ky. Law Rep., 1854.)

As to the injuries of appellee, her own testimony as well as that of her physician showed that she was hurt in the back and hip; that her suffering was great, and that it continued down to the time of the trial of the cause. The physician was not sure that her health was permanently injured, probably that fact can not yet be determined. Upon the whole case, while the compensation allowed appellee by the jury was liberal, from the proof we are unable to say that it was excessive.

Wherefore, the judgment is affirmed.

McKINNEY v. THOMPSON.

(Filed April 20, 1905—Not to be reported.)

1. Barbed-wire fence—Where appellant had erected a barbed-wire fence along appellee's easement without his consent, under the provisions of section 1784, Kentucky Statutes, he was properly enjoined from maintaining such fence.

2. Easements—The evidence clearly establishing the use of the passway in controversy by prescription, appellant has no cause to complain of the judgment fixing the width of the passway at eighteen feet.

Montgomery & Lee for appellant.

James B. Finnell for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellee in the Scott Circuit Court for the purpose of enjoining appellant from narrowing a right of way claimed by appellee, and from maintaining a barbed-wire fence along its line. The

petition states, substantially, that one Remus Payne formerly owned a large tract of land in Scott county, Kentucky, which after his death was subdivided and sold in smaller tracts, one of which now belongs to appellee, another to appellant, a third to J. W. Prowell, and a fourth to J. M. Tisdale; that the lands of Prowell, appellant and Tisdale are situated between those of appellee and the Oxford and Newtown road, which is the only highway accessible from them; that in the division of these lands, more than twenty-five years before the institution of this action, the commissioners entrusted with this duty, for some reason, failed to establish a passway for the land now owned by appellee to the public highway before mentioned, but that appellee had acquired by adverse user for fifteen years, and now owned, a passway from his land over that of Prowell, appellant and Tisdale, of a varying width of from twenty to thirty feet; that appellant had wrongfully narrowed this right of way where it passes over his land by erecting and maintaining a barbed-wire fence in and along the same. The appellant filed an answer, admitting appellee was entitled to a right of way as claimed by him for the width of eighteen feet, but denying that it was wider than that; he also admitted the erection of a barbed-wire fence, but denied that it was a nuisance, or interfered with appellee's right of way. After the case had been pending more than a year he tendered and offered to file an amended petition, in which he undertook to set up in estoppel certain facts admitted to be true in an agreed action between Prowell and appellee concerning the right of way over the former's land. The pleading tendered also admitted the legal right of appellee to have a passway established over his land, but alleged that none had ever theretofore been legally established either by grant or adverse user for the statutory period. There is, in addition, the following allegation: "He says that the only attempt to locate a passway which has ever been made was when this defendant left a space of eighteen feet for the purpose of a passway, which he still insists is sufficient therefor." The motion to file this amended answer was overruled by the court. Subsequently appellant offered and was allowed to file a second amended answer, in which he alleges in substance that the use of the right of way in question was by permission only. This was controverted by reply.

On final submission the court entered a decree establishing a right of way eighteen feet in width, as admitted by appellant, and perpetually enjoining him from obstructing appellee in its use and from maintaining the barbed-wire fence along its line. To reverse this judgment he has brought the record to this court for review. It is apparent that appellee's land would be utterly valueless without the right of way to the public road, and the evidence shows that it has been constantly used by appellee and his vendors under a claim of right since the original division of Remus Payne's estate. It is difficult to determine just what appellant does claim by his answer as amended with reference to appellee's legal right to the use of the passway. Taken as a whole, we are inclined to think it admits the right, but if this conclusion be unsound, taking the most favorable view possible, the pleading admits the actual user, but alleges that it was by permission. It is immaterial, for the purposes of this appeal, which of these conclusions be adopted. The evidence clearly refutes the user by permission and establishes the prescriptive right. As the judgment establishes the width of the

easement at eighteen feet, as contended for by appellant, he has no cause of complaint on this branch of the controversy.

The claim that section 1784 of the Kentucky Statutes permits the use of a barbed-wire fence along the lines of a right of way results from a misreading of the statute, so much of which as is pertinent to the subject in hand being as follows: "When a division fence is desirable, or is made necessary by the division of improved or inclosed land, or when no fence or no division fence exists between the improved or inclosed lands of adjoining owners, or lands where the right of way is owned by one party, either party may, after he has built a lawful fence upon his proportion of the line, require the other party to erect a lawful fence out of planks, rails, wire or wire and plank upon his proportion of the line; but no barbed-wire shall be used without the consent of both parties to the fence." * * * As the statute specifically prohibits the erection of a barbed-wire fence along the line of a right of way without consent of parties, the court did not err in enjoining appellant from the further maintenance of that which he had wrongfully erected along the line of appellee's easement.

Perceiving no error in the record prejudicial to the legal rights of appellant the judgment is affirmed.

BEVINS v. COMMONWEALTH.

(Filed April 20, 1905—Not to be reported.)

Pool tables—Payment of license for—Repeal of statute—The revenue law of this State, which became effective March 29, 1902, does not include the statute requiring the payment of a license tax to keep pool tables, and, therefore, the latter statute was repealed by the enactment of the present revenue law. It follows, therefore, that a license for pool tables is no longer required.

Little & Slack for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Ed. Bevins, was indicted by the grand jury of Daviess county, charged with the offense of "keeping a room in which a pool table was kept, for the use of which a price was charged, without first procuring a license so to do, and paying the tax thereon as required by law." Upon the trial of the case the defendant, in open court, admitted the truth of the facts stated in the indictment, whereupon he was found guilty, and fined in the sum of \$55, from which he prosecutes this appeal.

The soundness of the judgment of the trial court depends upon the question of whether or not so much of the former revenue statute as required a license to keep pool tables is still in force. It is conceded that under the law as it existed prior to March 29, 1902, the payment of a license tax was required, and that, by the revenue statute which became a law on the day mentioned, the former provision, requiring the payment of a license tax for the keeping of pool tables, is omitted. An examination of the revenue act, which became a law on the 29th day of March, 1902, and which is chapter 108

of the Kentucky Statutes, makes it clear that it was intended to constitute the general revenue law of the State, and that any former provision relating to the State's revenue not contained in it is repealed. The title contains a list of all the revenue statutes theretofore existing, which it was desired to amend and re-enact, and they are welded together and re-enacted so as to read as now set forth in the Kentucky Statutes. In this general statute all of the subjects of taxation and license are set forth with such minute particularity as to exclude the idea that the legislature intended that it should not contain all the fiscal law of the State. This principle of construction finds support in *Buchannon v. Commonwealth*, 95 Ky., 334; *Long, Treasurer v. Stone, Auditor*, 19 Ky. Law Rep., 246; *Conley v. Commonwealth*, 17 Ky. Law Rep., 678. The case of *Murphy, Assessor v. City of Louisville*, 24 Ky. Law Rep., 1574, in nowise militates against this view. There it was held that the law under discussion did not repeal a revenue act of cities of the first class, which, while a general law, was one of local application only. It follows from this conclusion that, under the fiscal laws of the State, the payment of a license on rooms wherein pool tables are kept for hire is no longer required.

The judgment is reversed, with directions to dismiss the indictment.

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COURT OF APPEALS OF KENTUCKY.

MURNAHAN v. CINCINNATI, NEWPORT AND COVINGTON STREET RY. CO., &c.

(Filed April 14, 1905—Not to be reported.)

Street railways—Action against for damages—Discharge of passenger—The rule as to discharge of passengers is different in the case of street railways from steam railways. The latter is required to furnish a safe place for such discharge, while the former is under no such obligation, but may discharge its passengers at convenient places along the streets it traverses. In this action, there being no averment in the petition that there was a defect in the street, nor an averment that the conductor knew of its being an unsafe place where the car stopped, and no averment the condition alleged was not known to appellant, a demurrer was properly sustained to her petition in this action for damages against appellee.

H. M. Benton for appellant.

L. J. Crawford for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Paynter.

The appellant was a passenger on one of appellees' street cars. At 8 o'clock, a. m., she alighted from it, and she avers that in doing so she fractured her ankle and sustained serious injury thereby. She seeks to recover damages for the injury. As a ground for recovery it is substantially averred that the car did not stop at its usual stopping point, at which the smooth surface of the concrete street afforded a convenient and safe place for passengers to alight, but that defendant's employes and servants negligently failed to stop the car at the usual stopping point, but stopped it about ten feet beyond, at which point the surface of the street was composed of rough and uneven granite stones, which afforded an unsafe place for the plaintiff (she was carrying an infant child) to alight from the car; that she had no means of observing, and was not warned of the unsafe condition of the street, and that the defendant's conductor knowingly failed to

warn her of the danger of her alighting at that point; that the conductor was on the rear platform of the car, and in violation of his duty urged her to undue haste in alighting from the car; that by his words and actions he imparted to her his anxiety for her to hurriedly alight from the car, and that while she was on the step of the car he took hold of the bell rope as though to start the car, and that she was thereby further urged to hastily step to the ground, and that in doing so her foot turned upon one of the rough and uneven stones, thereby fracturing her ankle.

A different duty attaches to a street railway from that which attaches to steam railway operators in respect to furnishing safe places for discharging their passengers. The latter is required to furnish such, while the former is under no such obligation, but may discharge its passengers at convenient points along the streets it traverses.

This court said in *Sweet v. Louisville Railway Co.*, 23 Ky. Law Rep., 2280: "It is stated, and it seems to be true, that a different duty attaches to street railway and to steam railway operators in respect to furnishing safe places for discharging their passengers. The latter must furnish such, while the former is under no such obligation, but discharges its passengers at convenient points along the streets it traverses. (Booth on Street Railways, section 826.) If the street at the place of discharging the passenger presents a dangerous condition to one alighting there, and such danger is obvious to the passenger, the carrier is not liable to him for injuries received from such defects. But where the danger is known, or is such as must have been known, to the carrier, and is unknown to the passenger, as where because of the darkness he can not see it, the carrier is bound to warn the passenger of the danger, or to assist him in safely alighting, or stop the car at a point beyond or short of the danger point. Its failure to take one of these precautions renders it liable to the passenger sustaining injury because of such neglect."

It is a matter of common knowledge that granite stones used for paving streets are rough and uneven. There is no averment that they were more so at the point in question than is usual on streets thus paved. There is no averment in the petition that there was a hole or depression in the street, neither is there any averment that the conductor knew that it was unsafe for the plaintiff to alight from the car at that place. There is no averment that the rough and uneven stones were not obvious to the plaintiff. It is not averred that she was blind, or that her eyesight was defective; but facts are averred which show that the uneven condition of the stones was obvious to her. She alighted from the car in broad daylight, and, necessarily, the paving of the street was obvious to her. It is averred in the petition that the conductor knowingly failed to warn her of the danger of alighting at the point where the injury was received. That is not equivalent to saying that he had knowledge of the fact that it was dangerous, but it only imputed to him knowledge that he had failed to give her warning.

We think under the rule enunciated in *Sweet v. Railway* the court properly sustained the demurrer to the petition, and the judgment is affirmed.

COMMONWEALTH v. WALLS.

(Filed April 14, 1905—Not to be reported.)

1. Indictments—Forgery—Altering instruments—An indictment which charged in substance that an order for the payment of money was altered by erasing certain words, which directed that a certain sum should be withheld, so as to collect the entire amount, is sufficient to charge forgery because it enabled him who made the erasure to obtain money by his wrongful act.

2. Same—It is not necessary that an entire instrument should be forged to make the crime of forgery complete. This crime may be committed by the alteration of an instrument, by erasure or addition, with intent to prejudice the rights of another.

N. B. Hays and C. H. Morris for appellant.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charged appellee with the crime of forgery, committed by altering an order drawn as follows:

“Mr. G. W. Stephens:

“Dear Sir—You will please count J. P. Walls’ load of staves and pay him for this load, and the load he brought through Monday, deducting therefrom \$3.82 that he owes me; hold same in your possession until I call for it.

“Very respectfully yours,

“LORENZO CORDON.”

It is in substance charged that appellee forged, uttered and counterfeited the order by unlawfully, fraudulently and feloniously erasing therefrom the words “deducting therefrom \$3.82 that he owes me, and hold same in your possession until I call for it,” and that it was done for the purpose of fraud and deceit. The court sustained a demurrer to the indictment, and the case is appealed to have that action of the court reviewed. The indictment is evidently based on section 1185, Kentucky Statutes, which reads as follows:

“Section 1185. If any person shall forge or counterfeit any * * * order or promissory note for the payment of money or other thing, * * * or receipt for the money, or property or other thing, with intention to defraud another, * * * shall be,” etc.

The attorney general does not seem to know the grounds upon which the demurrer was sustained to the indictment, therefore, the court considers the whole indictment and determines whether it is good under the statute. Presumably the court sustained the indictment because the entire instrument was not forged and uttered. Forgery can be committed by the alteration of an instrument, by erasure or addition, with intent to prejudice the rights of another. It has been held that to alter the date of a promissory note or an order, to alter the sum of a note, to alter the words and figures of a bank bill, to alter the date of a deed so as to affect established rights, is forgery. This court, in *Commonwealth v. Hyde*, 94 Ky., 518, said: “It is certainly not necessary that the whole instrument should be made false or fictitious. Making an alteration or erasure in any material part of a true instrument, whereby another may be defrauded, is a forgery.”

The alteration in this case was for the purpose of defrauding the drawer of the order of \$3.32, and it enabled the appellee to obtain that much money by his wrongful act.

In our judgment the indictment is good and the demurrer should have been overruled, and the judgment is reversed for proceedings consistent with this action.

JACKSON, &c. v. HARDIN.

(Filed April 21, 1905.)

Injunctions—Pendency of appeal—Appellate court—Revisory power—Section 747, Civil Code of Practice, pertaining to the suspending, modifying or continuing of an injunction during the pendency of an appeal, limits the application to this court to revise the action of the circuit court as to continuing the injunction enforced pending the appeal to "twenty days after the entry of such order," and when such motion is made within twenty days after the entry of the order it comes too late.

F. C. Newman for appellants.

Sam C. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Hobson.

On final hearing the circuit court dissolved the injunction which had been obtained by appellants, granting them an appeal to this court, and on their motion that the injunction be continued in force pending the appeal he made an order continuing the injunction in force for sixty days from date of the judgment. The appeal is now pending in this court and is set for hearing on May 24th, but the sixty days will expire before that time, and appellants have entered a motion that this court continue the injunction in force pending the appeal. Section 747 of the Civil Code of Practice is as follows: "An appeal shall not stay proceedings on the judgment unless a supersedeas be issued. The provisions of the Civil Code concerning supersedeas on appeals shall not apply to judgments granting, modifying, perpetuating or dissolving injunctions. When an appeal shall be taken from any judgment granting, modifying, perpetuating or dissolving any injunction the court which rendered the judgment may, in its discretion, if the ends of justice so require, at the time the appeal is taken, make an order suspending, modifying or continuing the injunction during the pendency of the appeal, upon such terms as to bond or otherwise, as may be proper for the security of the rights of the opposite party. Either party, within twenty days after the entry of such order, may take a transcript of the record, or all parts thereof appertaining to the injunction, and upon reasonable notice in writing to the opposite party move the Court of Appeals, or, if in vacation, any judge thereof, to revise the order of the lower court, and finally determine how far the injunction shall be suspended, modified or continued pending the appeal. Pending such application to the Court of Appeals or judge thereof, but not longer than for twenty days, the status existing immediately before the entry of the judgment appealed from shall be maintained, and the lower court shall so provide in the judgment upon

the request of either party. If, at any time, upon reasonable notice to the party affected, it may be made to appear that the sureties upon the bond required in the court below are insufficient, the Court of Appeals, or a judge thereof in vacation, may set aside the order suspending, modifying or continuing the injunction pending the appeal unless, sufficient surety be furnished by a day fixed by the court or judge."

It will be observed that the statute limits the application to this court to revise the action of the circuit court as to continuing the injunction in force pending the appeal to "twenty days after the entry of such order." The motion here was not made within twenty days after the entry of the order, and so comes too late. The motion is made under the statute. No other question is presented.

The motion is, therefore, overruled.

GREGORY v. NEW HOME SEWING MACHINE CO.

(Filed April 21, 1905—Not to be reported.)

Judgments—Reversal of—The Code of Practice provides that a judgment shall not be reversed for any error of law not affecting the substantial rights of the adverse party, and as the appellant in this action obtained credit upon the trial in the lower court for everything he claimed, it is immaterial to him whether the claim was upon the equity or ordinary side of the docket.

Lee & Hester for appellant.

Ed. Thomas for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee purchased a number of sewing machines from appellant, and on May 20, 1899, executed to it his notes for \$700 for the balance due on the account, and also executed a mortgage to secure the payment of the notes. Thereafter he continued to buy sewing machines until there was a balance of several hundred dollars due by him on the open account. Appellee on August 17, 1904, began this action against him by petition in equity, setting up the notes and the mortgages to secure them, also the account made after the execution of the notes, and praying judgment for its debt and the enforcement of its mortgage lien. Grounds of attachment were alleged and an attachment was taken out. The defendant appeared in the action, and moved the court to require the plaintiff to elect which cause of action he would prosecute. The court overruled the motion. The defendant then filed an answer, in which he set up credits on the account to the amount of \$111. The plaintiff did not controvert the allegations of the answer, and thereupon judgment was rendered for the plaintiff for the debt sued for and the enforcement of its mortgage, subject to the credits set up in the answer, \$17.75 interest on the account being included in the judgment. The defendant appeals, insisting that the court erred in overruling his motion that the plaintiff be required to elect which cause of action sued on he would prosecute, and that the court erred in allowing interest on the account.

It is provided in the Code of Practice that a judgment shall not be reversed for any error of law not affecting the substantial rights of the adverse party. The defendant was allowed by the court credit for everything which he claimed in his answer. As to the balance of the debt he had no defense, and it was immaterial to him whether the claim was sued upon on the equity docket or the ordinary docket. He was in no way prejudiced by the fact that one suit was brought rather than two, one in equity on the mortgage debt to foreclose the mortgage and the other at common law on the account. As to the interest on the account the court was clearly right. The account was past due. The defendant had purchased the sewing machines, and had failed to pay for them as he had agreed to do. If the case had been brought before a jury they might, in their discretion, have found for the plaintiff in any view of the case such interest as they thought proper. The court had the same power in rendering judgment where there was no controversy about the debt. In *Henderson Cotton Manufacturing Co. v. Lowell Machine Shops*, 86 Ky., 668, this court thus laid down the rule as to the allowance of interest as a matter of right on an open account: "Both reason and authority say that if, by the terms of the contract, whether oral or written, a debt be due at a certain time, then it by law carries interest from that time in the absence of any agreement otherwise by the parties."

Judgment affirmed.

MORRIS, &c. v. STRAUGHAN, EX'OR, &c.

(Filed April 21, 1905—Not to be reported.)

Wills—Contest of—Insufficiency of evidence—In this action attacking testator's will on the ground of mental incapacity, evidence examined and held that it does not create a suspicion of mental incompetency to make and execute the will.

E. E. McKay, R. F. Peak and H. K. Bourne for appellants.

John D. Carroll, Turner & Turner and Willis & Todd for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Nunn.

It appears that one James L. Straughan in December, 1900, made and executed a will disposing of his estate, which was composed of real and personal property of the value of about \$25,000. Although the will was introduced as evidence on the trial in the lower court, it appears not to have been copied into the transcript, and we have no knowledge of the contents of it except from what appears in the briefs of counsel and the references made thereto, by the witnesses in their oral testimony.

The appellant, James H. Morris, was dissatisfied with the provisions of the will and instituted this contest, alleging that the testator had not mental capacity sufficient to execute it, and that he was unduly influenced at and prior to the time he made it. The appellees denied this, and on the trial the lower court gave a peremptory instruction to find for appellees. The appellants made no attempt to introduce any proof upon the question of undue influence, and the record does not show even a suspicion of anything of that kind. The evidence shows that the testator was about seventy-one

years of age at the time he made the will, and that he lived about eleven months after the execution of it. The propounders of the will introduced the draftsman, who stated that he prepared the will under the immediate direction of the testator, and that it was testator's will in all its parts; that he had been intimately acquainted with Mr. Straughan for many years, and that he was a man of strong mind and good business capacity, and that his mental condition appeared to be very good at the time of making it. The will was witnessed by his family physician and another neighbor, Mr. Gatton, the testimony of both of whom was to the same effect as that of the draftsman as to the mental condition of the testator. On the cross-examination of the family physician he stated that in the month of September prior to the execution of the will he discovered that Mr. Straughan was afflicted with Bright's disease and organic valvular heart trouble, but that his mind did not seem to be affected by reason thereof. The appellants then introduced three physicians, who testified as experts, who stated that such diseases affected the mind, and that there was a possibility that his mind was affected in the month of December, 1900, the time he made the will. Not one of them gave an opinion as to the testator's mental condition in the month of December, 1900, although two of them knew him, and one of these intimately, for a number of years next before his death. They were even asked their opinion from personal intercourse. The appellants contented themselves with answers as to the possible effect on the mind of one afflicted with such diseases. The appellant, Morris, did not profess to state or know the condition of the mind of the testator in the month of December, 1900. He only saw him for a short time in the month of October, 1900, and again not until some time in the spring of 1901, and then again a short time before he died in the month of November. He stated that at the time he saw testator he did not think his mind was in good condition, but he nowhere stated that he was incompetent to make the will at the time it was made. He lived about fourteen miles from testator, and he did not introduce any person who was even acquainted with testator to testify as to his competency or incompetency at or about the time he made the will. After carefully reading and considering all the testimony offered by appellants it does not create a suspicion that the testator was mentally incompetent to make and execute the will.

Wherefore, the judgment is affirmed.

WEAVER v. COMMONWEALTH.

(Filed April 21, 1905—Not to be reported.)

1. Criminal law—Larceny—Instructions—Upon the trial of appellant upon an indictment charging him with grand larceny, an instruction directing the jury to find him guilty if they believed from the evidence that he took and carried away property of the aggregate value of \$1,000, or property of the value of \$20, was erroneous because the jury were warranted in finding him guilty if the articles taken were of the value of \$20, although the property taken at no single instance was of as much value as \$20. To constitute grand larceny the value of the things taken must be \$20, and the taking must be done at one time.

2. Same—The court should have given an instruction upon petit larceny because under the form of the indictment and under the evidence the jury might have found defendant guilty of the latter offense.

3. Same—Evidence—Where evidence was admitted solely as affecting the credibility of a witness the court should have so admonished the jury, instead of allowing it to go as substantive evidence of appellant's guilt.

C. C. McMahon for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge O'Rear.

Appellant was convicted of the crime of grand larceny, charged to have been committed by his feloniously taking and carrying away numerous articles of wearing apparel, and other personal property, belonging to Dr. Dudley S. Reynolds, of the aggregate value of about \$1,000. The evidence disclosed that the articles were taken at intervals, and by different persons. There was evidence that appellant had been seen to take a pair of silk stockings, the value of which was not shown.

A witness for the Commonwealth, who was arrested for the same theft, testified in addition that appellant had told him that a couple of bundles, one of which contained silverware, was got from the Reynolds house. The value of none of these things was shown. All the stolen property that was discovered was found in the possession of certain Commonwealth witnesses and others also charged with the theft. None of it was found in the possession of appellant. Except an immaterial statement proven to have been made by appellant, the above is the only evidence tending to connect him with the theft.

Appellant complains of the trial which resulted in the judgment convicting him upon several grounds. One is that the instructions given to the jury do not fully present the law of the case. The court told the jury that if they believed from the evidence, beyond a reasonable doubt, that the defendant before the finding of the indictment unlawfully and feloniously took, stole and carried away the various articles enumerated in the indictment, and set out in detail in the instruction, "of the aggregate value of \$1,000, or any of said articles to the value of \$20 or more," ~~that~~ the defendant was guilty of a felony, and should be punished by confinement in the penitentiary not less than one nor more than five years. The objection to this instruction is that it does not require the jury to find as a matter of fact that the defendant took and carried away articles of the value of \$20 in the aggregate at one time. Under this instruction, if the jury had found under the proof that appellant had carried away at different times different articles, each of the value of less than \$20, and no single taking of as much as \$20 in value, yet if the aggregate of all of it so taken by him was more than \$20, then they were warranted in finding him guilty. Such is not the law. To constitute grand larceny the value of the things taken must be at least \$20. If the taking was at one time, then the value of all articles taken at that time could be added together in estimating the degree of the offense. Or, if the articles were taken by appellant as the result of a single purpose or impulse, though the asportation was at intervals to better suit his con-

venience, the degree of the offense will not be lessened by the fact that he could not, or did not, carry away all the articles at one load. But if appellant took at one time certain articles of less aggregate value than \$20, and later determined to and did take others, also of less value than \$20, but altogether being of the value of \$20, or more, nevertheless the two larcenies can not be added together so as to sustain the charge of grand larceny. Petty stealing by being often repeated is not raised to the crime of a felony. The nature of the transaction must determine whether the offense was one, or whether it was a series of offenses. (Bishop on Criminal Law, section 888.) The question should be submitted to the jury.

We are also of the opinion that the court should have submitted to the jury an instruction upon the offense of petit larceny. Under the form of the indictment, and under the evidence in this case, the jury might have found the defendant guilty of the latter offense only. (Nicholas v. Commonwealth, 78 Ky., 180; Fisher v. Commonwealth, 1 Bush, 211; Chenault v. Commonwealth, 90 Ky., 160.)

On the trial appellant denied having taken any of the things charged, and denied making his home at the place where they were found, and where he was arrested. He claimed to live in another part of the city. He introduced a woman with whom he lived as a witness, who testified that he did live with her, and had for a number of years, and that he had not brought to her house any of the articles charged to have been stolen, nor did she ever see them. She was asked on cross-examination if she did not say to the officer who searched her premises that while none of the things taken from the Reynolds house were then there, that appellant had brought some of them there, but had taken them away. She denied having made the statement. The Commonwealth was then allowed to prove in rebuttal by the officer that she had made that statement. This was objected to by appellant, but his objection was overruled. The evidence was admissible solely as affecting the credibility of the witness, Josephine VanDyke, and the court should have so admonished the jury. Letting it go as it did, it had the effect of substantive evidence of the defendant's guilt, which was of course erroneous, being purely a hearsay statement. (Mosely v. Commonwealth, 24 Ky. Law Rep., 1811; Loving v. Commonwealth, 80 Ky., 511; Fletcher v. Commonwealth, 26 Ky. Law Rep., 1157.)

For these reasons the judgment of the circuit court is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

HARDESTY, &c. v. TOWN OF MT. EDEN, &c.

(Filed April 14, 1905—Not to be reported.)

1. Cities and towns—Ordinances—Extension of limits—An ordinance enacted by a board of town trustees, providing for the extension of the town limits one-third of a mile from the public well from a certain corner in each direction of the compass, is sufficiently definite, and the criticism that it should have stated from what part of the well is not apt, but the beginning point may be assumed to be the center of the well.

2. Time of pleading—Permitting the answer to be filed in this action after the expiration of twenty days was in the discretion of the court.

Gilbert, Peak & Gilbert for appellants.

W. M. Harrison and Willis & Willis for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Paynter.

The town of Mt. Eden is a city of the sixth class. The board of trustees desired to annex territory to the town, and in execution of that purpose it enacted an ordinance which reads as follows:

"Ordinance No. Be it ordained by the board of trustees of the town of Mt. Eden, Ky., that the town limits be extended one-third of a mile from the public well on the corner of Third and Market streets, north, south, east and west.

"Approved July 15, 1901.

"THOMAS HARRISON, Chairman,

"E. S. BROWN, Clerk."

The appellants instituted this proceeding to have the ordinance declared void, principally because it does not define accurately the boundary of the territory proposed to be annexed. The contention is that it is not definite and certain, because it can not be told from the description of the territory to be annexed whether it describes a circle or a square. Had the board of trustees intended that the territory should be described by a circle, it would certainly have so stated in the ordinance. But it will be observed that it commences at the "public well, on the corner of Third and Market streets," and it is extended north, south, east and west one-third of a mile therefrom. No conclusion can be reached from the language used except that that territory should be square.

It is contended that it is not accurate, because it calls to commence at the well, without stating whether it is the center or the sides of the well.

In making a survey of land, and a tree is called for, it could not be said that it was not accurate because it was not stated that it was to commence from the side or the center of the tree. In our opinion the beginning point is the center of the well. It is urged that the court erred in allowing the answer to be filed after the expiration of twenty days. To allow the filing of the answer was in the sound discretion of the court. Under the facts shown, we think he did not abuse his discretion. In fact had no answer been filed it is not certain that we would have reached a conclusion other than we have in this case.

The judgment is affirmed.

CITY OF LATONIA, &c. v. MEYER.

(Filed April 20, 1905—Not to be reported)

Annexing property—Listing of property for taxation—Where property was not situated within the corporate limits of a city on the date at which it should be assessed for taxation, it was not liable to taxation in that city for that year (sections 3535 and 3533, Kentucky Statutes), and the property of appellant not having been annexed to the city of Latonia at the time fixed for its assessment by these statutes, it was clearly not subject to taxation there for that year, but in South Covington, from which it was transferred, if it was subject to a tax at all.

L. L. Manson, L. T. Applegate and A. L. Vickers for appellants.

Orle S. Ware and John S. Rich for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, Meyer, owned property in South Covington District. Latonia is a city of the fourth class. By a judgment of the Kenton Circuit Court, entered May 23, 1904, the territory embracing appellee's property was annexed to the city of Latonia, so his property was not taxable for the year of 1904, unless it became so by the judgment of the court which annexed the territory which embraced his property. It is provided by section 8535, Kentucky Statutes, that "all property taxed according to value shall be valued as of the first day of April each year, and the person owning the same or holding the same in the right of another on that day shall list it with the assessor, and remain bound for and pay the tax notwithstanding he may have sold or parted with the property."

In section 8538 it is provided: "It shall be the duty of the assessor on or before the 1st Monday in May of each year to take a list of all the taxable property in said city, and return the same to the board of council."

The property within the city of Latonia was to be valued for the purpose of taxation as of the date of April 1st of each year. It was the duty of the assessor to return his list of all the taxable property on or before the first Monday in May of each year. The appellee's property was not situated within the corporate limits of the city of Latonia on the date at which it should be valued or at the time the assessment should have been made. Only the property situated within the corporate limits of the city on the 1st day of April should have been assessed and required to pay taxes. The assessor had no authority to assess the appellee's property on either of the dates mentioned, because it was not situated within the corporate limits of the municipality. Therefore, it was not omitted property. The fact that the property was annexed to the city did not give the municipality the right to impose a tax upon it except at times provided by the Statute. If the appellee's property was liable to pay a local tax for the year of 1904, it was due the South Covington District, not to the city of Latonia. (Bierley, &c. v. Quick's Run and Ohio River T. P. R. Co., 17 Ky. Law Rep., 36.)

The judgment is affirmed.

TRIMBLE v. SWINFORD.

(Filed April 20, 1905—Not to be reported)

Evidence—The evidence upon this appeal examined and held to support the judgment, which is, therefore, affirmed. It was the province of the jury to pass upon the evidence, and if it was at all, it was not so flagrantly against the weight of the evidence as to authorize the granting of a new trial.

W. I. Clarke for appellant.

C. H. Wilson, C. C. Grassham and J. C. Hodge for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Paynter.

The appellant was sued by the appellee for an aggravated assault upon her person. A jury returned a verdict against him for \$500, upon which judgment was rendered. A reversal is sought principally upon the ground that the verdict is against the weight of the evidence.

The appellee alone testified to the assault, which she claimed was committed upon her some time during the night in the dining-room of the appellant's residence where she was sleeping. The appellant admits that he was in the room, but denies the assault. To support his evidence he introduced Hickman Kayse, who testified that he was in the room at the time the appellant passed through, and that he did not stop at appellee's bed as claimed by her. The witness says that neither the appellee nor appellant knew that he was in the room; that he had entered it surreptitiously, and declined to state the purpose for which he entered it. He admits that nothing had transpired between himself and the appellee which justified his intrusion into the room. After reading his evidence the court can see why the jury gave little credence to it. It was the province of the jury to pass upon the evidence, and if at all, it is not so flagrantly against the weight of the evidence as to justify the court in granting a new trial.

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. CARTER.

(Filed April 25, 1905—Not to be reported.)

1. Railroads—Instructions—Upon the trial of this action, which was an action for damages for an alleged closing of appellee's passway, an instruction which directed the jury, if they found that by uniting the time that appellee had used the passway with that with which it had been used by her husband, it had been used for fifteen years before it was obstructed by appellant, they would find for her in such sum as would compensate her for such trouble, annoyance and inconvenience resulting from the maintenance of the fence, was misleading, and they should have been instructed that the measure of damages was the diminution of the value of the use of her house and land during the time the obstruction was continued, and that such recovery was limited to that measure.

2. Same—Evidence of rental value—Evidence offered upon the trial by appellee of the rental value of the property should have been allowed, for by it the jury might have been able to determine how far the value of the use of the property had been diminished by the obstruction.

3. Same—Conduct of attorney in argument—Upon the trial in the lower court in this action against appellant for damages for obstructing appellee's passway, the statement of her attorney that "a more deliberate and barefaced attempt to steal this defenceless widow's passway was never seen," and again, that "after keeping it (the passway) for nine months, they sneaked back and fixed gates," and again, "a more high-handed stealing of a widow's passway was never perpetrated," was improper and calculated to predjudice the jury, and should not have been allowed.

C. R. McDowell, Chenault Hugely, B. D. Warfield and Edw. W. Hines for appellant.

J. W. Rawlings and Robt. Harding for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Chief Justice Hobson.

On the first appeal of this case the plaintiff had recovered a verdict for \$800, and the judgment was reversed on the ground that the verdict was excessive. (L. & N. R. R. Co. v. Carter, 23 Ky. Law Rep., 104.) On the second appeal there was a verdict for her for the sum of \$718 on substantially the same evidence. This was also reversed as excessive. (L. & N. R. R. Co. v. Carter, 25 Ky. Law Rep., 759.) On a petition to extend the opinion and lay down the measure of damages the court, after quoting from the case of Bannon v. Rohmeiser, 17 Ky. Law Rep., 1389, said: "The rule thus stated should control the jury in the retrial of this case, and it will be the duty of the trial judge to instruct the jury that if they find for the appellee, the measure of damages is the diminution, if any, of the value of the use of her house and land during the time the obstruction of the passway in controversy was continued by the appellant."

On the return of the case to the circuit court there was another trial, resulting in a verdict and judgment in favor of appellee for \$700, and the railroad company appeals to this court for the third time. The facts of the case are stated in the two opinions heretofore delivered. The evidence on the last trial is much the same as on the other two. The verdict is palpably excessive, and can not be allowed to stand for the reasons below given and those given in the former opinions. On the last trial the court instructed the jury as follows:

"1st. If you believe from the evidence in this case that the plaintiff, Jane Carter, by uniting the time of her own use of the alleged passway with the time of its use by her husband, continuously, peaceably, openly, without asking permission of any one and claiming to do so as a right, used the way across which the defendant built the wire fence for fifteen consecutive years before said fence was built, and that by reason of said fence plaintiff's egress from and ingress to her premises have been obstructed, you will find for plaintiff such sum as you believe from the evidence will reasonably compensate her for any trouble, annoyance, or inconvenience, which may be shown by the evidence to have been caused by the fence, not exceeding \$1,000, the amount claimed in the petition. Unless you so believe, you will find for the defendant.

"2d. You are further instructed that if you find for the plaintiff under instruction No. 1 the measure of damages is the diminution of the value of the use of her house and land during the time the obstruction of the passway in controversy was continued, namely, from June 16, 1889, to April, 1900, and must be limited to that measure."

These instructions misled the jury. All of instruction 1 following the words "you will find for the plaintiff" should have been omitted, and then instruction 2 should have been given. The evidence offered by the defendant as to the reasonable rental value of the plaintiff's property should have been allowed, for, if the jury were shown what the total rental value was, they would have some guide in determining how far the value of the use had been diminished during the time the passway was obstructed. As the

plaintiff was allowed to state what she said to one of the defendant's agents about the fence the defendant should have been allowed to ask her on cross-examination if she had applied to the defendant to remove the fence before bringing the suit, and the defendant should have been allowed to show why the gates were put in.

During his closing argument the plaintiff's attorney used this language:

"A more deliberate and barefaced attempt to steal this defenceless widow's passway was never seen." To which the defendant, by counsel, at the time objected, and its objection being overruled, the defendant at the time excepted. Also the following language: "And after keeping it (the passway) for nine months, then they sneaked back and fixed gates," to which language the defendant, by counsel, at the time objected, and its objection being overruled, excepted. Also the following language: "A more high-handed stealing of a widow's passway was never perpetrated," which was followed by this language: "If I was to die and my widow was subjected to such an outrage, I would surrender my place in heaven to come down to avenge the wrong." To all of which language the defendant, by attorney, objected as an abuse of the right of argument, and which objection being overruled, excepted. This was improper. Such denunciation was calculated to prejudice the jury, and should not have been allowed.

Judgment reversed and cause remanded for a new trial.

ALLARD v. ALLARD, &c.

(Filed April 25, 1905—Not to be reported.)

Wills—Agreement as to disposition of property devised—Dower —Where Allard was devised by his father the latter's estate, but under an agreement a contest of the will should be disposed of by consent that it should be established and he should convey the one-half of the estate to two grandchildren, which he did, an action upon his death by his widow to have dower in the lands thus conveyed can not be maintained for the reason that under the agreement Allard held the property one-half for himself and one-half for the contestants, the purpose of the agreement being not only to settle the will contest, but to obtain a division of the land, and under it he merely held the one-half in which dower is claimed as trustee, and, therefore, his widow was not entitled to a right of dower in that part of the estate.

C. M. Fouts, E. H. Puryear and R. L. Lightfoot for appellant.

Bagby & Martin and Bloomfield & Crice for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Hobson.

J. L. Allard died a resident of McCracken county, the owner of a large estate lying in Kentucky and Illinois. He left a will by which he devised it all to his son, C. O. Allard, his only living child, but he had two grandchildren who contested the will, and took an appeal from the order of the county court probating it. The case was tried in the McCracken Circuit Court before a jury, who found against the will. Judgment was entered upon the verdict, and C. O. Allard was granted an appeal to this court. Time was

given him until the next term of the court to prepare and file a bill of exceptions. Before the time arrived for filing a bill of exceptions the parties compromised and a written agreement was entered into, by which the verdict of the jury was agreed to be set aside, a new trial granted and the will established, C. O. Allard agreeing to convey one-half Kentucky lands to the contestants and also agreeing that these lands should be divided in that case by commissioners appointed by the court. The agreement was filed in court; it was approved by the court and judgment was entered pursuant thereto.

Commissioners were appointed who divided the land; their report was confirmed and deeds made. Some years after all of this had been done C. O. Allard died and his widow, Vina Allard, instituted this action to have dower allotted to her in the land conveyed to the two grandchildren, she not having signed the deeds, and not being a party to the contract of settlement made by her husband. The court dismissed her petition, and she appeals. It is insisted for her that the will was sustained, the order rejecting it having been set aside and a new trial granted, and that, therefore, the legal title of the property vested in her husband during the coverture. But all this was not by operation of law. It was by agreement of parties. The order probating the will was made by agreement, and under this agreement C. O. Allard held the title to the property, one-half for himself and the other half for the contestants. The case would not be substantially different if the order referred to had been made upon an agreement that the contestants were to have a certain sum of money, which should be a lien on the property. Under such a state of case while C. O. Allard would have taken the legal title under the agreement, he would have taken it subject to the lien; and if the lien had been foreclosed and the property sold his wife would not have been entitled to dower, for as to this half of the property he would at no time have held a clear legal title, but only a bare legal title, charged with a lien. The agreement which was made vested the entire legal title to the property in him, one-half absolutely and the other half as trustee for contestants. The purpose of the agreement was not only to settle the will contest, but to obtain a division of the land immediately. The title was put in Allard as a matter of form to carry out the contemplated arrangement.

Judgment affirmed.

COMMONWEALTH v. COMBS.

(Filed April 25, 1905.)

1. Primary election—Fraud—Party injured—Remedy—The remedy of one claiming a nomination by a party of which he is being deprived, is to appeal to the authorities of his party and not to the clerks of the county courts, nor to the courts.

2. Missing precinct—Failure to furnish ballots—Certificate—County clerk—Though it be conceded that a primary election was void in which one precinct of the county was deprived of an opportunity to vote by not having ballots furnished it, and if it be further conceded that there was no authority for completing the election in the missing precinct on a subsequent day, these facts are matters which pertain to the duty of the party governing authority, and lie back of its certificate of nominations. When the certificate

is filed substantially in the form and manner prescribed by the statute it is not within the province of the county clerk to go behind it.

3. Circuit court—Jurisdiction—Granting injunction—While the clerk of the circuit court may, in the absence of the circuit judge from the county, grant a preliminary restraining order, without notice, upon a showing that irreparable injury would be sustained by the party moving, before he could give notice, such clerk has no jurisdiction in any event to grant a mandatory injunction.

4. County clerk—Indictment—Placing nominees on ballot—Duty—Refusal—Collusion—Good faith—Question for jury—In an indictment against a county clerk for knowingly and willfully refusing and failing to have the names of certain nominees printed upon the official ballot in the manner provided by the election law of this State, if his refusal was in obedience to an order of injunction made by the circuit clerk, and in an honest belief that such order was valid, then his omission was not willful, but if the proceedings for the injunction were not begun in good faith, but were the result of a collusion between the defendant and any other persons to wrongfully deprive the nominees of their legal right to have their names appear on the ballots as such nominees, then he could not justify his official action by his fraudulent conduct, and in such case the question of the good faith of the defendant should have been submitted to the jury.

John C. Eversole and N. B. Hays for appellant.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge O'Rear.

The governing committee of the Republican party of Owsley county ordered a primary election to select candidates of that party for the various county offices to be voted for at the November election, 1901. The election was held, but owing to some mishap the ballots prepared for one precinct were not provided, or were not delivered, so that the voters of that precinct did not get to vote in that primary. The election proceeded in the other precincts. The result showed that A. C. Hyden had received the highest number of the votes cast as the nominee for county judge. He was then the county judge of that county and was a candidate for re-election. Others were likewise nominated for other offices. Upon its being discovered that the missing precinct had not had a chance to vote, the county committee called all the candidates to meet it at Booneville, the county seat, when it was agreed that on the following Saturday the election should be continued in the missing precinct, and that the result there should be added to the total of votes cast in the other precincts, and that the final result was to be so ascertained as if all the precincts had voted upon the same day. The election was continued accordingly, with the result that Hyden was defeated upon the face of the returns. The committee thereafter met and canvassed the returns, and certified to the county court clerk, as required by law, the nominations for the various offices, including that of county judge, Hyden's opponent being certified as the nominee. This certificate was filed not more than sixty and not less than fifteen days before the ensuing regular election, as required by the statute. Notwithstanding, Hyden and the others who had received apparent majorities without the missing precincts, continued to claim their nominations, and declared that the election held in the missing precinct was void. Appellee, H. C. Combs, was at

that time the county court clerk of Owsley county, and was a candidate before the primary for nomination for re-election. In the election as first held he had received an apparent majority, but with the votes of the missing precinct he was defeated. His successful opponent was certified by the chairman and secretary of the county committee as the nominee of the party for county court clerk. The nominee for county judge, as certified to by the county committee, resigned his nomination in the manner provided for by the statute. The county committee then called a mass convention to nominate a candidate for that office. The convention met and nominated W. T. McGuire, which fact was duly certified to the county court clerk. A few days before the regular election a suit was filed by all the candidates who had received apparent majorities in the first day's voting in the primary against their successful opponents in the result of the two days' voting, seeking an injunction restraining the county court clerk from placing the latter's names on the ballot as the nominees and under the title and device of the Republican party, and commanding the clerk to place the plaintiffs' names on the ballot as such nominees. The county court clerk was made a party defendant (as well as a party plaintiff) to this action. A similar suit was filed by Hyden against McGuire and appellee, the county court clerk, regarding the arrangement of the ballot in the county judge's race. In the first-named suit a restraining order was issued by the county judge Hyden, which was also a mandatory injunction to the clerk to place the names of the plaintiffs on the ballots as such nominees. Instead of defendants. In Hyden's suit against McGuire a similar injunction and restraining order was granted and issued by the circuit court clerk. These orders were granted without notice to the defendants, and before they had been summoned in the actions. Appellee, though, seems to have had personal knowledge of the fact. Indeed he was one of the plaintiffs who procured the order to issue as to all the offices except that of county judge. McGuire heard rumors of the proceedings just before the election, and went to the circuit court clerk's office to verify them. He was there told that no such suit could be found, and nothing was there to show that any such had been filed. Not satisfied, he went to the sheriff to learn whether he had any process against him, and found that he had. Returning to the clerk's office with a copy of the summons and restraining order, the papers of the suit were produced to him. Notices were immediately given that the defendants in the suits would apply to the Hon. S. B. Dishman, circuit judge of the district at Manchester, on the following day, which was the Saturday before the day of the regular election, to dissolve the injunction and restraining order. The motion was made accordingly, and the restraining order and injunction were dissolved. By the time the parties could return to Booneville and get into the clerk's office to file the judge's order dissolving the injunction it was Monday morning, the day before the election. McGuire and his associates then furnished to appellee pasters upon which their names had been printed, to be attached to the ballots in the appropriate places, placing them on the ballots as nominees of their party for the various offices to which they had been nominated as certified to by the county committee. Thereupon the plaintiffs in the suits mentioned got

out another injunction, similarly issued, restraining the clerk from using the pasters. The clerk refused to use them, and refused and failed to have McGuire's name placed on the ballots as the nominee of the Republican party for county judge, or placed on the ballots at all. He also refused to have any other parties' names as certified by the county committee placed on the ballots at all. It was then too late to do anything else in the way of legal proceedings to correct the ballot. There was not a printing office in the county capable of printing the ballots, so the clerk had had them printed elsewhere. Booneville is about twelve miles from the nearest railroad station. The grand jury of Owsley county indicted appellee for knowingly and willfully refusing and failing to have the name of W. T. McGuire printed upon the official ballot in the manner provided for by the election law of this State. Upon the trial there was evidence of intentional action of appellee to do what he did do to prevent the election of McGuire and his associate nominees. But appellee justified his act under the order of the circuit court issued by its clerk in the suit of Hyden v. McGuire, restraining him from placing the name of McGuire on the ballot as such nominee; and that after the restraining order was dissolved it was physically impossible, under the existing conditions, for him to then have had other ballots printed. The circuit court seems to have come to the conclusion that this defense was good, and consequently instructed the jury to find the defendant not guilty. The Commonwealth has prosecuted this appeal that the law governing similar acts may be declared.

The Australian system of voting by secret ballot has come into use in this State only within the last few years. The Constitution of 1891 for the first time provided that elections should be by secret ballot. The laws enacted from time to time since by the legislature to carry into effect the constitutional requirement have been found not entirely adequate to prevent frauds. To cure the defects, actual or supposed, the legislature has adopted numerous amendments, in some instances amounting to almost complete revisions. Throughout all these efforts to perfect the law this main idea has been kept prominent, to insure an absolutely fair, untrammelled expression of the choice of the legal voters. It is realized that unless this fountain of all power and government under the American system is preserved from the control of fraud, the State is imperilled, and government by the people will be impossible, for government by fraud is the basest of social existence, and is utterly inconsistent with the idea of government by popular will. The machinery necessary for conducting elections has been found more or less cumbersome, because of the intricacy required to prevent all manner of frauds—to make them as far as practicable impossible in the first instance. For it is realized that if fraud can triumph at first, so as to get hold of the functions of government, it would be more difficult to right it, to the extent that its agents or recipients were to execute the laws to punish it. Therefore, the prevention, in preference to the punishment, of frauds has been sought with a diligence indicated by the extreme care exacted of all officers in holding elections. The voter can vote only by using the official ballot. (Section 1446.) The ballot is furnished by public authority, so that it can be certainly authenticated, and so as to prevent substitution. It is not intended that the voter should be hampered at all, but that he may be

afforded the simplest, easiest and freest method of indicating his will concerning the persons or matters to be voted for. In this country the fact is that final selections of public officials are more frequently made through party than through individual choice. Yet this is not always so. Consequently provision is made for indicating the individual choice if it should not be the voter's party choice. The fact of party affiliation is so well established and recognized that the legislatures of many of the States, and particularly of this State, have brought party elections, called primary elections, by which the nominees of a party are chosen, under the surveillance and protection of the law. For if party nominations could be made irrespective of the fair expression of the will of its members, it would frequently result, after all, that fraud was actually controlling the selection of public officials.

A party or primary election has, since the enactment of the present statutes on the subject, ceased to be solely a matter of party concern. It is one of which the law takes cognizance. It must be conducted under the statute. (*Brown v. Republican County Executive Committee*, 23 Ky. Law Rep., 2421; *Young v. Beckham*, 24 Ky. Law Rep., 2135, and its officers are the officers of the State, though appointed by the party authorities. (*Neal v. Young*, 25 Ky. Law Rep., 185; *Egan v. Cerwe*, 23 Ky. Law Rep., 1496; *Young v. Beckham*, 24 Ky. Law Rep., 2135; section 1560, Kentucky Statutes.) When the result is ascertained in the manner provided by the statute, it gives to the nominees, and to that party, legal rights which all others must respect, and which the courts will enforce. (*Neal v. Young*, 25 Ky. Law Rep., 185.) As the official ballot alone can be used, it becomes apparent from the foregoing statements, wherein a party nomination to an office is a matter of more than merely party or personal concern. It is one in which the public are also interested. Choice must generally be exercised by the voters at the regular election between party nominees, to be effectual, for except a considerable number should join in a petition for the purpose, no other name can be printed on the ballots than such nominee. Besides, conditions might arise too late to admit of the voters taking that course to bring about the defeat of an undeserving and undesirable candidate already entitled to have his name placed on the ballot. Contests can arise, and do arise, over the title to a party nomination. Formerly, rival claims of this character, when made to the county court clerk, the official who prepares the ballots for county offices, were decided by him without appeal. This led to abuse, because it occasionally happened that from political or personal interest this officer, defeat the real choice of the party, placed the one not entitled to it under the party device as its nominee. To obviate that the legislature has taken from this official all discretion in such matters. If there is a contest or dispute over a party nomination, the governing authorities of that party are given exclusive jurisdiction to determine it. (Sections 153 and 1460, Kentucky Statutes; *Moody v. Trimble*, 22 Ky. Law Rep., 692; 109 Ky. 189; 50 L. R. A., 810.) The remedy of one claiming a nomination by a party, of which he is being deprived, is to appeal to the authorities of his party, and not to the clerks of the county courts, nor to the courts. Such was the state of the law in 1901 when the acts charged in this indictment are alleged to have been committed.

Though it be conceded that an election was void in which one precinct of the county was deprived of an opportunity to vote by not having ballots furnished to it (*Hocker v. Pendleton*, 100 Ky., 726, 19 Ky. Law Rep., 185), and if it be further conceded that there was no authority for completing the election in the missing precinct on a subsequent day, those facts are matters which pertain to the duty of the party governing authority, and lie back of its certificate of nomination. When the certificate is filed substantially in the form and manner prescribed by the statutes, it is not within the province of the county court clerk to go behind it, to determine whether it was rightfully done. (*Hollen v. Center*, 102 Ky., 119, 19 Ky. Law Rep., 1184; *Wilkins v. Duffy*, 24 Ky. Law Rep., 913, 968.) No party nomination could be safe if that were so. We do not decide that a fraudulent certification by a party authority, though in the form prescribed by statute, is not impeachable. We only go so far here as to say that the county court clerk and other election officers can not collaterally impeach or ignore it. Until it is set aside by the governing authority of the party, as permitted by the statute (sections 1568 and 1460, Kentucky Statutes), or by a court of competent jurisdiction, officers of election can not question it. It follows that the nomination of McGuire being the only one certified to appellee as county court clerk as the nominee of the Republican party for the office of county judge of Owsley county, it was the duty of appellee to have recognized it alone, unless its validity was impeached in one of the manners above indicated. It is claimed this was done by the order of injunction issued by the circuit court clerk of Owsley county, in the suit of *Hyden v. McGuire*, which is in the following language:

"Owsley Circuit Court.

"A. C. Hyden, Plaintiff,

"v.
"W. T. McGuire and H. C. Combs, Defendant.

{ Order restraining.

"The Commonwealth of Kentucky:

"To W. T. McGuire and H. C. Combs—You are hereby restrained from certifying or causing to be printed upon the official ballots under the device of the Republican party, which device is the log cabin, the name of W. T. McGuire as a candidate for the office of judge of the Owsley County Court, to be voted for at the November election, 1901, in Owsley county; and you are further restrained from certifying or causing to be printed upon said ballots the name of A. C. Hyden under any other device than that of the log cabin, the Republican device, which he is entitled to as a candidate for county judge of said county at said election.

' Witness, R. L. Rose, clerk of the Owsley Circuit Court, this October 24, 1901.

R. L. ROSE, Clk. O. C. C."

The Owsley Circuit Court is a court of general jurisdiction, sitting in Owsley county. Its judgments and orders concerning the subject-matter embraced in the suit of *Hyden v. McGuire* are conclusive upon parties and privies, and may be and should be obeyed till reversed, modified or vacated, provided the court had got the jurisdiction of the case and parties when the order was issued. The Civil Code of Practice regulating the granting and issual of injunctions (section 276) provides that preliminary restraining orders may be granted without notice, upon a showing that irreparable injury would be sustained by the party moving before he could give notice.

This order may be granted and issued by the clerk of the court, or the county judge, provided the circuit judge is absent from the county. But the clerk has no jurisdiction in any event to grant a mandatory injunction, That can be done alone by the court, or by a circuit judge. (Section 273, Civil Code.) So much of the order quoted above as is mandatory in its terms was void on its face.

McGuire's nomination had been certified several days before the suit was brought to enjoin the clerk from putting it on the ballot as a nominee of his party. His nomination, under which he was asserting title to the party emblem and position on the ticket, had taken place nearly a year previous. The election was to occur on November 5. The petition seeking the injunction was filed October 24. The petition says that the plaintiff learned on October 21st that McGuire's name had been certified as the nominee of the Republican party for county judge. It claimed that "unless an injunction was immediately granted and issued irreparable injury would result at once to him." Notice of the application for the injunction was not given. It was a notorious fact, and was doubtless known to all the parties, that the ballots for the regular November election would have to be printed elsewhere than in Owsley county; that it would take several days in any event to get them printed and returned so as to have them at the various voting places on the morning of the election; that if the order for a change, or reprinting of ballots, was not placed with the printer by the 1st of November anyhow, it would mean that it would then be useless to do so; it would be too late. The restraining order, so called, issued on October 24, which forbade the county clerk from putting McGuire's name on the ballots as the nominee of the Republican party for county judge, was served on appellee on October 24, just in time, it seems, to allow him to have the ballots printed so as to get them distributed for the election. But it was not served on McGuire till November 1, too late, in any event, to admit of his having it acted on in time by a circuit judge so as to correct its mischief, if found to have been improvidently issued. It was, therefore, in its nature and effect final in every sense. It granted in fact, as it indeed purported to upon its face, final and complete relief in the action. A ministerial officer, without notice, without hearing, without trial, in vacation, proceeded to render judgment, final in its nature, forever depriving a man of a substantial legal right. No subsequent reversal of his action would avail. No other trial could ever remedy the evil done. It would seem that authority was not needed to brand such a proceeding as void—as not binding on anybody. Yet we have a case at hand so clearly applicable and so conclusive that we cite it, as it seems to have escaped the attention to which it was entitled. In *Weaver, Mayor v. Toney*, Judge, 107 Ky., 419, 21 Ky. Law Rep., 1157, a circuit judge granted a "temporary injunction" without notice, enjoining an act concerning duties of election officers, the effect of which was to grant all the relief that could ever be had in the case. This court held the action of the circuit judge and the order of injunction to be void. In speaking of that proceeding the court, per Chief Justice Hazelrigg, said: "The order is not a mere temporary restraining order, mandatory in its nature. The relief sought and granted is the whole relief obtainable. When the order is obeyed, the end of the litigation is reached. There is no mere temporary

stay with reservation of the right of parties till they can be heard. * * * If we attempt to apply the Code provisions to a case where the act commanded to be done is not of a mere temporary matter, but is practically a finality, and the sum total of the relief sought by the applicant, we must appreciate at once the inapplicability of the section. * * * This so-called temporary restraining order is in substance imperatively mandatory, and we must look at the substance and not the shadow of things."

The court in that case also passed upon the question whether the naked averment in the petition, that the plaintiff would suffer irreparable injury unless the restraining order was immediately granted, was sufficient to dispense with notice. It was found that the plaintiff knew of the alleged threatened danger on the day before he applied for the injunction. The court in passing upon whether notice was indispensable under those circumstances, said: "In the case at hand the applicant for an injunction, at a date when there was apparently still ample time to give the reasonable notice required by the law, is found saying that he is in possession of facts which cause him to believe that he will be irreparably injured from the delay of giving notice. If there was in fact not time to give the notice on the 6th, the petition ought to have disclosed the fact. It is not, therefore, a case where notice can be dispensed with, but, on the contrary, it is a case where the face of the application shows that notice was demanded by the very terms of the statute, and where, therefore, the court was without statutory authority to issue the writ except after notice. * * * Where the order is final in its character the question becomes, in a measure, a jurisdictional one."

In the suit of Hyden v. McGuire, the plaintiff had from October 21 to October 24 to have given notice to his adversary litigants, a fact disclosed on the face of the petition. Furthermore, the petition did not disclose such an emergency as could have dispensed with notice. In that state of case action by the officer, in the absence of notice, was void for want of jurisdiction. This rule is not new. The authorities are abundant, many of which are collated and cited in Weaver v. Toney, supra. If it be thought that this rule leaves officers executing injunctions in jeopardy, a sufficient response is that as the decisions of the courts defining the officers' duties in such matters are of public notoriety and accessible to them, constituting in part the law which they must take notice of, and which it is presumed they do know, they need not be imperiled. The writ of injunction is a harsh one. When employed, except as final process, it involves necessarily the prejudging of the case, to some extent, the anticipation of the result, based upon evidence of what would probably be shown later on. If it does more than maintain a status, which may be speedily looked into after full opportunity of the parties to be heard, but in fact gives final judgment in the matter, settling rights forever, it is contrary to the spirit of our laws, which, since the great charter, forbid that a man should be deprived of his property or liberty save "by the law of the land," which includes his having his "day in court."

But this matter goes deeper than that. There was evidence tending to show that appellee and the plaintiffs engaged in those suits, brought them not in good faith, and not that the courts might redress a right claimed by

them and wrongfully withheld by another, but to use the process of the law to do an unlawful act, that is, to prevent in an irregular way those persons' names from appearing on the official ballot that were entitled then to so appear. If appellee obeyed the order in good faith, and in an honest belief that the order of injunction issued in the Hyden-McGuire suit was valid and was binding upon him, then he did not willfully, in the sense meant by the statute, omit McGuire's name from the ballot. On the other hand, if the proceedings in the Hyden-McGuire suit were not begun in good faith, but were the result of a collusion between appellee and any of the plaintiffs to wrongfully deprive the nominees of their legal right to have their names appear on the ballots as such nominees, then appellee could not justify his official action by his fraudulent conduct.

The statute under which the indictment was returned in this case, reads: "If the county court clerk shall willfully and knowingly refuse or fail to have the name of any candidate printed on the official ballot in the manner provided for in this act, he shall forfeit his office and be guilty of a felony, and upon conviction be confined in the penitentiary not less than one nor more than five years." (Section 1457a, Kentucky Statutes.)

Section 1591, Kentucky Statutes, reads: "This chapter shall be liberally construed, so as to prevent any evasion of its prohibitions and penalties by shift or device." * * *

If it were permitted to an officer of an election to join with others in an undertaking to violate the election law, and do by a misuse of the process of the courts what the statute positively prohibited as a high crime, then it were possible always to violate the statute and to escape its punishment, too. Judgments and orders of courts of general jurisdiction are entitled to great consideration, as being binding upon all persons connected with the record. But if the judgment has been procured by fraud in order to perpetrate a crime, then it will not be a shield for those who brought it into being for the unlawful purpose.

We are, therefore, of opinion that the court erred in giving the jury the peremptory instruction too find the defendant not guilty.

This opinion is directed to be certified to the lower court.

KENTUCKY BUILDING AND LOAN ASSOCIATION'S ASS'EE v.
DAUGHERTY, &c.

(Filed April 26, 1905—Not to be reported.)

1. Building and loan associations—Insolvency—Borrowing members—Dues—How applied—It appearing that the association in which the borrowing member was a stockholder consolidated with another association and created a new company, to which the old association assigned all its assets, including note of appellee for \$1,000 given for his stock and a mortgage he had executed to secure it, and that the new company is insolvent, the rule is that a borrowing member of an insolvent building and loan association will not be allowed to apply to his debt the amount paid as dues on his stock, but to these he stands as any other creditor, and must take such dividends as are shown to be due the stockholders on a final settlement.

2. Same—As to the dues paid by appellee on his new stock in the new as-

sociation the rule applies, but it can not apply to his dues paid on the stock in the old company, which had been, by consent, cancelled, for as to this he was never a stockholder in the new company. By surrendering his old stock and accepting the credit on his debt he elected to treat these dues as paid on it, and thereafter as to this money only the relation of debtor and creditor existed between him and the association. The chancellor charged him with the amount which he borrowed, with interest from the time he got the money, crediting him with his payments as they were made, and ignoring altogether his note for \$900, and this was proper.

James C. Poston, Burnett & Burnett and C. B. Blakey for appellant.

L. A. Faurest for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Hobson.

On November 26, 1892, G. W. Daugherty subscribed for ten shares of stock in the Kentucky Building and Loan Association, a corporation created under the laws of this State, and paid it \$10 admission fee, \$6 as dues on stock for the month of December, and \$6 as dues on stock for the month of January. On the 1st of February, 1893, he borrowed of the association \$800, and as part security therefor pledged eight shares of his stock, it being agreed that when these eight shares were paid up they should be cancelled and the loan treated as paid. From that time until July 30, 1894, he paid the association monthly \$8 for interest and premium on the loan and \$6 for dues on the stock. On July 30, 1894, he borrowed from the association the further sum of \$200, and as part security therefor pledged his remaining two shares of stock under a like agreement, that when the stock should be fully paid up it was to be cancelled and the loan treated as paid. From that time until February 1, 1897, he paid the association monthly \$10 for interest and premium on the loan and \$6 for dues on the stock. About February 1, 1897, the association, while it was a going concern, and another building and loan association organized under the laws of this State, consolidated and formed the Kentucky Citizens Building and Loan Association. The Kentucky Building and Loan Association prior to February 1, 1897, assigned and transferred to the new company all of its assets, including the note for \$1,000 held by it and a mortgage which had been executed to secure it. The Kentucky Building and Loan Association then ceased to have a corporate existence.

The new company credited Daugherty with \$100 on the principal of his debt, and took a new note from him for \$900. The stock which he held in the old company was cancelled and the new company issued to him nine shares of its stock, but he received no credit thereon for the dues paid by him on the stock theretofore issued to him by the old company. From that time he paid to the new company monthly \$9 for premium on the loan and \$5.40 for dues on the stock for some months.

On July 2, 1897, the new association made an assignment for the benefit of its creditors, and subsequently this suit was brought by the assignee against Daugherty on his note for \$900, and to enforce the mortgage securing it. Daugherty pleaded usury, insisting that all his payments to the old company, whether made on the stock or on the debt, should be applied to

the debt, and that the \$900 note was to a large extent without consideration. The court below sustained this view, and the plaintiff appeals.

It is unquestioned that the new association is insolvent. The rule is that where a building and loan association is insolvent and in the hands of an assignee for the benefit of its creditors, a borrowing member will not be allowed to apply to his debt the amount paid by him to the association as dues on his stock, but as to these he stands as any other stockholder, and must take such dividends as are coming to the stockholders on the settlement of the affairs of the corporation. Where the association is solvent a different rule applies. There the whole transaction is regarded simply as a borrowing of money, and all sums paid will be treated as paid upon the debt. It is conceded for appellee that he is not entitled to credit on his debt for the dues paid on the stock of the new company, and the question to be determined is whether the same rule should be applied to the dues paid on the stock of the old company. Where an assignee purchases a note in consequence of assurances from the obligor that it is good and will be paid, he will not be allowed to set up against the assignee defenses which would otherwise have been good against the assignor. (Smith v. Stone, 17 B. Mon., 171; McBrayer v. Collins, 18 B. Mon., 838.) The same rule is applied where after the assignment the obligor by a valid contract for indulgence, as by executing a new note to the assignee, payable in the future, lulls the assignee into security and thus causes him to lose his recourse. (Stone v. McConnell, 1 Duvall, 55; Beal v. Bethel, 3 Ky. Law Rep., 397; Burks v. Cheek, 11 Ky. Law Rep., 953.) The rule rests upon the ground of estoppel. It applies to usury as well as to other defenses; but it will not be applied where the assignee has lost nothing, and is in no worse situation by the renewal of the note. In the case at bar the two old companies were consolidated and a new one was formed, which simply succeeded to their rights, took all their assets, debts and liabilities and stood in their shoes. The renewal of the note to the new corporation in no way changed the situation of the parties or affected any of their rights, and the case must be determined as though the new corporation had continued to hold the note executed by Daugherty to the old association. (Shirley v. Stephenson, 104 Ky., 518.)

In determining what are the rights of the parties on this basis we have had great difficulty from the fact that there is no proof in the record, and that we must determine the case entirely from the allegations of the pleadings. In the answer of the defendant he made the following allegations, which were not controverted by the reply: "He states that on or about February 1, 1897, said association, while it was a going concern, and another corporation organized under the laws of this State for a similar purpose and with similar powers, consolidated and formed the Kentucky Citizens Building and Loan Association, of which the plaintiff is the assignee. He said that said associations at that time cancelled all of the said stock of this defendant and credited him on the amount due from him as aforesaid with only \$100 for the amounts paid as admission fee and dues on said stock, and treated the aforesaid payments on account of interest and premiums as only paying the interest up to said time, when in fact said admission fees, dues, interest and premiums much more than paid the said interest and \$100 of

the said principal. He says that said Kentucky Citizens Building and Loan Association then issued to him nine shares of its stock, and he executed the papers sued on herein. * * * He says that when the nine shares of stock were issued to him by plaintiff's assignee he was given no credit thereon for the dues paid by him on the stock theretofore issued to him by the Kentucky Building and Loan Association; but he was credited on his indebtedness to said association by \$100, and no more, for said dues."

In an amended answer he made this allegation: "The defendant, G. W. Daugherty, by leave of court amends his answer herein, and says that the Kentucky Building and Loan Association cancelled his stock in said association as set up in his answer herein and gave him credit for only the interest and \$100 on the principal of his indebtedness to said association for what he had paid to said association, but that in fact he had paid on said indebtedness all the amounts set out in his answer herein, and there was due from him to said association on February 1, 1897, only the sum of \$398.08 on said indebtedness, and all amounts claimed to be due in excess of said sum of \$398 08 was usury."

In reply to the above the plaintiff said this: "The plaintiffs, the Louisville Trust Co., as assignee and receiver, etc., for reply to the amended answer deny that the Kentucky Building and Loan Association ever cancelled any stock owned by the defendant, G. W. Daugherty, in said association, or gave him credit for only the interest and \$100 on the principal of his indebtedness to said association for what he had paid to said association; deny that said defendant had paid, or has ever paid, on his said indebtedness all the amounts set out in his answer herein, or any part thereof, except such sums as are admitted by the plaintiffs to have been paid in plaintiff's reply heretofore filed."

It will thus be seen that though it is denied that the Kentucky Building and Loan Association cancelled appellee's stock in that association, it is not denied that his stock was cancelled at the time of the consolidation by the Kentucky Citizens Building and Loan Association. It is also not denied that the credit which was then given him by that association of \$100 was on account of the dues which he had paid on the old stock which was cancelled. Upon the facts alleged the credit of \$100 was not given him on account of what he had paid for interest and premiums, but on account of the dues which he had paid. When his old stock was cancelled and the association undertook to credit him on his debt for what he had paid in dues thereon, if the proper credit was not given him the note then taken was to that extent without consideration. The rights of the parties became fixed as of that date, and if a note was taken for a greater amount than he owed, it was as to the excess usurious, for a compromise or settlement as to the amount of usury is not binding. (*Cynthiana, &c., Association v. Ecklar*, 112 Ky., 164.) The case would not be substantially different if he then had demanded of the Kentucky Citizens Building and Loan Association the cancellation of his old stock and credit on his debt for what he had paid as dues. If he had made this demand he would have been entitled to credit for all he had paid as dues, the association being then a going concern. When the company undertook to settle with him he was not required to make a demand; for this was waived by the settlement and the taking of

the new note, and if he was not credited by the proper amount, it is simply a case of a note taken for a greater amount than was due. Under the admitted allegations of the answer the money he had paid on his old stock was not brought over into the new stock issued by the new company. This stock, under the allegations of the answer, was a new matter and had no connection with the dues paid on the old stock. When his stock in the old company was cancelled, and he was credited by \$100 on account of the dues paid thereon, he no longer had any rights as the holder of this stock. He could demand nothing from the association in the way of dividends thereon, and if he is denied credit for the money paid as dues on it over and above \$100 he is without remedy. So far as the note for \$900 was for more than he owed, it was a usurious transaction, and to relieve him from it does not infringe the rule that a borrowing stockholder will not be allowed after the insolvency of the company to treat dues he had paid as paid on his debt. The rule rests on the ground that he can not make this election after all chance of profiting upon his stock has failed and thus secure a preference over the non-borrowing stockholders. As to the dues paid by Daugherty on his new stock in the new association the rule applies; but it can not apply to his dues paid on the stock in the old company which had been by consent cancelled; for as to this he was never a stockholder in the new company. By surrendering his old stock and accepting the credit on his debt he elected to treat these dues as paid on it, and thereafter as to this money only the relation of debtor and creditor existed between him and the association. The settlement by which the amount of the credit he should receive therefor was fixed being of no more validity than any other agreement as to usury, the rights of the parties must be ascertained as in other cases from the amount of the debt actually due when the new note was taken. The circuit court charged him with the amount which he borrowed, with interest from the time he got the money, crediting him with his payments as they were made and ignoring altogether the note for \$900. On the whole case, as presented by the pleadings, we see no error in the judgment.

Judgment affirmed.

Whole court sitting.

COMMONWEALTH v. ILLINOIS CENTRAL R. R. CO.

(Filed April 20, 1905—Not to be reported.)

Railroads—Indictment for failure to provide depot—As the place where it is charged no depot was provided is a village, it obviously is embraced in the category of "other stations" mentioned in the statute (section 772, Kentucky Statutes), and as there is no allegation that the railroad commission had required appellee to have a passenger station at the place mentioned in the indictment, the company was guilty of no offense in failing to provide such station.

S. V. Dixon and N. B. Hays for appellant.

Trabue, Doolan & Cox, H. D. Allen and J. M. Dickinson for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Barker.

The grand jury of Union county, at its March term, 1904, returned an indictment against the Illinois Central R. R. Co., charging it with failing to provide "a convenient and suitable waiting room, and keeping and maintaining the same in decent order and repair at its depot at Sullivan." The offense is more particularly as follows: "Illinois Central R. R. Co. * * * did unlawfully and willfully fail, neglect and refuse to provide a convenient and suitable waiting room at its depot at Sullivan, Ky., a village; that said corporation has had a depot at Sullivan for over five years just prior to the first day of March, 1904, and has used same continuously all of said time as its depot and passenger station, and that said waiting room in said depot and passenger station aforesaid was on said date and is not convenient and suitable for the accommodation of the passengers of said company and the public, there being one waiting room only, which is too small and is not kept and maintained in decent order and repair." The foregoing indictment is predicated upon the following provision in section 772 of the Kentucky Statutes: * * * "And that every company operating a railroad in this State shall provide a convenient and suitable waiting room and water closet or privies at all depots in cities and towns, and at such other stations as the railroad commission may require on its lines, and keep and maintain same in decent order and repair."

As Sullivan is specifically alleged in the indictment to be a village, and is not, therefore, an incorporated municipality, such as a city or town, it obviously falls in the category of "other stations" mentioned in the statute under discussion; and as there is no allegation that the railroad commission had required the appellee, either to have a passenger station at Sullivan or to keep it in repair, it clearly follows that it has not committed the offense of disobeying their requirement in this regard. The trial court properly sustained a general demurrer to the indictment, and dismissed it.

Judgment affirmed.

COMBS, &c. v. EVERSOLE, JUDGE.

(Filed April 21, 1905.)

Sheriffs—Resignation—Sureties—Authority to nominate collector—Where the sheriff of county resigns his office the sureties on his bond for the collection of taxes are not authorized to nominate and require the county judge to appoint a person to collect such taxes in the place of the sheriff who has resigned; such right applies where the sheriff dies, but not when he resigns his office.

Wm. Cromwell, Miller & Fitzpatrick and W. C. Eversole for appellants.

Wootton & Morgan and Greene & VanWinkle for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Settle.

E. H. Cornett was duly elected sheriff of Perry county at the November election, 1901, for a term of four years from the first Monday in January, 1902. On the first Monday in January, 1902, he qualified as sheriff by taking the necessary oath and with sufficient security executing the official, county levy and State revenue bonds required by law of sheriffs, which were duly

approved and accepted by the judge of the county court. Similar bonds were executed by Cornett as sheriff, and approved by the county judge on the first Monday in January of each succeeding year during his term of office.

Appellants were sureties in the three bonds given by him on the first Monday in January, 1905, for that year, the last of the term for which he was elected. In addition to the performance of his official duties it was the duty of Cornett, as sheriff, to collect the taxes, both county levy and State revenue, in the county of Perry for the year 1905. On February 13, 1905, Cornett resigned the office of sheriff of Perry county, and on February 15, two days thereafter, at a regular term of the Perry County Court, the judge thereof appointed one S. B. Holliday sheriff to fill the vacancy in that office caused by the resignation of E. H. Cornett. Thereupon Holliday took the oath of office and he and his sureties executed the required bonds, which were approved and accepted by the county court, since which time he has been acting as sheriff of the county.

On the day of the appointment of Holliday as sheriff appellants, as sureties in the several bonds executed by E. H. Cornett on the first Monday in January, 1905, by a writing addressed to the judge of the county court, nominated one Arch Cornett for appointment as collector for Perry county of taxes, county levy and state revenue for the year 1905, and requested his appointment to that office, but the nomination was rejected and his appointment as collector was not made by the county judge. Appellants insisting upon their alleged right as sureties of the late sheriff, E. H. Cornett, to nominate for appointment a collector of taxes in the county of Perry for the year 1905, instituted this action in the circuit court for a writ of mandamus to compel appellee, as county judge, to appoint as collector of taxes the person nominated by them for that office. Appellee filed a general demurrer to the petition, which was sustained by the lower court, and appellants failing to plead further the action was dismissed. If, as contended by appellants, they had the right after the resignation of the sheriff to nominate for appointment by the county judge a collector of taxes for 1905, it would follow that the lower court erred in rendering the judgment appealed from. But did appellants have such right?

The only authority for the exercise of such right by the sureties of a sheriff is contained in section 4136, Kentucky Statutes, which provides: "If the sheriff shall die during his term of office his sureties shall have the right to nominate a person to collect the revenue for that year, and upon their written nomination of such person he shall be appointed by the county court, and the sureties shall be liable to the Commonwealth for the taxes with which their principal was charged: Provided, That this section shall not apply when in any case the sureties, in the opinion of the county court, are not in the aggregate worth in property subject to execution, above their debts, the amount of the taxes with which their principal was charged."

Manifestly this section confers upon the sureties of the sheriff no such right as claimed by appellants for the simple reason that the sheriff did not die. If the legislature had intended that the sureties of the sheriff should nominate a collector to succeed him in case of his resignation or removal from office, it would have been so expressed and could have been done, by

merely saying that in case of a vacancy in the office of sheriff, whether caused by death, resignation or removal from office of the incumbent, his sureties shall have the right to nominate a person to collect the revenue for that year, etc. But the very fact that their right to make such nomination is confined by the language of the section, *supra*, to the existence of a vacancy caused by the death of the sheriff, excludes the idea that they can exercise the right upon any other ground or condition, therefore, we do not feel authorized to add to the statute or extend its meaning or effect.

Section 1526, Kentucky Statutes, provides: "A vacancy in the office of sheriff * * * shall be temporarily filled by the county court until the successor shall have been elected as provided by section 1522 of this article, and shall have qualified." * * *

A vacancy in office is defined by section 1521, Kentucky Statutes, as follows: "The term 'vacancy in office,' or any equivalent phrase, as used in this article, means such as exists when there is any unexpired part of a term of office without a lawful incumbent therein, or when the person elected or appointed to an office fails to qualify according to law, or when there has been no election to fill the office at the time appointed by law. It applies whether the vacancy is occasioned by death, resignation, removal from the State, county or district, or otherwise."

Although there are many different ways in which a vacancy in the office of sheriff may occur, and the sureties of a sheriff may incur as much risk or liability by his resignation or removal from office as from his death, yet the statute declares that only by the death of the sheriff shall the sureties select and nominate for appointment by the county court the person who may take his place as collector of taxes. We are of opinion, therefore, that appellants had no right to nominate a collector to succeed E. H. Cornett, and that appellee was under no duty to appoint the person nominated by them. But, upon the other hand, that he had the right to appoint Holliday sheriff, as was done. The foregoing conclusions being in accord with the judgment of the circuit court, we deem it unnecessary to consider other questions discussed in the briefs of counsel.

Wherefore, the judgment is affirmed.

Whole court sitting.

BATES v. THE BURT & BRABB LUMBER CO., &c.

(Filed April 21, 1905—Not to be reported.)

Married women—Action by wife—Husband not party—Compromise by husband—Validity—A married woman is not bound by a compromise of her suit made by her husband, to which he was not a party, without her knowledge or consent, and a sale of her land made under a judgment so obtained to which she objected is not valid, and should be set aside.

R. O. Brashears for appellant.

D. D. Fields for appellees.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1890 the appellant, Mary J. Bates, and her husband, T. G. Bates, sold and conveyed to one Cross 404 poplar, ash and cucumber trees at the price of \$475. In the deed from Bates and wife to Cross for this timber this language occurs: "And it is further agreed by the party of the first part, in order to insure further the title to the trees hereby conveyed, that the party of the second part has, and is hereby given, a lien on the lands above described by the party of the first part in order to indemnify the said party of the second part against any loss which he may sustain by reason of the failure of title to any part of said trees in case the title of the party of the first part should fail to any part thereof, and thereby the party of the second part should lose any of said trees; and it is further agreed that the party of the second part shall pay to the party of the first part all damages that may be done to growing crops by reason of the removal of said timber." It appears that this timber was upon two surveys of land; the one described in the conveyance belonging to the appellant, and the other was the property of her husband, T. G. Bates. Afterwards, in the year 1894, in litigation with a person by the name of Hall, T. G. Bates lost his piece of land and, therefore, neither Cross nor his assignees obtained the timber on that piece. Cross conveyed his title to the trees to the Asher Lumber Co., a corporation which was succeeded by the appellee.

The appellee brought this action for the value of 214 trees alleged to be on the land, recovered by Hall from Bates, fixing their value at \$249, with interest from July, 1890. The appellee and her husband answered this petition, admitting the loss of this land, but denied that there were 214 trees sold to Cross on that piece, and alleged that there were only 161 on that piece of land, and that appellee received all the trees sold on the other piece and thirty-five trees in addition thereto, which had not been sold by them, and further alleged that appellees, in removing the timber from his land, negligently injured and damaged the growing crops thereon, destroyed fencing and committed other damage and injury in a greater sum than the amount due appellee on account of the loss of the trees described. The appellant and her husband took the depositions of five or six witnesses which substantially sustained their defense and counterclaim; but appellee was not represented at the taking of these depositions, and obtained a continuance of the cause for the purpose of taking other proof and to cross-examine appellant's witnesses. It does not appear from the record that that was ever done, but before the next term of the court the following agreement was entered into between the appellee and T. G. Bates:

"This agreement made and entered into this the 14th day of October, 1902, by and between the Burt & Brabb Lumber Co., of the first part, and T. G. Bates, of the other part, witnesseth: That whereas, there is now pending in the Letcher Circuit Court a suit of first party against second party and wife to recover judgment for certain trees sold by second party to George F. Cross, and afterwards conveyed to first party, title to which failed, and to enforce a lien on the lands described in the deed to Cross for the payment of said money, and the parties being desirous of settling said matters, it is now agreed that judgment be entered at the next term of the said court in, favor of plaintiffs, the Burt & Brabb Lumber Co., for the sum of \$249.10, with interest at the rate of 6 per cent. per annum from the 18th day of July,

1890, until paid, and costs of this action, and that defendant have a right to dismiss his counterclaim without prejudice as to any right of action he may have against any person except plaintiff, and that a lien be adjudged on said land to secure the payment of said sums, and that a decree be entered to sell said land on a credit of twelve months.

"BURT & BRABB LUMBER CO.,

"By D. D. FIELDS, Attorney,

"T. G. BATES."

At the next term of the court this agreement was filed and a judgment was rendered in accordance therewith, directing a sale of the land described in the conveyance. The commissioner sold the land, and the appellee purchased it at the price of \$488. The commissioner had it appraised before the sale, and the appraisers valued it at \$1,400. It appears, without contradiction, that appellant, Mary J. Bates, was not present at the time the agreement referred to was executed, nor at court when it was filed, and had no knowledge of it nor the withdrawal of her defense and counterclaim, and that she never consented thereto; that she was present when the sale was made and publicly objected to it for the reasons stated, and claimed the land as her individual property. She filed exceptions to the commissioner's report of sale, setting forth the facts stated, and also moved the court to set aside the judgment. The court overruled her motion and exceptions and confirmed the sale, to all of which she objected and excepted and prosecutes this appeal. It appears that she received this land by descent from her father, but in a division of his estate the conveyance was made to her and her husband.

Appellant was and is not bound by the agreement made between appellee and her husband. It is shown upon the face of the agreement that she was no party to it, and it appears, without contradiction, that she has no knowledge of it, and never consented it to, and under these facts the court erred in withdrawing her answer and counterclaim and in rendering a judgment directing a sale of her land. Upon the pleadings and the proof in the cause as existing at the time of the judgment appellant was entitled to a judgment in her favor rather than one against her. It seems to be conceded that after the court refused to set aside the judgment and the sale of the land by the commissioner, T. G. Bates, the husband of appellant tendered appellee the full amount of its debt, interest and cost, which tender was not accepted for the reason, as alleged by appellee, that it was tendered more than twelve months after the sale by the commissioner.

For the errors complained of the judgment is reversed and the cause remanded, with directions to the lower court to set aside the judgment and the sale of the land and to permit the appellant or her husband to satisfy appellee's judgment by paying to it the amount of its debt, interest and cost to the time of the tender stated. If they fail to do this the court shall grant the appellant a trial, and if anything is found to be due appellee it should be given a lien on the land described for its payment.

LOUISVILLE & NASHVILLE R. R. CO. v. LUCAS' ADM'R.

(Filed April 25, 1905.)

Supersedeas bond—Execution—Filing transcript—Supersedeas—When it may issue—Appeal pending—Effect—Where a supersedeas bond was executed before the clerk of the circuit court within the time allowed for filing the transcript of the record in the office of the clerk of the Court of Appeals, as provided by section 738, Civil Code, the appeal did not thereby abate, but was still pending in the Court of Appeals until dismissed by said court, and it was the right and duty of the clerk of the circuit court to issue the supersedeas at any time before the dismissal of the appeal, and as the appeal was then pending the supersedeas was not void.

Wallace & Harris for appellant.

Greene & VanWinkle and B. G. Williams for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee recovered a judgment against appellant for the sum of \$8,000 in the Woodford Circuit Court on October 29, 1904. Appellant filed grounds and moved the court for a new trial. On November 4 the motion was overruled and an appeal was granted to this court. On November 14 appellant executed a supersedeas bond, but the clerk failed to issue a supersedeas thereon until March 24, 1905. The time for filing the transcript in the clerk's office of this court expired on March 21, 1905, or three days before the supersedeas was issued. On April 11, appellant filed the transcript and had a summons issued, which was executed on appellee on April 17, and on April 20 appellee filed a copy of the judgment and bond and moved the court to dismiss the appeal granted by the circuit court, with damages, because the transcript was not filed in time. Appellant resists the motion, insisting that it is not liable for damages as no supersedeas was issued by the clerk of the circuit court within the time allowed for filing the record in this court.

By section 738 of the Civil Code the appellant is required to file the transcript in the clerk's office of this court twenty days before the beginning of the second term after the granting of the appeal. Appellant failed to do this, and, therefore, the appeal granted by the circuit court must be dismissed. Whether damages may be awarded depends upon the validity of the supersedeas. Section 749 of the Civil Code is as follows:

"1st. The bond must be executed before the clerk of the court rendering the judgment, if the appeal be granted by that court. In other cases, it must be executed before the clerk of the Court of Appeals.

"2d. The clerk of the court rendering the judgment shall issue the supersedeas, if the bond be executed before him before the expiration of the time for filing a copy of the record in the clerk's office of the Court of Appeals pursuant to section 738. In other cases it must be issued by the clerk of the Court of Appeals."

The bond having been executed on November 14, was properly executed before the clerk of the court rendering the judgment. It was the duty of the clerk to issue the supersedeas as soon as the bond was executed; but damages will not be awarded unless a supersedeas issues, as the judgment.

is not superseded by the execution of the bond nor until the supersedeas has issued. (Civil Code, section 748; Jones v. Green, 12 Bush, 127; Phoenix Insurance Co. v. McKernan, 20 Ky. Law Rep., 337.) The clerk did issue a supersedeas, but did not issue it until March 24, or three days after the time had expired for filing the transcript in this court, and the question arises, whether he had authority then to issue it, for if he had not, it was void.

It will be observed that the statute limits the time within which the clerk of the court rendering the judgment may take the bond, but it simply provides that he shall issue the supersedeas if the bond is executed before him within the time limit. It will also be observed that the clerk of the Court of Appeals is only authorized to issue the supersedeas in other cases, that is, the clerk of the Court of Appeals is not authorized to issue the supersedeas where the bond is executed in proper time before the clerk of the court rendering the judgment. As the clerk of this court could not issue the supersedeas on March 24, the clerk of the circuit court could do so unless the bond was a nullity. If appellee had gone to the clerk of the circuit court on March 24 and demanded an execution, the clerk would have been liable upon his bond to appellant for damages for not issuing the supersedeas if he had issued an execution on the judgment; or if he had refused to issue the execution he would have been liable to appellee for damages if he did not issue the supersedeas. The only way he had of protecting himself when he had negligently delayed to issue the supersedeas was to issue it when his attention was called to the matter. His then issuing it did not prejudice appellant, and there being nothing in the statute limiting the time when he may issue the supersedeas after he has properly taken the bond, the supersedeas was valid from the time it was issued. The appeal granted by the circuit court did not abate on March 21 upon the failure of appellant to file the transcript with the clerk of this court. It was a pending appeal on March 21 when the supersedeas was issued. By section 740 of the Code if the transcript is not filed in time the appeal shall be dismissed; but the appellee may waive the right to have it dismissed for this cause, and the appeal does not abate until it is dismissed by this court. When the circuit clerk came to issue the supersedeas he was not required to examine the clerk's office of this court and learn whether the transcript had been filed here; but when the records of his office showed the execution of the bond in due time, by the terms of the statute it was his duty to issue the supersedeas, and, as the appeal was then pending the supersedeas was not void. After the supersedeas was issued no execution could properly issue on the judgment and no steps could be taken by appellee to enforce it during the pendency of the appeal.

In Walston v. Louisville, 20 Ky. Law Rep., 1853, the judgment was rendered and the appeal was granted on February 27, 1900, the bond was executed on December 4, 1900, and the supersedeas was issued on the same day. In that case the time had expired for filing the transcript in the clerk's office of this court when the bond was executed before the clerk of the court rendering the judgment.

The appeal granted by the circuit court is, therefore, dismissed, with damages.

COMMONWEALTH v. FINN, ALIAS LOWRY.

(Filed April 25, 1905.)

1. Robbery—Indictment—Validity—An indictment which charges that the defendant, William Finn, alias Thomas Lowry, did unlawfully, feloniously and forcibly take, steal and carry away one diamond pin, the more exact description of same is unknown to the grand jury, then and there the personal property of W. R. Varian and of the value of \$35 and more, all of which was so feloniously taken, stolen and carried away from the person of said W. R. Varian, without his consent and against his will, by force and violence and putting him, the said W. R. Varian, in fear of some immediate danger to his person, etc., is a good indictment for robbery.

2. Previous convictions—Allegations—A second count in the indictment which charges that on the 19th day of July, 1900, the said William Finn, alias Walter Harvey, was convicted of burglary in the State of Wisconsin, and on the 28th day of February, he, the said William Finn, alias Thos. Lowry, alias Harry Ramsey, was convicted of robbery in the State of Louisiana, is not good in that it is not direct and certain as required by section 124, Criminal Code, as regards not only the party charged and the offense charged, but the county in which the offense was committed, as well as the particular circumstances of the offense charged in so far as they are necessary to constitute a complete offense.

3. Judgments of other States—Pleading—Necessity—Good pleading in an indictment, where a judgment of a court of another State is relied on, requires that the laws of the State under which the judgment was rendered be pleaded so far as to show the jurisdiction of the court to render the judgment relied on, and that the trial court in this State may know that the convictions were for felonies punishable by confinement in the penitentiary.

4. Cognizance of statutes—Courts of this State do not take cognizance of the statutes and jurisdictions of courts of other States unless pleaded, and they must be pleaded as other facts.

N. B. Hays and Chas. Morris for appellant.

Sallee & Slattery for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge O'Rear.

The indictment in this case is in the following language:

"The grand jury of Mason county, in the name and by the authority of the Commonwealth of Kentucky, accuse William Finn, alias Thos. Lowry, of the crime of robbery and two former convictions, committed as follows, viz., the said William Finn, alias Thos. Lowry, on the 7th day of October, 1903, and other days before and since, within twelve months last past, and before the finding of this indictment in the county aforesaid, did unlawfully, feloniously and forcibly take, steal and carry away one diamond pin, the more exact description of same is unknown to the grand jury, then and there the personal property of W. R. Varian, and of the value of \$35 and more, and all of which was so feloniously taken, stolen and carried away by said William Finn, alias Thos. Lowry, from the person of said W. R. Varian, without his consent and against his will, by force and violence and putting him, the said W. R. Varian, in fear of some immediate injury to his person, contrary to law and against the peace and dignity of the Commonwealth of Kentucky.

"ED. DAUM, Commonwealth Attorney.

"The grand jury further charge that on the 19th day of July, 1900, the aforesaid William Finn, alias Walter Harvey, and alias Edward Harvey, was convicted of burglary in the State of Wisconsin. And that on the 28th day of February, 1902, he, the said William Finn, alias Thos. Lowry, alias Harry Ramsey, was convicted of robbery in the State of Louisiana, contrary to law and against the peace and dignity of the Commonwealth of Kentucky."

The circuit court sustained a demurrer to so much of the indictment as attempted to charge appellee with two former convictions, but overruled the demurrer in so far as it charged appellee with the crime of robbery. The court is of opinion that the ruling in both respects was correct. Concerning the former conviction the indictment is fatal in that it fails to satisfy section 124 of the Criminal Code of Practice, that the indictment must be direct and certain as regards not only the party charged and the offense charged, but the county in which the offense was committed, as well as the particular circumstances of the offense charged, in so far as they are necessary to constitute a complete offense. The attempt of the Commonwealth was to charge appellee, by the second count of the indictment, with the offense of being an habitual criminal. It was framed under section 1130, Kentucky Statutes, which provides that every person convicted a third time of a felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary during his life. The indictment in this case fails to show what the law is in the State of Louisiana and Wisconsin, where it is charged appellee had been previously convicted in the latter State of robbery, in the former of burglary. It fails to show that these acts were felonies in those States. It is also bad in not showing the courts in which the convictions took place. Good pleading, where a judgment of a court of another State is relied upon, requires that the laws of the State under which the judgment was rendered be pleaded so as to show the jurisdiction of the court to render the judgment relied upon. It was likewise essential to plead the laws of the States in which the judgments are claimed to have been rendered, so that the trial court in this State may know whether in point of fact the convictions, even if had as claimed, were felonies, the punishment of which was by confinement in the penitentiary. Courts of this State do not take cognizance of the statutes and jurisdictions of courts of other States unless pleaded, and they must be pleaded as other facts. Furthermore, appellee was entitled to be notified explicitly what court in each instance it was that it is claimed had convicted him of the offense alleged, that he might meet the charge by proof.

Therefore, the judgment of the circuit court is affirmed.

LANHAM v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed April 25, 1905.)

1. Railroads—Injury to employe—Compromise—Writing—Avoidance—Where an employe of a railroad company was injured by falling from a hand car while in such employment, and by a compromise with said company in writing agreed, in satisfaction of his claim for damages, to accept

\$100 in money and the payment of his physician's bill for treating him for his injuries, he can not, in an action thereafter brought, recover damages for such injuries, where such writing is relied on as a defense, in the absence of an allegation of fraud or mistake in the execution of such writing.

2. Parol evidence to vary writing—Fraud or mistake—Where a writing purports to be a compromise and settlement of a claim for damages, the presumption is that all matters pertaining thereto are embraced therein, and parol evidence is not admissible to vary its terms in the absence of a charge of fraud or mistake in its execution.

Robt. Harding, A. P. Cooper and E. R. Puryear for appellant.

Benjamin D. Warfield for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Settle.

Appellant sued appellee in the Marion Circuit Court to recover damages for the alleged breach of a contract claimed to have been made between them, whereby appellee agreed to furnish him medical or surgical treatment and attention until he recover from certain injuries received in its service and upon its railroad.

It was in substance alleged in the petition that appellant's leg was broken and his person otherwise injured by the negligence of appellee for which he had and held a claim for damages against it, in compromise and settlement of which appellee agreed to pay him \$100, to furnish him medical attention and treatment for his injuries "until the same should be and become well, and to repair said injuries;" that appellee did pay him the \$100 and began and furnished him medical attention for several months, but before his injuries were well, and while they still needed attention, appellee's physician ceased to treat him and refused to further do so, which was a violation of the contract, prevented his cure, and caused him physical pain and damage in the sum of \$2,000, for which amount judgment was prayed. The answer of appellee denied that appellant's injuries were caused by its negligence, but admitted the compromise of his claim for damages and the payment of \$100 in settlement thereof. The answer denied, however, that appellee in or by the compromise and settlement with appellant agreed to furnish him medical attention, or treatment for his injuries, or until such injuries should be or become well, or that before his injuries were well, or while they still needed attention, its physicians ceased or refused to further treat his injuries, or that it thereby or otherwise violated its contract with him, prevented his cure, or caused him physical pain or damage in the sum claimed, or in any other amount.

Following the specific denials mentioned, the averments were made in the answer that the only terms of the compromise and settlement between it and appellant were the agreement on its part to pay him the \$100, and his agreement to accept that sum in full compromise and settlement of his claim against it for the injuries complained of, and that at the time of making the compromise the entire agreement and contract of the parties in reference thereto was reduced to writing and signed by appellant, which writing acknowledged the payment by appellee to appellant of the \$100 accepted by the latter in settlement of his claim.

In the second paragraph of the answer it was further averred that at the time of receiving his injuries appellant was taken charge of by a competent physician and surgeon, who immediately placed him in a well equipped hospital, where he was boarded, well nursed, and his injuries carefully treated by the physician for several months, and until the services of the physician were no longer needed, when appellant voluntarily left the hospital and care of the physician, and that while appellee was in no way liable for appellant's board, nursing or the medical attention furnished him, it paid therefor \$400. The reply contained a traverse of nearly all the affirmative matter of the answer, except that it failed to sufficiently deny the execution of the writing evidencing the compromise and settlement, but did deny that it contained all the agreement that formed the basis of the compromise without, however, averring fraud, mistake or duress in the writing or its execution.

The case went to trial upon the issues thus presented by the pleadings, and upon the conclusions of appellant's evidence the court peremptorily instructed the jury to find for the appellee, and they returned a verdict as instructed. It was insisted for appellant, on his motion for a new trial in the lower court, and is now contended by his counsel, that the court erred in giving the peremptory instruction, and that for this alleged error the judgment appealed from should be reversed.

The writing relied on by appellee, as showing the contract made with appellant, is as follows:

"Louisville & Nashville R. R. Co.

"To Dee Lanham, Dr.

Allicetown, Ky., August 17.

"Received of the Louisville & Nashville R. R. Co., \$100, in full compromise, settlement and adjustment of all claims and demands of every character whatever, which I have against the said company, its officers, agents and employes, on account of injuries to my person and damage to and loss of property sustained by me at or near Woodbine, Ky., on or about the 2d day of May, 1901, by falling off a hand car while employed as a laborer in extra gang No. 2, and on every other account whatever.

"Witness my hand at Lebanon, Ky., this August 17, 1901.

his
"DEE x LANHAM,
mark.

"Witness: JOHN McCHORD,

"R. E. FLEMING."

The failure of appellant to deny the giving of the foregoing writing is tantamount to an admission of its execution and existence, and his averment in the reply, that it does not contain all the terms of the settlement of his claim against appellee, can not avail in the absence of an averment of fraud or mistake in the contract, or in reducing its terms to writing, and no such averment appears in the appellant's pleadings. It is a fundamental rule of the law of contracts that where a contract when made is put in writing, or if made in parol is afterwards reduced to writing, the writing is presumed to contain the contract in its entirety, and it will be treated as evidencing the whole of the contract unless it be attacked upon the ground of fraud, mistake or duress. (Castleman v. Southern Mutual Life Ins. Co., 14 Bush, 197; Farmer v. Gregory & Stagg, 78 Ky., 475.)

In view, therefore, of the writing executed by appellant at the time of the compromise and settlement with appellee, and the absence of an allegation of fraud or mistake in its terms or execution, we think it was incompetent for him to contradict, vary or add to the writing, by setting up another and parol agreement alleged to have been made with appellee before or at the same time, and that the evidence offered by him in support of such contract was incompetent, and should have been excluded by the trial court. It is, however, contended by counsel for appellant that the writing in question is a mere receipt for the \$100 paid appellant by appellee upon his claim for damages, and was not intended to evidence the terms of the settlement, consequently the presumption that it contains the entire agreement of the parties can not prevail, for which reason appellant was entitled to set up and prove the contract as claimed by him without regard to the writing.

The language of the writing proves it to be more than a receipt. It is also a statement of appellant's claim for damages for injuries sustained, how and when they were received, and is in addition a formal release, discharging appellee from all past, present and future liability for injuries to appellant's person, and loss of or damage to his property, or on any other account whatsoever, resulting from his falling off a hand car May 2, 1901. Regarding the inadmissibility of evidence to contradict the terms of the written contract, it is well settled that releases, deeds and other written contracts are governed by the same rule. All preliminary negotiations are presumed to be merged in them, and from the time of their execution they must be deemed to be the only competent evidence of the agreement of the parties upon the subjects to which they relate, unless avoided for fraud, mistake, duress or some like cause.

In 2 Parsons on Contracts, 9 edition, page 715, it is said: "But if a plaintiff is met by a general release under his seal to the defendant, he can not set up an exception by parol. And where the release is general, it can not be limited or qualified by extrinsic evidence though a receipt may be. And a release, or receipt in full, throws the whole burden of proof on him who signed it, if he alleged that he signed it through mistake or fraud." (Kirchner v. New Home Sewing Machine Co., 31 N. E., 1104; Pierson v. Hooker, 3 Johns, 68; Crow v. Williamson, 111 Ky., 276; Harison v. Thompson, 84 S. W., 569.)

It is claimed for appellant that the fact that appellee paid \$400 to the physician for medical attention given him sustains his contention that he was to be treated at appellee's expense until cured. If this were admitted to be true it would not, in the absence of an allegation of fraud or mistake in the writing, render competent as evidence the fact asserted, nor, upon the other hand, would its admission disprove the averment's of appellee's answer that its payment of the physician's bill was a mere gratuity, extended because appellant was in its service when injured. As bearing on the question of whether appellant was discharged from the hospital before he was healed of his wounds, it is contended by appellee, and admitted by appellant, that he received treatment from the hospital physician after leaving the hospital, and this fact is argued as proving that he left the hospital voluntarily, and the further fact that he did not apply to another physician (Dr. Evans) for treatment until three weeks after the hospital physician ceased

to treat him, is also argued as showing that he was well when the latter quit attending him.

The cure of appellant at the hands of the appellee's physician is also argued, from the fact that when treated by the second physician it was for erysipelas in the wounded leg, which disease he did not have until appellee's physician quit treating him. This disease Dr. Evans said was caused by filth. We deem it unnecessary to discuss these matters of evidence as they were all incompetent, because of the absence from appellant's pleading of any allegation of fraud or mistake in the writing he executed to appellee. The only contract between the parties was contained in the writing. That instrument does not manifest the alleged undertaking upon the part of appellee to furnish appellant medical treatment until well of his injuries, or at all, and that undertaking was not alleged to have been omitted from the writing by fraud or mistake, the only agreement between the parties expressed therein being that appellant had released appellee from all liability for his injuries in consideration of \$100, the payment of which was acknowledged. The only proper thing for the trial court to do was to instruct the jury to find for appellee as was done.

Wherefore, the judgment is affirmed.

SMITH v. SMITH.

(Filed April 25, 1905--Not to be reported.)

Husband and wife—Divorce—Alimony.—In an action by the wife for a divorce and alimony, where the evidence shows that their differences resulted mainly from troubles arising in attempting to raise two families of children together (both parents having children by former marriages) and that the wife was more to blame in these matters than the husband; that he was old and in bad health and needed her attention and services and desired her to remain with him; that he had very little property and was a pensioner, she was not entitled to alimony, and a judgment allowing her \$60 per annum is set aside.

J. R. Llewellyn and G. T. Rodes for appellant.

A. W. Baker for appellee.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge Settle.

Appellant and appellee were married on the 22d day of October, 1899, and lived together as man and wife from that time until March 15, 1904, when appellee left her home and took up her residence with a married daughter, with whom she yet resides. After leaving appellant she brought this suit for a divorce and alimony upon the ground of his alleged cruel and inhuman treatment of her.

Appellant by answer traversed the allegations of the petition, and in addition asked a divorce a mense et thora from appellee upon the ground of her violent and ungovernable temper, and settled aversion for him. The answer was made a counterclaim against appellee. The chancellor dismissed appellant's counterclaim, but granted appellee a divorce a vinculo and alimony of \$60 per annum. To so much of the judgment as allowed

appellee alimony appellant excepted, and its reversal to that extent is sought by this appeal. While we can not disturb the judgment as to the divorce, we have carefully considered the grounds urged therefor and the proof offered in support thereof, that we might determine whether the allowance of alimony was proper. It appears from the record that appellant and appellee had several children, each by a former marriage. Upon their marriage they took these children to live with them, and dissension and trouble soon arose between the children which very naturally involved the parents. In fact appellee's complaint against appellant in this case was the alleged misconduct of his children, their mistreatment of her and his refusal to control and require them to treat her with respect. Upon the other hand, appellant complained of the misconduct of appellee's children and her failure to control them.

According to the evidence, on one occasion a son of appellee attempted to cut one of appellant's sons with a knife, at which appellant was greatly provoked, and at his request appellee sent her son to another place to live. On another occasion appellee got into an altercation with appellant's two unmarried daughters, and one of them struck her, whereupon appellant whipped the two girls and found them a home elsewhere than at his own house. Appellee complained specially of the alleged impudence and bad conduct of her stepson, Ben. Smith, a boy of fourteen years of age. The evidence shows that Ben was at times impudent and disrespectful to appellee, but this was in large measure caused by her mistreatment of him and her failure to furnish him with a comfortable bed, bed clothing and place to sleep.

At first appellant seems to have made every effort to keep the pence between his son, Ben, and appellee, and to require the former to treat her with proper respect. He received no assistance from appellee in this laudable undertaking, as she was fault finding, officious and domineering in her conduct towards appellant and his children. It seemed to make appellee jealous and suspicious to see appellant in conversation with a married daughter that frequently visited him, and it is evident from the proof that she gave his children as much provocation and as unkind treatment as she received. According to the evidence, appellant is an old man and greatly afflicted with a disease which often confines him to his house for weeks at a time, and has made of him a confirmed invalid. When thus confined he required much nursing and attention, which appellee frequently failed to give him. On one occasion, shortly before she separated from appellant to make her home with a married daughter, she left him sick, and did not return for several weeks, though his illness continued during that time and he stood in daily need of her care and services.

While, according to the evidence, appellant would sometimes speak to appellee harshly, because provoked by her to do so, he was in the main patient and forbearing in his conduct to and treatment of her. She used his credit at the neighborhood store without stint, and was at all times a beneficiary of his pension. Upon the whole case, we are satisfied that many of the domestic troubles that came between appellant and appellee might have been avoided if he had exercised greater control over his children, and had been less indifferent and more conciliatory in his conduct toward appellee.

We are at the same time convinced that she was more frequently at fault in causing the family disturbances, and the greater offender against the family peace, and that her bearing toward appellant manifested an entire absence of affection for him, as well as a total disregard for his happiness and health. In view of these facts we do not think she was entitled to alimony. Besides, it is shown by the record that appellant repeatedly requested appellee to return to his home and live with him. This fact, together with his willingness to receive her again as his wife, was averred in his amended counterclaim, and not denied by reply or controverted of record, and his persistency in seeking her return indicates his good faith in that regard. Moreover, on account of his frail health the small estate of which he is in possession, including his pension, is barely sufficient to support him in his feebleness and old age. Under the facts of this case it is even questionable whether the chancellor should have allowed her a fee for her attorney and the costs of the action, but we will not disturb the judgment as to those items.

Appellee claims to have been the owner in her own right at the time of her marriage of a horse, cow and hog, and a few household effects, and this property is alleged to have been converted by appellant. The answer admits the sale of the horse to appellee's son-in-law, but avers it was made at her request, and that a part of the purchase price has never been paid. Such of the consideration as was received was paid in corn, of which appellee and her children got the benefit jointly with appellant. It appears that the cow was sold and the money received by appellee, and that the hog was, with her consent, killed and consumed by the family, including her children. The articles of furniture are of little value, and the answer concedes appellee's right to take possession of them at any time. It also appears that when she finally left appellant's home appellee took with her a horse of his which she yet retains, though his right to its return is asserted by the answer. The judgment does not mention this horse, but we assume that the chancellor meant to allow her to retain it in lieu of the property claimed by her. If so, the horse, according to the evidence, is of sufficient value to compensate her for the property alleged to have been converted by appellant.

For the reasons indicated the judgment is reversed in so far as it allows appellee \$60 per annum alimony, but is in other respects undisturbed.

WILSON'S ADM'R V. CHESAPEAKE & OHIO RY. CO., &c.

(Filed April 25, 1905—Not to be reported.)

Railroads—Causing death—Negligence—Peremptory instruction—In an action against a railroad company for the negligent killing of plaintiff's intestate at a private crossing of the railroad track, where there was evidence tending to show that deceased could not see the train until she reached the crossing, and that persons using said crossing depended on hearing the approaching train whistle at a public crossing three-fourths of a mile from the private crossing, and that the train that killed her was traveling at the rate of fifty miles an hour and did not whistle or ring its bell at said public crossing on that occasion, nor at the private crossing, it was error in the court to give the jury a peremptory instruction to find for the defendant.

A. D. Cole and T. R. Phister for appellant.

Worthington & Cochran and W. H. Wadsworth for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Nunn.

On the 2d of September, 1899, one Nancy J. Wilson was killed by one of appellee's trains. Her administrators brought this action for the recovery of damages therefor. On the trial and after appellants had introduced their evidence, on motion of appellees, the court granted them a peremptory instruction, and the jury rendered a verdict in conformity therewith. Of this the appellants complain.

The only question to be determined is whether the appellants introduced any evidence to authorize a recovery. If so there must be a reversal, otherwise an affirmance. It is shown in the record that Mason Wilson, the husband of Nancy, owned a tract of land in the Ohio river bottom in Lewis county long prior to the building of appellee railroad; that his dwelling was left between the railroad and the river; that he had a passway from his house out from the river for a long time prior to the building of the road, and when the railroad was built over this private passway it made a crossing at that point and had kept it in repair ever since, and it has been constantly used as a passway. Mason Wilson died many years ago and left his widow residing at the old home. One of her sons, J. B. Wilson, lived on the other side of the railroad from her, about a quarter of a mile distant, and about 150 yards from the railroad. On the day she was killed she visited her son and started to return to her home about 2 o'clock, p. m., about the time one of appellee's trains was due. She was walking and was holding with one hand her apron, containing some cantaloupes and with the other hand an umbrella, and she had on a sunbonnet. Before she reached the railroad track, and while on this traveled road, she had to pass by an embankment of earth which had been placed there by appellees, and which was situated between her and the approaching train. When she reached the first rail she was struck by the engine and thrown about forty-five feet, and instantly killed.

There was an effort on the part of appellees to show by the proof that this embankment of earth was not of sufficient height to have prevented her from discovering the approaching train if she had been exercising, at the time, any care. The appellants endeavored to show by the proof that this embankment was so high with the weeds growing upon the top of it that it prevented her from seeing the approaching train. There was evidence that tended to sustain each of their contentions. Appellants proved by many witnesses that there was a public highway crossing the railroad about three-quarters of a mile below this private crossing, and that this train which killed Mrs. Wilson was traveling at not less than fifty miles per hour, and that it did not whistle at this public crossing nor at the private crossing until about the moment it struck her. It was also proven that trains occasionally whistled at this private crossing, and that those living on the Wilson farm and using this private crossing were governed in using this crossing by the whistle at the public crossing.

There was only one witness introduced who saw her killed, and he stated that he did not notice whether or not she turned her head up or down the track as though looking for the train, and upon this statement the appellees contend that she did not exercise any care in approaching the track, and that she was guilty of contributory neglect, but for which she would not have been killed, and that the peremptory instruction was proper. It was proven, without contradiction, that appellee's agents in charge of the train failed to give warning by blowing the whistle or ringing the bell of its approach to the public crossing, and that persons using this private crossing were enabled by such signals to avoid collision with the trains. This court in several cases has decided that failure of those in charge of a railroad train to give the signals mentioned to apprise persons at or near a public crossing of its approach must be regarded as negligence. (*Paducah, &c., R. R. Co. v. Hoehl*, 12 Bush, 41; *Louisville, &c. v. Goetz*, 79 Ky., 444; *Cahill v. Cincinnati, &c., R. R. Co.*, 92 Ky., 345.) It has been held that the same reason does not exist for giving signals and slackening usual speed of a train at private crossing, and failure in that respect is not generally regarded as negligence. (*Johnson v. L. & N. R. R. Co.*, 91 Ky., 651, and the case in 92 Ky., *supra*.)

In the *Cahill* case the court used this language: "But the evidence in this case shows that a signal when given by steam whistle on approach of a railroad train from the south to the public crossing referred to can be distinctly heard at and even beyond *Cahill's* crossing. And thus arises a question, not heretofore presented to or decided by this court, whether persons lawfully using a private crossing in the vicinity of a public crossing are entitled to the benefit of signals required to be given at the latter; and whether for the failure to give it negligence, as to them, should in any case be imputed to the railroad company." The court decided that such failure was negligence as to persons using such private crossing. This principle is peculiarly applicable to the case at bar. The court in the *Cahill* case also used this language: "On the contrary, it is bound to look out for the presence of persons at an established and recognized private crossing, and use reasonable precaution and vigilance to avoid injuring them. And so they had the right to act upon the presumption the company will duly comply with every legal requirement that may affect them in the reasonable use of such crossing. Therefore, if a person of common prudence and intelligence, who distinctly and habitually hears signals of approach of railroad trains to a public crossing that he knows it is both the duty and the custom of the company to give, would ordinarily rely on such signals in the use of his own private crossing, then he should in law as well as in fact have the benefit of them. Otherwise, his would be the case of a person injured while in the reasonable exercise of a legal right, yet without remedy against the wrongdoer or person in fault." The court continuing, said: "It is not contended the plaintiff was negligent in any respect except failing to look for the coming train before going upon the railroad. Whether either she or *Henry Conrad* did so look could not, for the reason before indicated, be shown by direct testimony. Therefore, it was the peculiar province of the jury, not of the court, to determine that question from facts and circumstances proved; for whatever may be the rule elsewhere it

has been definitely settled by this court that it is not to be presumed in the absence of evidence as to the care exercised by a person injured or killed on a railroad, where he had a right to be, that he recklessly or carelessly imperiled his own life. (Louisville, &c., R. R. Co. v. Goetz, 79 Ky., 442.) Moreover, even if plaintiff was guilty of negligence, considering the long distance, four hundred yards, the buggy could have been seen from the train, the question was pertinent, and ought to have been submitted to the jury whether those in charge did or could by reasonable diligence have discovered the danger of a collision in time to prevent it by checking the train or blowing the whistle. But to decide that failure of a person to look along a railroad before attempting to cross it is, under all circumstances, and necessarily, negligence, would be arbitrary and without reason; for there may be evidence sufficient to satisfy a person of ordinary carefulness the track is clear without taking that precaution—as when he knows it is not usual train time and does not hear the signal he knows it is customary for the company to give and him to hear. A person thus reasoning and acting, it seems to us, can not, upon principle, be regarded as negligent, even if he does fall short of the measure of vigilance needed to prevent being injured by a passenger train running hours behind time, at an extraordinary rate of speed and without any signal of its approach.”

These principles are applicable to the case at bar except it was not shown that the train was behind time, or whether the deceased knew the time of the train. But if she did, the other facts proven would authorize a submission of the question of her negligence or want of care to the jury for its determination.

In the 12 Bush case, supra, Mary Hoehl, the person injured, stated in her evidence that she did not look up or down the track for an approaching train before going upon the track. There was some evidence that those in charge of the train did not give any signals of the approach to the crossing, and the court determined in such case that it was a question of fact to be tried by the jury as to whether or not she was guilty of such negligence as to preclude a recovery on her part. We are of the opinion that the lower court erred in giving the peremptory instruction.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

PALESTINE BUILDING ASSOCIATION v. MINOR, &c.

(Filed April 25, 1905—Not to be reported.)

1. Private nuisance—Injunction to restrain—While we are not prepared to say as a matter of law that picnics, beer gardens, bowling alleys and the like are per se nuisances, yet they may be so conducted as to become hurtful to the health and destructive of the comfort of the community in which they may be exercised, and when this happens the hurtful thing must be abated, for no one can have the legal right to do that which destroys his neighbor's property or health.

2. Same—Where private citizens suffer peculiar injury from nuisances, apart from that of the general public they may maintain their action in equity to abate it, although the public, through the attorney general, may also have the right to proceed in the name of the Commonwealth to abate the nuisance.

Wm. B. Eagles for appellant.

Tarvin, Roe & Huggins for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division

Opinion of the court by Judge O'Rear.

Appellees, property owners in Louisville, whose property was in the immediate vicinity of a lot and buildings owned and operated by appellant, brought this suit to enjoin a nuisance, which operated to seriously diminish their comfortable enjoyment of their homes. Appellant's premises were enclosed by a high fence, and used as a private park. The park was rented to lodges and societies and other bodies for holding picnics and entertainments, both day and night. It was located in a residence portion of the city. The amusements were mostly, or altogether, out of doors, so that the noises created thereby and by the crowds which were attracted and congregated at and about the point, and in going to and from it, were freely heard in all the surrounding premises. Large crowds of noisy, bolsterous, dissolute, drunken people gathered at the park, and indulged in music, dancing, hallooing, shouting and other convivial excesses throughout the day and until very late hours of the night, frequently as late as 2 or 3 o'clock in the morning. The neighboring residents were disturbed to such an extent that they could not sleep. They were offended by the obscenity of the revelers and by their bolsterous noise, as well as by brass bands which kept up their music or noise until after midnight. Such at least was the finding of facts by the chancellor, who admitted in his judgment, as we are bound to upon the facts of the record, that all of the gatherings were not of the description indicated, nor were all of the people who gathered at any of these meetings of the class described. The complainants below also admit that there were occasions when the meetings were not disturbing, and of those they did not complain. They also admitted that many persons attended these gatherings there that were not in themselves or conduct objectionable. Still most frequently the gatherings were of the class described.

Quite a number of witnesses for appellant have testified that they frequented the park, some of whom were there pretty constantly, and that, so far as they had ever heard, the disturbances complained of by the neighbors did not occur. The judgment of the circuit court did not require appellant to close its park, nor was it required to discontinue picnics and other public gatherings and performances there. Therefore, if appellant and its lessees and tenants do not give entertainments of the kind that are unusual, and unnecessarily disturb the surrounding settlement, the injunction granted in the case can not hurt them. The circuit court recognized and kept within the opinion of this court in *Pfingst v. Senn*, 94 Ky., 556, in which it was said: "Among the rights to be enjoyed, indeed we might say necessary to be enjoyed, by a large class of persons in a crowded city is the right or privilege of attending places of open air amusement."

Nor are we prepared to say as a matter of law that picnics, beer gardens, bowling alleys and the like are per se nuisances, nor are livery stables, slaughter houses and the like. Yet many occupations and businesses, not necessarily harmful in their nature, may be so conducted as to become

hurtful to the health and destructive of the comfort of the community in which they may be exercised. When this happens the hurtful thing must be abated, for no one can have the legal right to do that which destroys his neighbor's property or health.

Accepting the trial judge's finding of the facts as establishing the conditions complained of by appellees, it is disclosed that appellant's property is with its permission being used for the assembling and misconduct of persons as a disorderly house, which operates to seriously diminish the comfortable enjoyment of the dwelling houses in the immediate vicinity, as well as to impair the health of the inhabitants. While it is undoubtedly the correct rule that a court of equity will not interfere by injunction in cases of nuisances, trespasses and like injuries to property, when the parties can have complete redress in a court of law, still if it appears that irreparable mischief will be done by withholding the process, or where the damages that will result to the complainants are incapable of being adequately measured or where the mischief is such, from its continuous and permanent character, that it must occasion constantly recurring grievances, which can not be otherwise prevented, a court of equity ought to interfere by injunction to stay the wrong and protect the complainant's property and personal rights from hurt or destruction. In *Peacock v. Spitzelberger*, 16 Ky. Law Rep., 803, a noisy business operated at night in a residence community was declared to be a nuisance, although the business was not of itself a nuisance. In *David v. Davis*, 40 W. V., 464, the court held that a noise made by a disorderly crowd at a place of public amusement may be a nuisance. The playing of a brass band at night in a residence section was held under the facts of that case to be a nuisance. In *Hayden v. Tucker*, 37 Mo., 214, it was held "that that which impairs the enjoyment of the dwelling may be a nuisance, although it does not drive occupants therefrom."

It was shown in this case that the criminal laws had been resorted to, but without avail; that although some of the perpetrators were fined for their disorderly conduct, yet from the very nature of the thing, from the sizes of the crowds that gathered, from the extreme difficulty, if not impracticability of keeping a sufficient police force at hand to always restrain the conduct of those gathered at the place of amusement, it was impossible to deter or prevent the commission of the excesses complained of by the use of the criminal laws. A common nuisance, that is, a public nuisance, in its nature, is continuing. It is an encroachment upon the rights of the public. The acts constituting it may or may not in themselves be offenses under the law of the land, or they may be such as that they are partly offenses and partly are not, and yet such as to be impossible of segregation, so as by punishing the parts that are in themselves offenses against the law would be inadequate to suppress the whole thing that really does the mischief. It is not denied that where private citizens suffer peculiar injury apart from that of the general public from nuisances, that they may maintain their action in equity to abate it, although the public, through the attorney general or Commonwealth attorney, may also have the right to proceed in the name of the Commonwealth to abate the nuisance. In *Commonwealth v. McGovern*, 25 Ky. Law Rep., 411, it was distinctly held that the remedy by

Injunction was applicable to restrain the owner of property from so using it for the gathering of large, boisterous, dissolute crowds of lawless people as that it became a nuisance to the community.

The judgment is affirmed.

CITY OF COVINGTON v. McKENNA & CRAIG.

(Filed April 26, 1905—Not to be reported.)

1. Apportionment warrant — Personal judgment — Jurisdiction — In an action by McKenna on an apportionment warrant against Craig and the city of Covington for \$186, and to enforce a lien on Craig's property and for judgment against the city if the property is not liable, in which the court dismissed the petition against Craig, a judgment for McKenna against the city for the debt is a personal judgment, of which this court has no jurisdiction.

2. Title to land—Appeals—Where the amount in controversy is less than \$200, to give this court jurisdiction the title to land must be directly involved and concluded by the judgment. The fact that the title to land is involved collaterally is not sufficient to give this court jurisdiction.

F. J. Hanlon for appellant.

T. B. Wise for appellee McKenna.

O. P. Schmidt and R. L. Greene for appellee Craig.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Hobson.

McKenna held an apportionment warrant for the construction of a street in the city of Covington, and filed this suit against Craig and the city to enforce the lien on Craig's property and for the judgment against the city if the property was not liable. The amount of the warrant was \$186.

Craig answered, alleging that he was the owner of the ground on which the street was constructed, and that it was not a street of the city. He made his answer a cross petition against the city. The city answered the cross petition, denying its allegations. On final hearing the court delivered a written opinion in which he held that the strip of ground was the property of Craig, concluding the opinion with a judgment dismissing McKenna's petition against Craig and giving McKenna judgment against the city. No judgment was entered upon the cross petition of Craig against the city, this matter being reserved for future adjudication. The city appeals, making both McKenna and Craig appellees, and they have entered a motion to dismiss the appeal for want of jurisdiction on the ground that the amount in controversy is less than \$200. As between McKenna and the city the judgment in his favor against the city is simply a personal judgment for \$186 and costs. As between Craig and the city on the question of the ownership of the strip no judgment has been rendered, as the cross petition is still pending and the matters involved therein are undetermined. The fact that the court based its judgment in favor of McKenna against the city on the ground that the city did not own the land does not change the character of the judgment. It is simply a personal judgment. Where the

amount in controversy is less than \$200, to give this court jurisdiction the title to land must be directly involved and concluded by the judgment. The title to the land is not concluded by the judgment of McKenna against the city. No final judgment has been rendered between Craig, the claimant, and the city as to the title to the land, and, therefore, the only question on the appeal is the propriety of the personal judgment of McKenna against the city, which is for an amount under \$200. In determining that the city was liable to McKenna the court reached the conclusion that the city did not have title to the land, but this is only the reason for his judgment. The fact that the title to land is involved collaterally is not sufficient to give this court jurisdiction. The judgment appealed from, after setting out the evidence and discussing certain authorities, proceeds in these words: "There appears nowhere any intention on the part of the owner of this property to dedicate same, nor does there appear any claim of right to this property by the city, and, in fact, it appears that the city knew it was not dedicated. * * * It is, therefore, adjudged by the court that the petition be dismissed as against the defendant, A. J. Craig, and that he recover of the plaintiff his costs herein expended, to which plaintiff excepts. It is further adjudged by the court that the plaintiff recover of the defendant, the city of Covington, the sum of \$186.09, with interest thereon from September 24, 1903, until paid, and the further sum of \$12, cost of exhibits, and his other costs herein expended, to which the city of Covington excepts. This cause is retained on the docket for further proceedings on the cross petition of the defendant, Craig, against the defendant, the city of Covington. Defendant, city of Covington, excepts and prays an appeal to the Court of Appeals, which is granted."

While this judgment contains an opinion by the court that the strip was the property of Craig, no final relief is given on the subject, and when the case is heard on the cross petition of Craig against the city such judgment may be rendered as on the whole case may seem right.

The appeal is, therefore, dismissed.

MATHLEY v. COMMONWEALTH.

(Filed April 26, 1905.)

1. Homicide—Defense—Insanity—Instructions—Where the undisputed evidence shows that the defendant deliberately and without apparent cause shot and killed a young girl, with whom he was in love and wanted to marry, but who had refused to marry him, and also at the same time mortally wounded his rival, who was with the girl, the only defense being as to his sanity at the time, the following instructions, given by the court, are held to be proper.

"No. 7. The court further instructs the jury that the law presumes every man sane until the contrary is shown by the evidence, and before the defendant can be excused on the grounds of insanity the jury must believe from the evidence that the defendant at the time of the killing was without sufficient reason to know what he was doing, or that, as the result of mental unsoundness, he had not then sufficient will power to govern his action by reason of some insane impulse which he could not resist or control.

"No. 8. The court further instructs the jury that although they may believe from the evidence that the defendant at the time of the killing of Emma Watkins was without sufficient power to govern his action by reason of some impulse which he could not resist or control, yet if they further believe from the evidence that such lack of reason to know right from wrong, or such insufficient will power to govern his actions, or to control his impulses, arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit the defendant on the grounds of insanity."

2. Evidence—Letters showing motive—Competency—Letters taken from the possession of defendant at the time of his arrest, which he admitted were given to him by the deceased, which tend to establish the cause of jealousy on his part, and tend to furnish a motive for the killing, are clearly admissible in evidence.

Little & Slack, E. D. Guffy and J. R. Hays for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Robert Mathley, was indicated by the grand jury of Daviess county, charged with the murder of Emma Watkins. Upon trial he was found guilty by the jury, and his punishment fixed at death. To reverse the judgment based upon this verdict he has appealed to this court.

The facts necessary to illustrate the questions of law arising upon the record are as follows: The appellant, who is a widower, became enamoured of Emma Watkins, a girl of seventeen or eighteen years of age. According to the evidence for a time, at least, they were engaged to be married, and perhaps (although this is not material) there had been illicit relations between them. It is further shown that he was exceedingly desirous of marrying the girl, and was probably jealous of her. Deceased had been employed in the home of appellant, who was keeping house with his mother, but at the time of the killing she was not in his service, but was visiting the house of William Warren, where the tragedy took place.

On the 26th day of June, 1904, the appellant, Emma Watkins. James Gregston, Mrs. William Warren and William Warren were all at the house of the latter in Owensboro, Ky. James Gregston was showing some attention to Emma Watkins, but after a short while he and William Warren left the house, taking opposite directions. Appellant, after the departure of Gregston and Warren, sought to obtain the promise of the girl to marry him, but this she refused to give, saying, in substance, that she had loved him at one time, but since he had threatened to shoot her she no longer loved him. Without giving in detail their conversation, appellant said to the girl she might as well marry him, as she should not marry any one else. After being absent a short while, James Gregston returned to the house, whereupon the appellant, without any warning or apparent cause, drew a revolver and fired two shots, one mortally wounding James Gregston, and the other killing Emma Watkins. Gregston ran out of the house and fell in the street; the girl ran into the kitchen and there fell dead. Appellant, pistol in hand, sat down on the kitchen floor beside the dead body of his victim, where he remained until arrested and disarmed by the police officers.

The theory of the Commonwealth is that the killing was the result of jealousy; that of the defense that it was caused by insanity. Among the grounds for reversal it is urged that the court erred in admitting one of the witnesses (a physician) to testify that he was consulted, professionally, by Emma Watkins some time before her death, and that in response to a direct question from him, she said she was pregnant, and had been so for three months. This is objected to as hearsay, and admitting for the purposes of the case that it is justly subject to that criticism, it was not prejudicial to the substantial rights of appellant, for the reason that Mrs. William Warren had already testified, without objection, that the girl had made the same statement to her.

Some time before her death Will Gregston, a brother of James, while confined in jail, wrote several letters to Emma Watkins, which show that he also was in love with her, and that he claimed to have had illicit relations with her. These letters were taken from the possession of appellant at the time of his arrest; he admitted they were given to him by Emma Watkins as they were received, and that he knew their contents. As these letters tend to establish a cause for jealousy on his part, and thus furnish a motive for the killing, they were clearly admissible in evidence.

Instructions Nos. 7 and 8, which are complained of, are as follows:

"No. 7. The court further instructs the jury that the law presumes every man sane until the contrary is shown by the evidence, and before the defendant can be excused on the grounds of insanity the jury must believe from the evidence that the defendant at the time of the killing was without sufficient reason to know what he was doing, or that as the result of mental unsoundness he had not then sufficient will power to govern his action by reason of some insane impulse which he could not resist or control.

"No. 8. The court further instructs the jury that although they may believe from the evidence that the defendant at the time of the killing of Emma Watkins was without sufficient power to govern his action by reason of some impulse which he could not resist or control, yet if they further believe from the evidence that such lack of reason to know right from wrong, or such insufficient will power to govern his actions, or to control his impulses, arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit the defendant on the ground of insanity."

Instruction No. 7 is objected to because it places the burden of proving his own insanity upon the accused. This instruction is approved in *Abbott v. Commonwealth*, 107 Ky., 624; *Ball v. Commonwealth*, 81 Ky., 662; *Brown v. Commonwealth*, 14 Bush, 400, and *Wright v. Commonwealth*, 24 Ky. Law Rep., 1838, and must now be considered as affording, when applicable, the correct rule.

Instruction No. 8 is criticised because it is said that it takes from the jury the right to find the defendant insane, although his mind may have been so diseased by long drunkenness as to deprive him of the power of knowing right from wrong, or of will power sufficient to govern his actions provided this condition was superinduced alone from voluntary drunkenness. If the inference which counsel draw from the language of the instruction in question is correct, their objection to it is well founded, but an analysis of

It shows that it clearly distinguishes between the lack of reason or will power arising from voluntary drunkenness, and the want of these mental powers arising from unsoundness of mind. The instruction tells the jury plainly, that if appellant's lack of reason or will power arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit him on the grounds of insanity. This instruction is copied from one approved by this court in *Wright v. Commonwealth*, *supra*, and we adhere to it as a sound exposition of the law on the subject of which it treats.

Appellant further complains that the court failed to expressly instruct the jury as to the presumption of innocence. Assuming that, ordinarily, this instruction is necessary and proper, the rights of appellant were not injured by its absence in this case. Here, there was no dispute as to the homicide having been committed by appellant without legal excuse or justification; that he shot the girl dead without provocation is admitted. His only defense is insanity; and, as to this, we have seen that the rule is well settled in this State that one charged with crime is presumed to be sane until the reverse is established by evidence.

There are other errors assigned, but we do not think them of sufficient merit to require special notice. The instructions of the court, except as herein set forth, are not criticised, and they properly state the law of the case. As was stated frankly by counsel in the argument at bar, this homicide was either one of atrocious and brutal murder, or the appellant was insane. His insanity, therefore, was the one real, substantial question in the case. There was evidence both for and against him on this proposition, and the jury, who were the final arbiters as to the facts, found this issue against him. A careful reading of the record convinces us that appellant had a fair and impartial trial at the hands of both the court and jury, and that his defense was fully presented by the able and loyal counsel appointed for him is abundantly shown both in the record and the argument at bar.

Perceiving no substantial error in the record the judgment is affirmed.

Whole court sitting.

MOUNT V. COMMONWEALTH.

(Filed April 27, 1905.)

1. Change of venue—Discretion of court—On the motion of defendant in a criminal prosecution for a change of venue the burden is on him to show that he can not get a fair trial in the county where the indictment was found. The motion is addressed to the sound discretion of the court, and this court will not interfere with its discretion unless it be made to appear with reasonable certainty that there was a manifest error on the part of that court in its decision of the question.

2. Continuance—Absent witness—Reading of stenographic report—Objection—Where on a second trial of a defendant indicted for murder a witness who testified on the former trial was absent and the defendant filed an affidavit stating he can prove additional facts by the absent witness (reciting them) that are material to his defense and that can not be proved by any other witness, it was error in the court to refuse to grant the defendant a continuance because he would not consent for the stenographic report of the testimony of such witness, made on the former trial, to be used as his evidence on the trial then pending.

3. Jurors—Previous opinions—New trial—Review on appeal—The fact that it was shown on the motion for a new trial that two of the jurors had expressed opinions before the trial that the defendant was guilty of the charge and ought to be locked up or hanged, can not be reviewed by this court under section 281, Criminal Code, which provides that the decision of the lower court upon a motion for a new trial shall not be subject to exception.

4. Evidence—Hearsay—Incompetency—A statement by a witness in regard to the reputation of a witness for defendant that one Spaulding had told him that such witness had sworn to a lie was incompetent, and should have been excluded by the court.

5. Misconduct of attorney—Rebuke of court—Effect—A statement by the attorney for the Commonwealth in his closing argument to the jury that, "If you convict the defendant, in my opinion, a more damnable villian never entered the doors of the penitentiary," though rebuked by the court, who told the jury that it ought not to influence them, was especially improper, because outside the record, grossly abusive of the prisoner at the bar, and so highly inflammatory in spirit and utterance as to be calculated to excite the passions and prejudices of the jury.

Thos. E. Moss for appellant.

J. G. Lovett, N. B. Hays and C. H. Morris for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Willis Mount, shot and killed Willis Nutty in the city of Paducah. He was indicted by the grand jury for murder, and in the trial which followed the jury fail to agree upon a verdict. But upon a second trial the jury found him guilty of voluntary manslaughter, and fixed his punishment at confinement in the penitentiary for twenty-one years. A new trial was refused him by the lower court, and the case is now before us for review.

The salient facts of the homicide, as shown by the bill of evidence, were as follows: On the night of December 10, 1903, between 10 and 11 o'clock, appellant and several other persons were in a room over and connected with Stagg's saloon, the room being in the third story of the building in which the saloon was situated. Nutty entered the room and rapping a table with a silver coin, said he would play the field. Al Phelps, one of the persons present, applying an indecent epithet to Nutty, said: "You came up here to shoot craps, and now you want to play the field." Nutty replied that (meaning the opprobrious epithet) was no more than Phelps was. Phelps then remarked to Nutty that if he (Phelps) was running the game, he would not allow him in it. When Nutty came into the room, and until he and Phelps got into the conversation referred to, appellant was lying with two other men on a bed in the corner of the room, but when the discussion between Nutty and Phelps began he got up from the bed, and with his hand in his pocket, remarked: "I wonder what he is going to do," and then advanced toward where Nutty and Phelps were standing at the table. As appellant approached Nutty, the latter said to him: "Mount, I know you; you look like 30 cents to me." Appellant thereupon drew his pistol, pointed it at Nutty, and fired. Nutty wheeled to the right, and appellant fired at

him the second time. Nutty then fell to the floor, and soon expired. One of the pistol balls entered the mouth and the other the back, and both wounds, in the opinion of the physician, were mortal.

After, or during the discussion with Phelps, Nutty put the coin he held in his hand in a side pocket, and the hand remained in the same pocket until he was shot by appellant, but no pistol or other weapon was found on his body after his death.

Appellant attempted to justify the homicide upon the ground of self defense and apparent necessity, his own testimony being to the effect that five years before Nutty had attempted to take his life and then cut him in the throat; that he had but a little while before his death left the penitentiary and returned to Paducah and repeatedly threatened appellee's life on the day of his death, saying that he would kill him and leave the city. These threats were communicated to appellant, some of them within an hour of the homicide; that on the occasion of the shooting he (appellant) got up from the bed for the purpose of leaving the room when he was addressed by Nutty in the language above quoted, intermixed with oaths and epithets, upon hearing which, and seeing Nutty suddenly throw his hand to his pocket, or behind him, he believed he was about to execute his threats to take his (appellant's) life, and he thereupon shot him to save his own life, which he in good faith then believed was about to be taken.

Appellant made proof by several witnesses of the threats of Nutty to kill him, but was himself uncorroborated by any other witness present as to the oaths and epithets claimed to have been applied to him by Nutty at the time of the shooting, or as to sudden throwing by the latter of his hand to his pocket, or behind him. As already stated, the only testimony from other witnesses present, as to the remarks and conduct of Nutty, was that he said to appellant: "Mount, I know you: you look like 80 cents to me," and only one witness (McGregor) stated that his hand remained in the pocket in which he placed the coin he exhibited after entering the room. A good deal of evidence was introduced by appellant to prove that Nutty was a violent, quarrelsome and dangerous man, and none was introduced by the prosecution to show that such was not his reputation.

Quite a number of alleged errors were assigned by appellant in the grounds for a new trial, nearly all of which are now relied on for a reversal, but we will only consider such of them as we think material. It is insisted for appellant that the court erred in refusing him a change of venue. The proof heard on the motion was conflicting, so much so indeed that it is difficult to determine on which side of the question it preponderates, and this of itself is sufficient to deter us from interfering with the ruling of the trial court. The question was one to be settled by that court upon the proof; the burden was upon the appellant to show that he could not get a fair trial in McCracken county. And while this court may properly review the decision of the lower court in granting or refusing a change of venue, it will not interfere with its exercise of discretion in that matter unless it is made to appear with reasonable certainty that there was manifest error upon the part of that court in its decision of the question. (*Dilger v. Commonwealth*, 88 Ky., 550.)

We may also add that the homicide occurred a year before the last trial.

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We may also add that the homicide occurred a year before the last trial.

There had been a mistrial in the meantime, and it does not appear that at either the first or last trial there existed any unusual excitement or public clamor against appellant. It is likewise contended by appellant that the lower court erred in refusing him a continuance of the case. It appears from the affidavit for the continuance that it was asked because of the absence of R. J. Bugg, Wm. Bishop and Mack Walker. The Commonwealth's attorney agreed that the statements of the affidavit as to what appellant expected to prove by Bugg and Walker might be read on the trial as their depositions respectively, but refused to admit as the deposition of Wm. Bishop what the affidavit stated he would testify in appellant's behalf, i present.

The court then announced that the case would be continued, whereupon the Commonwealth's attorney expressed to the court and to appellant his consent that the stenographic notes of the witness, Wm. Bishop, taken upon a former trial of the case, might be read as his deposition in lieu of appellant's affidavit as to what he could prove by him. Appellant refused to consent to the reading of the stenographic notes of Bishop's testimony taken on the former trial. The court then said he would permit the stenographic notes of Bishop's testimony to be read if appellant would consent thereto, but if such consent was not given he would not allow the case to be continued. And upon appellant's persisting in withholding his consent to the reading of the stenographic notes his motion for a continuance was overruled by the court and he was forced into a trial without the presence or testimony of Bishop, to which he at the time excepted.

There was no complaint on the part of the Commonwealth that appellant was not diligent in trying to procure the attendance at the trial of the three witnesses named in the affidavit, nor was it claimed that there was no probability of their being present at the next term of the court, or that their testimony, especially that of Bishop, was not material. The affidavit shows that Bishop, if present, would have testified that about a week before Nutty was killed he told Bishop "that he (Nutty) would kill that son of a b—, Willis Mount, before he left Paducah;" that Nutty was in Paducah at that time for a few days only, attending races and the fair, and that he (Bishop) communicated this threat to appellant the same night it was made, and advised him to look out for Nutty; that Bishop would further have testified that he and appellant were on a bed in the room when the killing took place, and at the time Nutty and Phelps were quarreling; that appellant got off the bed and Nutty started toward him, Bishop stepped between them, and Nutty had his hand in his pocket at the time; that he (Bishop) then started down stairs and after he left the room heard the shooting. It is unnecessary to set forth the facts to which it was stated in the affidavit. Bugg and Walker would testify, as they were both present and testified on the trial. Nor is it necessary or proper to compare the testimony attributed by the affidavit to Bishop with his testimony given on the first trial, as shown by the transcript made from the stenographic notes which the court made a part of the record, and which was in fact filed by the official stenographer by order of the court after appellant had refused to consent that it be read as the evidence of Bishop. It is true it was filed with and as a part of the record before any evidence was introduced, but appellant, as shown

by the record, objected to its being filed and excepted to the filing thereof, and it was not in fact read as evidence on the trial. In view of the refusal of appellant to consent that it be read as the deposition of Bishop it had no place in the record of the last trial. If it had been filed before the court overruled the motion for a continuance it could not have been used or considered upon the motion to contradict the statements of the affidavit for the continuance, for this court has repeatedly held that for the purpose of such motion the trial court must presume the statements of the affidavit are true, and that it is never permissible to allow the filing of counter affidavits to contradict the statements of the defendant's affidavit as to what his absent witness would prove. (*Baker v. Commonwealth*, 10 Ky. Law Rep., 746; *Wells v. Commonwealth*, 12 Ky. Law Rep., 111; *Saulstury v. Commonwealth*, 79 Ky., 425.)

The fact, therefore, if it be a fact, that the affidavit for the continuance states that the absent witness, Bishop, would prove certain facts that are not to be found in his testimony given on the former trial, as contained in the transcript made from the stenographic notes of such testimony, did not authorize the court to refuse a continuance because appellant would not consent that the transcript of the official stenographer might be read as Bishop's deposition. The sufficiency of the affidavit and the materiality of Bishop's evidence were conceded by the lower court in making the announcement that the case would be continued when the Commonwealth's attorney declared that he would not admit the appellant's affidavit as to what he expected to prove by Bishop as the deposition of the latter, and the mind of the court was evidently fixed as to appellant's right to a continuance until the Commonwealth's attorney said that he would consent that the stenographic notes of Bishop's testimony taken on the first trial might be read.

The effect of the court's ruling was to either force appellant to unwillingly agree to the admission of the stenographic report of the testimony of Bishop given on a previous trial, which, under the statute (section 4643, Kentucky Statutes) could not be done without his consent, or if he refused, such consent to deprive him altogether of the benefit of Bishop's testimony, which was admittedly material, and not only material, but some of it was as to a fact appellant could not, as shown by the bill of evidence, prove by any other witness, for no other witness testified that Nutty started toward appellant with his hand in his pocket as the latter got off the bed. Though McGregor testified that Nutty put his hand in his pocket, he says he did so in putting his money in it, and that he had not removed his hand from the pocket when shot by appellant. Of the other persons in the room at the time of the killing not one who was introduced as a witness testified that Nutty ever had his hand in his pocket, and none of them, not even McGregor, said that he saw Nutty start toward appellant.

We are clearly of opinion that the lower court erred to the prejudice of the substantial rights of the appellant in refusing him a continuance. Another contention of the appellant is that the court erred in not discharging the jury before the introduction of the evidence upon the motion of appellant to that effect, supported by proof in the form of affidavits, that E. L. Simmons, a member of the jury, had before becoming a member thereof ex-

pressed the opinion that appellant should be kept locked up; and, further, that it was error for the court to refuse him a new trial, as the affidavits furnished on the motion therefor showed that C. S. Smith, also a member of the jury, had formed and expressed an opinion before the trial that appellant was guilty and ought to be hanged. The last two alleged errors may be disposed of together, and in a few words. Section 281. Criminal Code, provides: "The decisions of the court upon challenges to the panel, and for cause, upon motion to set aside an indictment, and upon motions for a new trial, shall not be subject to exception."

The language of the section *supra* deprives this court of revisory power over error in the formation of a jury, or error, to which the attention of the trial court is called for the first time, on a motion for a new trial, hence we are without authority to reverse this case because of the two alleged errors in question. (*Howard v. Commonwealth*, 25 Ky. Law Rep., 2218; *Alderson v. Commonwealth*, 25 Ky. Law Rep., 82; *Curtis v. Commonwealth*, 23 Ky. Law Rep., 267.

Appellant further complains that incompetent evidence was admitted by the court to his prejudice. The only incompetent evidence we have discovered in the record is found in the testimony of the witness, Henry Douglass, who was permitted to state in regard to the reputation of Bob Curling, a witness for appellant, that one Spalding had told him that Curling had sworn to a lie against his brother at Union City. The testimony in question related to a particular act, or transaction, which was in no way a subject of investigation in the case at bar. The Commonwealth should have contented itself with proof as to the general reputation of the witness attacked for truth or morality. The statement complained of should, therefore, have been excluded by the court. Yet another complaint of appellant is that the trial court, over his objection, permitted certain improper and prejudicial statements to be made by the counsel for the Commonwealth in argument to the jury. We have carefully read the several alleged improper statements of counsel. Without discussing them in detail, we think some of them were objectionable, but only one of them was calculated to prejudice the rights of appellant, and it was made by the Commonwealth's attorney, who said in closing his argument to the jury: "If you convict the defendant, in my opinion a more damnable villain never entered the doors of the penitentiary."

This statement was rebuked by the court, and the jury told that it ought not to influence them. The statement was especially improper because outside the record, grossly abusive to the prisoner at the bar, who was powerless to resent or prevent it, and so highly inflammatory in spirit and utterance as to be calculated to excite the passions and prejudices of the jury, when their minds and judgments should have been cool and dispassionate in dealing with the life and liberty of a fellow being. It being their duty, if his guilt was established according to the forms of law, to fairly and impartially meet out to him such punishment as was commensurate with that guilt, and upon the other hand equally their duty to let him go acquit if under the evidence there was reasonable doubt of his guilt.

We quote from the opinion of this court in *Baker v. Commonwealth*, 20 Ky. Law Rep., 1784, the following, which aptly illustrates our views upon

this subject: * * * "The district attorney is a quasi judicial officer. He represents the Commonwealth, and the Commonwealth demands no victims. It seeks justice only, equal and impartial justice, and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes, hence he should act impartially. He should present the Commonwealth's case fairly, and should not press upon the jury any deductions from the evidence that are not strictly legitimate. When he exceeds this limit, and in hot zeal seeks to influence them by appealing to their prejudice, he is no longer an impartial officer, but becomes a hated partisan. His object, like the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And, however strong may be his belief of the prisoner's guilt, he must remember that though unfair means may result in doing justice to the prisoner in the particular case, yet justice so attained is unjust and dangerous to the whole community."

The rebuke administered by the trial judge for the opprobrious and unwarranted language of the Commonwealth's attorney and his admonition to the jury not to be influenced by it, doubtless limited to some extent, but did not entirely destroy its hurtful effect upon the jury, but in view of the interference of the judge we do not think the judgment should be reversed on account of the improper remarks of counsel. We are, however, of opinion that because of the refusal of the lower court to grant appellant a continuance, and on account of the admission of the incompetent evidence to which we have referred, he did not have a fair and impartial trial. There was no formal objection to the instructions. They are clear in meaning and exceptionally well expressed.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

Whole court sitting.

THOMAS V. COMMONWEALTH.

(Filed April 14, 1905—Not to be reported.)

1. Criminal law—Homicide—Instructions—Where the proof showed that appellant struck and kicked the deceased, from the effects of which she in a few days thereafter died, in addition to an instruction upon the question of murder, manslaughter and self-defense the court should have given an instruction upon involuntary manslaughter, because the beating may have been done without the intention of producing death.

2. Same—Hands and feet are not deadly weapons within the meaning of the law, and when death results unintentionally from their use in an assault the result is not murder, but involuntary manslaughter, and whether or not murder or involuntary manslaughter resulted was a question for the jury, and it was error to refuse to instruct as to involuntary manslaughter.

Robert L. Page and Edward G. Hill for appellant.

N. B. Hays and Chas. H. Morris for appellee.

Appeal from Jefferson Circuit Court, Criminal Division.

Opinion of the court by Judge Barker.

Appellant, James Thomas, was indicted by the grand jury of Jefferson

county, charged with the murder of Mamie Rentz. A trial resulted in his being convicted, and his punishment fixed at death. From the judgment of the court enforcing the verdict of the jury he prosecutes this appeal.

Appellant and his victim were negroes, living in a state of concubinage in Louisville, Ky.; he a powerful built man, weighing over 175 pounds, and she a small woman, weighing something like 95 pounds. On the night of the killing the accused came home largely under the influence of liquor, and for some slight offense, either real or imaginary, proceeded, without any preliminary quarrel, to administer to his paramour a brutal beating. He first knocked her to the floor with his fist, and then kicked her several times in the stomach, side and face, and was only induced to desist by the threats of several women, who witnessed the affair, to call in the police. The injured woman did not appear at first to be fatally injured, and for a day or two undertook to go about and attend to her household duties. But these were found to be beyond her strength, and she was carried to the city hospital, and after lingering in great pain for several days, died from the injuries inflicted upon her. The evidence for the Commonwealth fully established the foregoing facts, and also that several days before the tragedy the accused, in drunken anger, had threatened "to kick her heart out." The Commonwealth also introduced medical testimony to show that the deceased died from the effects of the injury inflicted by appellant, the fatal cause being the bursting of the fallopian tubes, and the consequent setting-up of peritonitis, from which death resulted.

The accused simply denied that he struck or stamped the deceased at all, or that he had any difficulty with her whatever, as detailed by the witnesses for the Commonwealth. The court, after the evidence was closed, gave the usual instructions as to murder, voluntary manslaughter and self-defense, but declined to give an instruction as to involuntary manslaughter, and this refusal is urged, with various other alleged errors, as grounds for a reversal of the judgment. Undoubtedly it is true, as is insisted by the Commonwealth, that murder may be committed by one kicking his victim to death, if it be done with the intent at the time to inflict fatal injury, but it is equally true that men often engage in fights and kick their opponents without intending any more than to administer a severe beating, and if, when this is the case, death results, the offense is involuntary manslaughter.

Greenleaf in his work on Evidence, volume 8, section 128, defines involuntary manslaughter as: "Where one, doing an unlawful act, not felonious, nor tending to great bodily harm, or doing a lawful act, without proper caution or requisite skill, undesignedly kills another." (Roberson's Kentucky Criminal Law and Procedure, volume 1, section 198; Blackstone's Commentaries, volume 4, star page 191; Conner v. Commonwealth, 13 Bush, 714; Buckner v. Commonwealth, 14 Bush, 603.)

In the case of Cosby v. Commonwealth, 24 Ky. Law Rep., 2050, it was held: "A rock or club is not necessarily a deadly weapon, but may be made so in the hands of a malicious or infuriated person of ordinary strength, if used in an attack upon another with the intent to take his life."

In this case the injuries were inflicted by the hands and feet of the appellant. These are not deadly weapons within the meaning of the law, and when death results unintentionally from their use in an assault the result

is not murder, but involuntary manslaughter. But if appellant intended to kill his mistress, or if from the manner and use of his fists and feet, considering the relative size and strength of the parties, what he did was calculated to produce death or great bodily harm, then the jury would have the right to find him guilty of murder. As to whether or not murder or involuntary manslaughter resulted from the acts of appellant was a question for the jury to determine under all the circumstances of the case, and, therefore, the refusal of the court to instruct as to involuntary manslaughter was prejudicial to his substantial rights.

The judgment is reversed for proceedings consistent with this opinion.

HORD, &c. v. SARTAIN, &c.

(Filed April 26, 1905—Not to be reported.)

1. Forcible entry and detainer—Limitation—Agreement to arbitrate—Where a writ of forcible entry was sued out after two years from the time the forcible entry complained of was committed, upon the trial of the traverse a peremptory instruction by the court to find for the defendants was proper.

2. Same—Arbitration—An agreement to arbitrate a controversy as to the possession of land, no change whatever in the possession taking place, was not a surrender of possession, and this being true appellants had not the actual possession of the property, and, therefore, there was no forcible entry.

Allan D. Cole and Frank P. O'Donnell for appellants.

W. D. Cochran for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Barker.

The appellants, who are the widow and children of George W. Hord, sued out a writ of forcible entry against the appellees, John Sartain and his wife, Francis V. Sartain, to recover possession of two and one-tenth acres of land situated in Mason county, Kentucky. Upon trial of the traverse on appeal to the Mason Circuit Court, after all the evidence was heard, the judge sustained a motion for a peremptory instruction to the jury to find a verdict for the defendants in the writ. Sartain and wife, which was done; and of this ruling appellants are complaining.

For the purposes of this appeal the facts of the controversy may be stated as follows: George W. Hord, the husband and father of appellants, and Alfred Cole owned adjoining farms. Some time prior to 1892 Hord rightfully claimed that the division fence between him and Cole was not upon the true property line, and that as it was situated it enclosed on Cole's side the property in dispute, two and one-tenth acres, belonging to him. It was then agreed between the parties that the fence should remain as then situated, and Cole, in consideration thereof, was to keep it in repair. Afterwards Cole died, and his heirs at law sold the farm, including the land in dispute, to John Sartain for \$700. Sartain subsequently conveyed it to his wife on the consideration of love and affection. In 1892 the Sartains built a dwelling house upon the land, and have since resided there continuously.

In 1903 the appellants, reasserting the claim of George W. Hord, entered into an agreement with appellees to arbitrate their respective rights to the property. The arbitrators arrived at the conclusion that the Sartains should keep the land, and, in consideration therefor, pay to appellants the sum of \$35. In pursuance of this judgment of the arbitrators a deed was prepared conveying the property to the Sartains upon the consideration, named, and tendered to them, whereupon they refused to accept it, or to pay the consideration of \$35, stating they were willing to pay as much as \$10, but no more.

Assuming this statement to be true, did the trial court err in awarding the peremptory instruction complained of? Section 452 of the Civil Code of Practice, so far as it is applicable to the case in hand, defines a forcible entry as "an entry without consent of the persons having the actual possession." Section 469 is as follows: "No inquisition of forcible entry or forcible detainer shall be taken at any time after two years from the forcible entry or detainer complained of."

If the forcible entry here involved occurred in 1892, when Sartain and wife built their house on the disputed land and moved into it, then the right to the writ was barred by the lapse of time. Appellants recognizing the force of this position, insist that the agreement by appellees to arbitrate their title to the property was a surrender of possession, and that afterwards their refusal to abide by the arbitration was, of itself, a forcible entry upon the possession of appellants, and as this took place in 1903, the right to the writ arose at that time. This contention does violence to the definition of forcible entry above cited from the Code. The agreement to arbitrate the title to the property in nowise changed the actual possession of the appellees. The undisputed evidence shows that since 1892 they had continuously resided upon the property involved here. Their agreement to arbitrate was not a surrender of their actual possession, no change whatever taking place. The possession remained afterwards just as before the agreement was made; and this being true, the appellants did not have actual possession of the property, and there was no forcible entry by appellees.

Judgment affirmed.

LEXINGTON HYDRAULIC AND MANUFACTURING CO. v.
OOTTS, &c.

(Filed April 27, 1905—Not to be reported.)

Breckinridge & Shelby for appellant.

Morton, Webb & Wilson for appellees.

Appeal from Fayette Circuit Court.

Chief Justice Hobson delivered the following response to petition for rehearing:

The map referred to in the evidence showing the location of the mains and hydrants should have been admitted; also the excluded portions of the depositions of Johnson and Davidson and the excluded portion of the testi-

mony of Gunn, relating to the map and the acceptance by the city authorities of the system of mains as shown on the map.

The petition for rehearing is overruled and the opinion is modified as above indicated.

THE BURT & BRABB LUMBER CO. v. S. J. & H. C. CRAWFORD.

(Filed April 27, 1905—Not to be reported.)

1. Claim and delivery—Counterclaim by defendant—Trial—Verdict—Delay in making objections—In an action for damages in determining logs that floated out and lodged on plaintiff's land, to which defendants pleaded a counterclaim for damages done by plaintiff to his land in permitting his logs to get loose, float on and injure his land, it is too late after the trial and verdict for the plaintiff to raise the question of the impropriety and irregularity of permitting defendants to file their counterclaim and have it litigated on the trial of plaintiff's action for claim and delivery of personal property.

2. Remark of court—Exceptions—It was not improper for the court to say on the trial, after six or seven witnesses had been heard, "that is enough evidence on that point," where it is not shown that the remark was heard by the jury.

3. Evidence—Exceptions—Avowal—We can not consider an alleged error of the court in refusing to permit a witness to state a contract he had made with one of the appellees, where there is no avowal of what the witness would have stated in answer to the question.

4. Province of jury—It is the province of the jury to determine the amount of damages from the evidence, and the court should not interfere unless the verdict should be flagrantly against it.

Theo. B. Blakey for appellant.

Hazelrigg & Hazelrigg, Gourley & Redwine and Chester A. Gourley for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Nunn.

The appellant in floating logs down the Kentucky river suffered four or five hundred of them to drift upon the lands of appellee, S. J. Crawford. He objected to appellant removing the logs without first settling the damage done to his lands. Appellant then instituted this action under section 180 of the Civil Code and executed the required bond, and in this way obtained its logs. Appellant also asked a judgment for \$100 damages for the wrongful detention of the logs. Appellees answered, admitting the right of appellant to the logs, but denied the damages, and made their answer a counterclaim against appellant, claiming damages in the sum of \$500 by reason of appellant suffering and permitting the logs to drift and remain upon his land until the water receded in the river, and by it directing and permitting its employes to enter upon his valuable bottom and farming lands with ox teams and haul over and through the bottom the logs and roll them into the river, thereby causing his lands to be tramped, washed and otherwise injured, and also causing the banks of the river to break by reason of rolling the logs over it. The appellant filed a reply, controverting

the averments of the counterclaim. A trial was had and the jury returned a verdict in favor of appellee, S. J. Crawford, for \$200.

The appellant asked a reversal, first, for the reason of an alleged improper remark made by the court during the progress of the trial; second, of misconduct of the attorney representing the appellee in his argument to the jury; third, because the damages were excessive; fourth, the verdict of the jury is not sustained by sufficient evidence; fifth, because the court refused to permit competent evidence offered by appellant to be introduced. The appellant's counsel in his brief suggests for the first time that it was improper and irregular to permit appellee to file the counterclaim and have it litigated on the trial of an action for the claim and delivery of personal property. Even if appellant is right in this, which we do not decide, it is now too late to consider such question as it made no objection of any character to the trial of this issue in the lower court. The court certainly had jurisdiction of the parties and of the subject matter, and if the parties, without objection, entered into the trial of it, they can not now complain.

On the question of excessive damages and that the verdict was not sustained by sufficient evidence, it is sufficient to say the five or six witnesses for the appellant testified that appellee's land was damaged by the removal of the logs but very little, if any; while six or seven witnesses for the appellee stated that it was materially damaged, and they fixed the amount ranging from \$200 to \$500. It was the province of the jury to determine the amount of damage from the evidence, and the court should not interfere unless the verdict should be flagrantly against it.

The appellant complains that the court refused to permit its witness, Eubanks, to state a contract that he had made with appellee, H. C. Crawford, a son of his co-appellee. We can not consider this error, if an error, for the reasons that the appellant did not make an avowal of what the witness would have stated in answer to the question. In addition to this, it appears from the record that the witness had previously stated all of this alleged contract, and it nowhere appears that the court withdrew this testimony from the consideration of the jury.

The alleged misconduct of the court, as appears from the record, is as follows: After the appellees had introduced six or seven witnesses upon the point of the extent and character of the damage to the land, they then offered to call another witness on the same point when the court remarked, "that is enough evidence on that point." It was the duty of the court to control the introduction of evidence within reasonable discretion and bounds, and the court did right in stopping the introduction of further evidence on that point. But if the court used this expression in the presence or hearing of the jury, it might possibly have created a wrong impression upon the minds of the jurors, but there is nothing in the record showing that it was made in the presence or hearing of the jury. As to the misconduct of counsel for appellee in his argument, all the information this court has upon that subject is learned from the brief of counsel. The record is silent upon the question, and, therefore, there is nothing for this court to consider with reference thereto.

For these reasons the judgment of the lower court is affirmed.

WHITTINGHAM v. FIDELITY TRUST CO., TRUSTEE, &c.

(Filed April 27, 1905—Not to be reported.)

Wills—Trust funds—Construction—Duty of trustee—A fund of \$5,300 was willed to the appellee to be held in trust to pay the income to M. W. during her life, the object being not only to make provision for her, but to enable her to assist in the support of her father and mother. The trustee invested \$5,000 of it in a house in Louisville, which was occupied by M. W. and her parents until she became of age, when in an action by her against the trustee for an accounting she recovered and was paid \$650. The house was then sold by the trustee for \$6,000, and M. W. claimed the \$700 excess. Held—That it was the duty of the trustee to keep the house in repair; that the excess in the value of the house was due to a rise in property in that neighborhood, and that appellant was not entitled to it.

C. B. Seymour and E. E. McKay for appellant.

L. N. Demblitz for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Hobson.

The will of Sarah Schofield contained, among other things, the following provisions: "I give and bequeath to the Fidelity Trust and Safety Vault Co., of Louisville, Ky., nine-twentieths of my aforesaid bonds, to be held upon the following trusts: First, to pay over the income from said bonds to my great-niece, Miss Martha Whittingham, daughter of my nephew, William O. Whittingham, during her life to her sole and separate use, free from the marital rights of any husband she might hereafter have. The object of this bequest is not only to make a provision for the said Martha, but to enable her to assist in the support of her father and mother, William O. and Maggie Whittingham, as long as they shall live, and this duty I strictly enjoin upon her."

The trust fund referred to amounted to something over \$5,300. The trustee invested \$5,000 of it in a house and lot in Louisville, on Fifth street near Walnut, which was occupied by William O. Whittingham and wife and the daughter, Martha. When she became of age she filed suit against the trustee for an account of the trust fund, and it was held by this court that the investment by the trustee in the house and lot was proper, but that it was incumbent upon the trustee to keep the taxes paid, keep the house in repair and preserve the corpus of the estate. The proof showed that the house was worth between \$4,000 and \$5,000. (Whittingham v. Schofield's Trustee, 23 Ky. Law Rep., 2444.) On the return of the case to the circuit court it was prepared pursuant to the mandate, and a judgment was rendered in favor of Miss Whittingham against the trustee for \$650, which was paid. The trustee also had the house put in repair at a cost of something over \$700, and rented it for \$35 a month. The repairs were paid out of the rents. It then sold the house for \$6,000 and Miss Whittingham in this action claims that as over \$700 of the rents had gone into the repairs on the house, and it had been sold for more than enough to pay back this to her and still leave the corpus of the trust unimpaired, this much of the proceeds of the house should be paid to her. The company answered, denying the allegations of her petition; proof was taken, and on final hearing her petition was dismissed and she appeals.

By the judgment of the court the fund claimed by appellant goes into the corpus of the trust fund, and she will get the interest on it as life tenant; but she claims that the principal should be adjudged to her to the extent that the rents were applied to make the improvements. The proof taken in the action shows that the house brought \$6,000 from the enhancement in value of property in that neighborhood, that is, it shows that the business part of the city is extending out and the house was sold for business purposes and not for a residence. So the fact is that the \$1,000 of surplus is due really to the rise in value of the property in which the trust was invested. It was in no better repair when sold by the trustee than when the trustee bought it. It was the duty of the trustee to keep it in repair all the time out of the rents, and no greater sum was spent in making the repairs when made by the trustee than would have been spent if the repairs had been made along as they were needed. The trustee allowed the beneficiaries the use of the property, and as they were not able to make the repairs, and the trustee apparently had no funds on hand, the repairs were not made until this court held the trustee delinquent in the matter. Appellant has received the \$650, and the surplus now in controversy having arisen from the rise in the price of property, she is not entitled to it.

Judgment affirmed.

PIERCE'S ADM'R v. ILLINOIS CENTRAL R. R. CO., &c.

(Filed April 28, 1905—Not to be reported.)

1. Railroads—Causing death—Negligence of employes—Joint liability—Removal of action—By section 6, Kentucky Statutes, a corporation and its agents and servants causing the death of a person are jointly liable therefor. Where a petition is filed in a State court against a nonresident corporation and two of its agents who are residents of this State, alleging facts showing their joint liability for negligently causing the death of plaintiff's intestate, such cause of action is not removable to the Federal court on the petition of the nonresident corporation, alleging that the other two defendants were united as co-defendants "solely for the purpose of preventing the petitioner from exercising the right guaranteed to it by the Constitution and laws of the United States, of removing this suit to the Circuit Court of the United States for the District of Kentucky."

2. Federal court—Improper removal—Jurisdiction—Trial—Bar—Where an action is properly brought in a State court the Federal court does not thereby acquire jurisdiction of the action, and although the plaintiff in the case should appear in the Federal court and try the case, any judgment rendered therein is void. The Federal court having no jurisdiction it can not be acquired or conferred by consent, and its orders and judgments are no bar to a trial of the action in the State court.

Hendrick & Miller for appellant.

Wheeler, Hughes & Berry, J. M. Dickison and Trabue, Doolan & Cox for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant instituted this suit on March 30, 1899, in the McCracken Circuit Court against the Illinois Central R. R. Co., W. C. Waggoner and W. Lyle to recover for the death of his intestate, which he alleged was caused by the concurrent negligence of the three defendants. Summons having been issued upon the petition and served upon all of the defendants the railroad company appeared on April 24, 1899, and filed its petition for the removal of the case to the Circuit Court of the United States, alleging that the other two defendants were united as co-defendants "for the purpose, and solely for the purpose, of preventing your petitioner from exercising the right guaranteed to it by the Constitution and laws of the United States, of removing this suit to the Circuit Court of the United States for the district of Kentucky." There was no allegation of fraud or misjoinder and no other statement about the joinder of the other two defendants except that there had been a previous suit filed against the railroad company which had been dismissed without prejudice after it was removed to the United States Circuit Court. The court made the following order: "This day came the defendant, Illinois Central R. R. Co., by Quigley & Quigley, attorneys, and filed in this action its petition and bond for removal of this cause to the Circuit Court of the United States for the District of Kentucky, and the said bond and surety thereon are approved and accepted by the court, and entered motion and moved the court to transfer this action to the said Circuit Court of the United States for the District of Kentucky."

On the next day the following order was entered: "This day came plaintiff and offered to file answer to the petition of defendant for the removal of this action to the United States Circuit Court for the District of Kentucky, to which the defendant objected and the court being advised, overruled said objection and ordered said answer to be filed, to which the defendant excepted."

The answer which was thus filed merely alleged that Waggoner and Lyle were residents of Kentucky, which was immaterial as this was by necessary implication conceded in the petition. No further steps were taken in the action and no order was made by the court until March 2, 1901, when this order was made: "This day the motion to redocket this action as to all the defendants came on to be heard, and the defendant, the Illinois Central R. R. Co., appeared by attorney and entered its objection, and the court, after hearing the argument of counsel for and against said motion, ordered and adjudged that said cause be redocketed as to all the defendants."

The defendants then filed answer, the railroad company pleading, among other things, that after the order of April 24, 1899, had been entered it took a copy of the record and filed the same in the United States Circuit Court for the District of Kentucky, and the plaintiff appeared in that court and entered a motion to remand the case to the State court, which motion was overruled; that thereupon issue was joined, and on April 3, 1900, a jury was impanelled who found for it, and thereupon the court entered a judgment dismissing the plaintiff's petition, from which no appeal had been taken, and which was in full force and effect. The plaintiff filed a reply, alleging that the Circuit Court of the United States had no jurisdiction of the action; that the case was not removed to that court, and that it was not removable under the statute. The court sustained a demurrer to the reply and the plaintiff failing to plead further, dismissed the action.

The ruling of the circuit court was evidently based upon the idea that as the plaintiff had appeared in the United States Circuit Court and moved to remand the case, and after that motion was overruled, had it set down for trial and tried, he was bound by the judgment of that court and could not proceed further in the State court or raise the question of the jurisdiction of the United States Circuit Court. In *Mexican National R. R. Co. v. Davidson*, 157 U. S., 201, the case was removed from the State court to the Circuit Court of the United States and the plaintiff recovered judgment in that court, but on appeal it was held that as the action was not removable upon the face of the petition, and the petition for removal to the Circuit Court of the United States was without jurisdiction, and that jurisdiction could not be conferred by consent. The rule established by the Supreme Court was followed by this court in *Illinois Central R. R. Co. v. Jones' Adm'r*, 26 Ky. Law Rep., 31. Under the principles declared by the Supreme Court in the case under the allegations of the petition and the petition for removal was not removable to the United States Circuit Court, its orders were void. But it is insisted that the State court, in April, 1899, removed the case to the Circuit Court of the United States, and thus lost jurisdiction over it; that the order of removal was a final order, and no appeal having been prosecuted from it, the plaintiff is bound by it. The only orders made by the State court in the matter are those above quoted. The first order simply shows a motion to remove the case to the Federal court, without any action by the court on the motion. So much of the order as approves the surety and accepts the bond was intended merely as introductory to the motion, and to leave as the only matter to be thereafter decided the question whether the petition showed facts sufficient for the removal of the action. This question was not decided by the court, nor was the motion submitted; on the contrary, on the next day the plaintiff filed a pleading on the motion. The order filing this pleading shows that the court still regarded the case as before him, and it is not claimed that any other order was made by the court in the premises. It is evident from the record that the railroad company, assuming that the case was ipso facto removed to the Federal court by the filing of its petition and bond, and that no order by the State court on the subject was necessary, proceeded to file the record in that court; and that the plaintiff also concluded that the Federal court was the forum which must pass on the propriety of the removal. This is true if on the face of the papers the case was removable. But if it was not prima facie removable, then the United States Circuit Court being without jurisdiction, as consent can not confer jurisdiction, its orders are no bar to the prosecution of the case in the State court. If the case was not prima facie removable it is equally evident that the State court had made no order from which the plaintiff could have appealed to this court, and that the case continued in that court.

It remains to determine whether, under the facts shown, the case on the face of the papers was removable. By section 6, Kentucky Statutes, the corporation and its agents or servants causing the death of the intestate are jointly liable therefor. A cause of action was stated not only against the railroad company, but against Waggoner and Lyle under the statute, and they being residents of the State, the case was not removable by the rail-

road company. (Chesapeake & Ohio R. R. Co. v. Dixon's Adm'r, 104 Ky., 608, 179 U. S., 131; Powers v. Railroad Co., 169 U. S., 92; Winston's Adm'r v. Railroad Co., 111 Ky., 954; Railroad Co. v. Cook's Adm'r, 113 Ky., 151.) As the petition stated a cause of action against Waggoner and Lyle, the allegation in the petition for removal that they were united as defendants solely for the purpose of preventing the removal of the case was immaterial. (See cases above cited; also Rutherford v. Illinois Central R. R. Co., 27 Ky. Law Rep., 397.)

Judgment reversed and cause remanded for further proceedings consistent herewith.

JONES, & CO. V. AMERICAN ASSOCIATION, INCORPORATED.

(Filed April 27, 1905.)

Land—Conveyance—Reservation of coal—Construction of deed—A deed was made by Robert George and wife in 1835 to Jas. D. George for six tracts of land, containing 540 acres, in which the habendum clause contained the following reservation: "To have and to hold the said tract or parcel of land with its appurtenances unto the said Jas. D. George and his heirs forever, with the exception of all the coal banks, and the said Robt. George and wife holding the right to them, and the privilege of a way to the different banks of coal with a wagon and team." Held—In view of the entire language and the circumstances under which it was made, when the grantor reserved all the coal banks he referred to the veins of coal under the ground, and not merely to such as had been opened, as there had been little or no development of coal land at that time, and the purpose of the grantor was to reserve the coal under the land.

S. B. Dishman and J. R. Sampson for appellants.

William Low for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Hobson.

On January 19, 1835, Robert George, by deed, conveyed to James D. George six tracts of land, containing 540 acres, lying in Harlan county. The deed, however, in the habendum clause contains the following reservation: "To have and to hold the said tract or parcels of land with its appurtenances unto the said James D. George and his heirs forever, with the exceptions of all the coal banks, and the said Robert George and wife hold the right to them and a privilege of a way to the different banks of coal with a wagon and team, and with the above exceptions the said Robert George and his wife, Judith, for them and their heirs, doth covenant and agree to, with the said James D. George and his heirs that he will warrant and defend the said tract or parcels of land with its appurtenances unto the said James D. George and his heirs forever against the claim or claims of him, the said Robert George, and Judith, his wife, as well as against the claim or claims of all and every other person or persons whatsoever will warrant and defend."

On October 15, 1839, Robert George made a deed to John P. Bruce, the material part of which is as follows:

"This indenture, made this 15th day of October, 1839, between Robert George, of Knox county, Ky., of the one part, and John P. Bruce, of the county and State aforesaid, of the other part,

"Witnesseth: That the said Robert George, for and in consideration of \$6,000 paid, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain and sell, unto the said John P. Bruce a certain tract or parcel of land lying in the county and State aforesaid. * * * (Here follows description of the tract and three other tracts, containing in all 788 acres, and being different tracts from the six tracts embraced in the deed from Robert George to James D. George.)

"To have and hold the aforesaid tracts or parcels of land to the said John P. Bruce, his heirs and assigns forever, and the said Robert George shall and will forever warrant and defend the aforesaid tracts or parcels of land from himself, his heirs and assigns, and from the claim or claims of every other person or persons whatsoever to the said John P. Bruce, his heirs and assigns forever, to his and their only proper use and behoof, together with the coal banks reserved by said George to himself in a deed made to J. D. George."

On February 17, 1840, James D. George conveyed to Robert George the six tracts of land which the former had conveyed to him in 1835, and two other tracts. This deed concludes with these words: "To have and to hold the aforesaid tracts or parcels of land to the said Robert George and his heirs forever, with the exception of all the above coal banks on the first six tracts aforementioned, which were reserved by the said Robert George when he deeded said tracts of land to said James D. George for himself, his heirs and assigns, the aforesaid tract of land and appurtenances unto the said Robert George, his heirs and assigns, against the claim or claims of all and every person or persons whatever, doth and will forever warrant and defend by these presents."

Robert George afterwards conveyed this land to those under whom appellees claim, and Bruce conveyed what he purchased to those under whom appellants claim. Appellants claim that they own the veins of coal under the six tracts of land conveyed by Robert George to James D. George, on the ground that the coal was reserved by the grantor in that deed, and was afterwards conveyed by Robert George to Bruce by the deed made on October 18, 1839. Appellees insist that the deed made by George to Bruce only passes title to the four tracts of land named therein, and does not pass any title to the coal in the six tracts conveyed by the deed of 1835 from Robert George to James D. George, although the coal was reserved in that deed by Robert George.

The rule is that a deed is construed as any other instrument to effectuate the intention of the maker, and reservations or exceptions are enforced although contained in the habendum clause of the deed as fully as if set out in the granting clause when, on the whole instrument, the intention of the parties is sufficiently expressed to be enforced. Although the reservation in the deed from Robert George to James D. George is inserted in the habendum clause, it is so fully and clearly expressed as to leave no doubt of the intention of the parties that the grantor reserved all the coal banks on the lands and held the right to them and the privilege of a way to the different

coal banks with a wagon and team. It is insisted for appellees that the words coal banks must refer to a mine that has been opened, but it is agreed in the record, as a fact which we know to be true, that when the deeds were made the county was sparsely settled, there were no railroads and no mercantile development of coal mines. In view of the entire language of the deed and the circumstances under which it was made, when the grantor reserved all the coal banks he referred to the veins of coal in the ground and not merely to such as had been opened. There had been little or no development of coal lands at that time, and the purpose of the grantor was to reserve the coal under the land.

It is earnestly insisted that in the deed from Robert George to Bruce there is a conveyance of only the four tracts of land, and that all that is said about the coal in that deed occurs in the habendum clause. The rule is relied on that the habendum clause will never extend the granting clause so as to make the deed cover property not included in the granting clause. But the rule referred to is not recognized by the more modern authorities and is not enforced in this State. The modern rule is to read a deed as any other instrument. Reading this deed in that way, we think it means that the grantor conveyed the four tracts named with general warranty, together with the coal banks reserved by the grantor in the deed made to James D. George. While the coal banks are not described, they are identified as those reserved in that deed, and the rule is that is certain which may be made certain. The deed had been made only four years before; it was recorded and an examination of the deed would show accurately what coal banks were included.

Counsel for appellees also make the question that the deed to Bruce was not properly recorded, and insists that appellees are bona fide purchasers without notice. The record is not so prepared as to present this question. There is neither pleading nor proof on the subject.

Judgment reversed and cause remanded for further proceedings consistent herewith.

COMMONWEALTH, FOR USE, &c. v. LEE, &c.

(Filed May 2, 1905.)

1. County judge—Guardian's bond—Insufficient surety—Where a county judge accepts as surety upon a guardian's bond of an infant a person he knows to be insufficient as surety under the statute, he is liable on his official bond for whatever damage accrued to the infant by reason of this insufficiency.

2. Liability of judge—Mode of ascertainment—To ascertain such deficiency the guardian should be charged with any balance of his ward's money remaining in his hands at the end of a year, which ought to have been invested or loaned out, and should be charged with interest upon interest in biennial rests during the period he so held it without investment. Where the mother of the infant is unable to support him from her own small estate she should be allowed a reasonable sum for his maintenance during his years of helpless infancy, but should not be allowed to charge where his labor for her was equal to the value of his maintenance.

Hendrick & Miller for appellants.

R. O. Hester for appellees.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Barker.

This is an action by the Commonwealth of Kentucky for the use of Thomas R. Lee against the appellee, W. P. Lee, on his official bond as judge of Marshall County Court, to recover damages alleged to have been sustained by his accepting Mary Lee as surety on the bond of T. D. Brown, as guardian of T. R. Lee, when he knew she was insolvent.

The following sections of the Kentucky Statutes are necessary to a discussion of the questions raised by the record before us:

"Section 2017. No guardian except a testamentary one for nurture and education can act until he has been appointed by the proper county court, and given covenant to the Commonwealth, with good surety, approved by the court, faithfully to discharge the trust of guardian. The bond shall be carefully kept by the county court clerk in a book to be provided for that purpose.

"Section 2018. If the court fails to take such covenant, or accept such person or persons as surety as do not satisfy it of their sufficiency, the judge so in default and his sureties shall be jointly and severally liable to the ward for any damages he may sustain thereby.

"Section 2034. No disbursement shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate, except in the following cases, unless authorized by the deed or will under which the estate is derived:

"1st. When the ward is of such tender years or infirm health that he cannot be bound out as an apprentice, or no suitable person will take him as such.

"2d. When it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court, upon settlement of the accounts, shall deem such application to have been judicious and properly made. But neither the ward nor his real estate shall be liable for any such disbursement.

"Section 2035. If, from any source, a balance is owing by a guardian at the end of any year, counting from the time of his appointment, which ought to have been invested or loaned out for the benefit of the ward in reasonable time, but which remains in the hands of the guardian, he shall be charged with interest from the end of the year in which such balance arose; and thereafter he shall be charged with interest upon interest in biennial rests, and the guardian shall account to his ward for whatever profit or rate of interest he receives from loans or investments of the trust funds."

J. F. Lee, the father of T. R. Lee, died intestate in Marshall county, Kentucky, in 1877, leaving a widow, Mary Lee, and five children. His estate consisted of land worth \$3,000, and an insurance policy on his life for \$5,000, together with other personalty, which realized at sale over \$3,000. After the death of J. F. Lee his son-in-law, T. D. Brown, was appointed and qualified as administrator of his estate, and collected the insurance

policy, sold and converted into cash sufficient other personalty to realize the sum of \$3,011.53. and, out of this sum paid off debts amounting in round numbers to \$1,800. This left in his hands a balance of \$6,211.53, one third of which was distributed to the widow, and the remainder divided equally among the five children.

Afterwards, on the 7th day of October, 1878, appellee, as judge of the Marshall County Court, appointed T. D. Brown guardian of T. R. Lee, then an infant about two years old, and accepted as surety on his bond Mrs. Mary Lee, the mother of the infant. Upon qualifying as guardian Brown charged himself with the infant's distributable share of his father's estate, thereby becoming in law responsible for it in this fiducial capacity. He remained guardian for his infant brother in law without having executed a new bond throughout the infancy of the latter.

Upon the wards' arriving at lawful age this action was instituted against appellee upon his official bond, the petition stating, substantially, the foregoing facts with regard to the estate, the appointment and qualification of the guardian, and that the surety on the guardian's bond was, at the time of her acceptance, insolvent, and known to be so by him; that by reason of the execution of the bond as guardian, and the acceptance of Mrs. Mary Lee as surety thereon, T. D. Brown received into his hands and custody all the personal estate of the infant; that he has become wholly insolvent, and unless the ward can recover a judgment against appellee equal to the estate received and squandered by his guardian, it will be entirely lost to him; that by reason of the failure of appellee, as county judge aforesaid, to require of his guardian a solvent surety, the ward has been damaged in the sum of \$3,216, for which he prays judgment. A general demurrer was interposed to the foregoing petition, and overruled by the court; whereupon appellee answered, placing in issue its material allegations. Upon trial of the case the court dismissed the petition, from which judgment this appeal is prosecuted.

The first question with which we are confronted is whether or not, assuming that the estate of the infant was in whole or in part lost by the insolvency of the guardian and his surety, the county judge who accepted the insolvent surety is responsible for the loss under the provisions of section 2018 of the Kentucky Statutes. The rule is well settled in this State that the county judge is not an insurer of the solvency of the sureties he accepts on guardians' bonds, and if the evidence before him as to their solvency is such as would satisfy a person of ordinary prudence and judgment, he is not liable for loss occasioned by their insolvency. (*Burdine v. Pettus*, 79 Ky., 240; *Cosby v. Commonwealth*, 91 Ky., 255; *Kimball v. Thurman*, 98 Ky., 578; *Commonwealth v. Tilton*, 23 Ky. Law Rep., 753.) But if, on the contrary, the county judge knows that the surety is insolvent, or if he be ignorant and fails to exercise reasonable diligence to inform himself, and accepts an insolvent surety, he is clearly liable if loss occurs. In the light of these two principles we will investigate the knowledge of the appellee as to the insolvency of the surety in the case at bar. Upon this subject we may accept his own statement of the facts. He says that he had known J. F. Lee in his lifetime, and was acquainted with his estate; he knew the proposed guardian, T. D. Brown, and the surety, Mary Lee, well; he knew

Mrs. Lee had no property of any description, except her distributable share of her husband's estate and her dower or homestead interest in his realty. As administrator he turned over to the surety her share as distributee of her husband's estate. Her distributable share of her husband's estate consisted, first, of about \$2,000 in money, and second, \$500 or \$600 worth of articles of personalty exempt from distribution and sale, which she received under subsection 5 of section 1401 of the Kentucky Statutes. As the money was not subject to execution, and the other personalty received by her was exempt from the payment of her debts, its possession added nothing to her solvency. It is not clear from the record whether she took a homestead interest in her husband's estate, or dower. This, however, is immaterial, as in either case she was entitled to homestead in it as against her creditors. These facts being within his knowledge, the judge can not be heard to say he was satisfied the surety was sufficient, unless we are to hold that he might willfully shut his eyes to the fact that she had no property whatever subject to execution, and assert that, nevertheless, he was satisfied of her sufficiency; in other words, knowing her insufficiency, he was still satisfied of her sufficiency.

The appellee may have believed (and we have no doubt he did believe) the interest of the infant would be safe in the hands of his brother in law, the guardian, and his mother, the surety, and that they would deal honestly and equitably with him and his estate; but this is vastly different from being satisfied of the sufficiency of the surety. The object of the statute is to protect the estate of infants in the hands of guardians, and the liability of county judges for accepting insufficient sureties on guardian bonds is to insure the exercise of ordinary judgment and prudence on their part in seeing to it that the proposed sureties are sufficient. This construction admits of no sentimental belief on the part of the judge based upon the relationship of the parties in interest. The statute is a practical one, requiring prudence and diligence in the protection of the infant's property.

We conclude that the evidence shows the appellee knew at the time he accepted Mrs. Lee as surety upon the guardian's bond of T. D. Brown she had no property subject to execution, and consequently knew she was insufficient as surety under the statute, and is, therefore, liable for whatever damage accrued to the infant by reason of this insufficiency. This brings us to the second branch of this case. The measure of appellee's liability to the injured ward is to make good whatever judgment the latter would be entitled to recover against his guardian and the surety. In this case the liability is reached by a consideration of the sum received by the guardian, the rate of interest with which he is chargeable, and the legitimacy of his expenditures.

Section 2085 of the Kentucky Statutes requires that the guardian shall be charged with any balance of his ward's money remaining in his hands at the end of a year, which ought to have been invested or loaned out in a reasonable time, and that he should be charged with interest upon interest, in biennial rests, during the period he so held it without investment. This rule of computation was properly adhered to by the commissioner appointed to audit the accounts of the guardian. Ordinarily parents are required to support their infant children without charge; but where the parent is poor,

and unable to discharge this legal and moral duty, and the infant has an estate of its own, the law allows the parent remuneration out of the estate of the child. It is also a general rule that the principal of an infant's estate can not be expended for maintenance; but this rule, under section 2034 of the statute, is subject to the exceptions that where the ward is of such tender years or infirm health that he can not be bound out as an apprentice, or no suitable person will take him as such; or when it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court upon settlement of the account shall deem such application to have been judiciously and properly made. (*Fielder v. Harbison*, 93 Ky., 482; *Campbell v. Golden*, 79 Ky., 544; *Jarret v. Andrews*, 7 Bush, 311; *Overfield v. Overfield*, 17 Ky. Law Rep., 813; *Chaplain v. Moore*, 7 Mon., 150; *Withers v. Hickman*, 6 B. Mon., 292; *Patton's Adm'r v. Patton's Heirs*, 3 B. Mon., 160.)

Applying these principles to the case at bar, the maintenance of the infant should be paid, first, out of the income of his estate; but if the circumstances were such that the income was insufficient for his proper support, then the guardian should be allowed to make up the deficiency from the principal of the personal estate in his hands. This record, in our opinion, shows that the mother was unable to support her son from her own small estate without assistance from his; she should be allowed, therefore, a reasonable sum for his maintenance during his years of helpless infancy, but should not be allowed to charge where his labor for her was equal to the value of his maintenance. We have not undertaken to lay down a hard and fast rule for the chancellor on this branch of the case, as all of the facts necessary for its adjudication are not now in the record. If the mother and infant children lived together, and the infant's land was used for the common support of the family, that ought to be considered in estimating the amount of his board. If the mother elected to take a homestead interest instead of dower in her husband's estate, the homestead being for the benefit of herself and infant children, that fact should be considered. The attempt to expend the principal of the ward's estate should be carefully scrutinized, and not allowed except where the circumstances clearly come within the permission of the statute. Upon the return of the case the chancellor will experience no difficulty in arriving at a proper judgment. Both parties should be permitted to amend the pleadings and proof in any reasonable way necessary to better present the case under the principles herein enunciated.

Judgment reversed for further procedure consistent with this opinion.

JONES v. DULANEY & MITCHELL, &c.

(Filed May 2, 1905—Not to be reported.)

W. B. Gaines and S. D. Hines for appellant.

Dulaney & Mitchell and Lewis McQuown for appellees.

Appeal from Warren Circuit Court.

Chief Justice Hobson delivered the following response to petition for rehearing:

SOUTH COVINGTON AND CIN. ST. RY. CO. V. SMITH. 811

Jones should only be adjudged a lien to the extent he has paid the debts named in the opinion, or may be bound for their payment if they are subsisting obligations against him and have not been paid. On the return of the case the circuit court may hear proof and determine these matters.

The opinion is modified as above indicated.

SOUTH COVINGTON AND CINCINNATI ST. RY. CO. v. SMITH.

(Filed May 2, 1905—Not to be reported.)

1. Street railways—Damages—Conflict of evidence—Where appellee was injured upon appellant's car by being thrown while the car was rounding a curve and falling against the controller box, and the evidence was conflicting as to how he happened to fall, the verdict of the jury in his favor will not be disturbed.

2. Same—Instructions—An instruction on motion of appellee, to the effect, that the jury should find for him if "the defendant failed to use the utmost care to prevent such electric current from being in the controller box," and on motion of appellant to the effect that if they believed "that the defendant used the utmost care and skill ordinarily used by persons in the same or similar business of carrying passengers," to prevent injuries, they should find for defendant, must be read together, and when so read present the whole law of the case; and, moreover, appellant can not complain of an instruction given on its own motion.

3. Same—The proof showing that appellee's doctor's bill was \$200, appellant can not complain that the court by an instruction did not limit recovery for expenses to that sum as that was the amount alleged in his petition to have been expended for medical expenses.

L. J. Crawford for appellant.

Phil J. Ryan and Thos. L. Michie for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee recovered a verdict for \$4,000 against appellant for personal injuries received by him while a passenger on one of its cars. The proof is very conflicting. The proof on his behalf is to the effect that he, with two companions, got on the street car to come home; that they stood on the rear platform of the car and the conductor there took up their fares. Soon after this, when the car was turning a corner, the lurch of the car caused appellee to throw out his hand and when it came in contact with the controller box he received a shock of electricity which caused him to fall to the floor. He was unconscious until the next morning. His arm was paralyzed; his hand was clenched so that he could not open it and, as one of the witnesses expressed it, the arm was dead. It was some weeks before this condition passed away. At the end of that time the muscles were relaxed so that he had no strength in the arm. For a while he improved, but at the trial he had about one-fifth of the strength in the arm that he had before, and the doctor who had attended him was unable to say whether the injury would be permanent or not. This was some months after he was hurt. He suffered great deal from the injury. For a while he could not work at all, and his

capacity to earn money was reduced from \$9 to \$7 a week at the time of the trial. He still suffered very much at times and was very nervous. The proof for the plaintiff also tended to show that the car was in bad condition and that this was known to the defendant and unknown to him; that regularly there should have been no electricity about the controller box; that it was a rainy day, and when the car floor was wet and a man's shoes were wet there would be more danger from a shock than under other conditions.

On the other hand, the proof for the defendant showed that the car was in good condition and had not been out of order; that there was no electricity about the controller box and that the plaintiff simply fell down from a fit or some other sudden malady; that he had a weak heart and that he was otherwise in a normal condition at the time of the trial. The evidence was such that the court properly left the case to the jury, and under all the facts and circumstances we can not say that their verdict is flagrantly against the evidence or that the amount of the recovery is so large as to justify us in disturbing it on the ground of passion or prejudice. The chief complaint is that the court erred in his instructions to the jury. By instruction A., given on the motion of the plaintiff, the court told the jury, among other things, that they should find for the plaintiff if "the defendant failed to use the utmost care to prevent such electric current from being in said controller box;" but by instruction 3, given on the motion of the defendant, the court also instructed the jury that if they believed from the evidence "that the defendant used the utmost care and skill ordinarily used by persons in the same or similar business of carrying passengers" to prevent and guard against such injuries as plaintiff complained of receiving, they should find for the defendant.

The two instructions must be read together, and when so read fairly present the law of the case; at least appellant can not complain as the third instruction was given on its own motion. Appellant also complains that the court, by its instructions, allowed the jury to find for the plaintiff, among other things, his expenses for medical attention, without limiting them to \$200, the amount alleged by the plaintiff in his petition to have been expended for medical attention. Appellant could not have been prejudiced by this as the proof showed that the doctor's bill was \$200, and there was no other evidence on the subject.

There was evidence of negligence on the part of the defendant. But if it be conceded that the witness who testifies to the car being out of order when sent out on the road was successfully contradicted; still if the controller box was charged with electricity to such an extent as to endanger the safety of the passenger who might accidentally touch it by any cause, the jury would be warranted in inferring from this fact negligence on the part of the defendant. It is the duty of the carrier to have his vehicles safe, and if they are unsafe negligence may be presumed. A vehicle is unsafe when the passenger may receive a deadly charge of electricity by coming in contact with a part of the vehicle which he is liable to touch while being carried. If the jury believed from the evidence that the plaintiff received the shock of electricity from touching the controller box, inflicting on him the injury complained of, they might properly find for the plaintiff, and whether the controller box was in fact charged with electricity and the plaintiff was

in fact injured by coming in contact with it were questions that were fairly submitted to the jury by the instructions of the court. The question of contributory negligence on the part of the plaintiff was also for the jury under the proof, and was fairly submitted to the jury by the instructions.

Judgment affirmed.

THOMAS v. HAGER, AUDITOR.

(Filed May 2, 1905—Not to be reported.)

1. Office and officer—Police judge—Compensation—Change of during term—So much of the act of March 21, 1902, amending section 353, Kentucky Statutes, as provides that no allowance shall be made to any county judge or magistrate or police judge, or other officials authorized by law to hold examining courts, does not apply to such officials who were in office at the time of the passage of said act.

2. Compensation of officer—Section 161 of the statutes provides that the compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office.

J. B. Lindsey for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant Thomas was elected police judge of the city of Lebanon at the November election, 1901, for a term of four years, beginning on the first Monday of January, 1902. He regularly qualified and entered upon the discharge of the duties of his office. At the time he was elected and qualified the fees allowed by law for the holding of examining trials were regulated by section 353, Kentucky Statutes, which, as it then stood, was as follows: "To county judges and other magistrates for holding examining courts in felony cases, for the first day's service, \$2; for each additional day, \$1, not to exceed \$4 in any one case."

By an act approved March 21, 1902, the following words were added to the statute: "Provided, that no allowance shall be made to any county judge, magistrate, police judge or any other official authorized by law to hold examining courts; and no claim for services incidental to examining courts shall be allowed to any sheriff, deputy sheriff, constable, marshal, policeman, or other officer authorized by law to execute warrants and other process in felony cases until the grand jury of the county in which the defendant is charged with having committed the offense has returned indictment for a felony. All laws in conflict or inconsistent with this act are hereby repealed."

Appellant held twenty-two examining trials in cases in which the grand jury failed to return an indictment for felony against the defendants. The auditor declined to allow the account for the holding of these examining trials or to pay him anything therefor, and he filed this action for a mandamus against the auditor, commanding him to draw his warrant on the treasurer in his favor for the amount of his fees. The circuit court sustained a demurrer to his petition and he appeals.

The act of March 21, 1902, is a wise provision, and is undoubtedly valid as to all officers elected or appointed after its enactment. But whether it is valid as to officers theretofore elected or appointed, under section 161 of the Constitution, is the question to be determined. That section reads as follows: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed."

Under this section it was held that circuit court clerks elected when there was no law in force allowing fees against the Commonwealth in felony cases were not entitled to the benefit of an act subsequently passed during their terms allowing a fee of \$5, payable out of the treasury, in each felony case. (*Bright v. Stone*, 20 Ky. Law Rep., 817; *Commonwealth v. Carter*, 21 Ky. Law Rep., 1509) Under these directions the circuit clerks of the State were required to pay back to the treasury the money that had been paid them for fees in felony cases under the act passed after their election. If an act allowing compensation, where none was allowed before, for official services is within the purview of the constitutional provision when passed after the officer's election, clearly an act subsequently passed disallowing compensation for official services which were allowed by law at the time of his election is equally invalid as to him. It is insisted, however, for the State that the act of March 21, 1902, does not of necessity change or in anywise reduce the compensation of plaintiff's office, but only imposes the condition that no claim for his services in examining trials shall be allowed until the grand jury of the county has returned an indictment for a felony. If the act merely postponed the allowance until the indictment was found, and did not operate to deprive appellant of compensation for services allowed by law at the time of his election, there would be much force in this position. But the necessary meaning and purpose of the act is that no compensation shall be allowed for services in holding examining trials where the grand jury fails to return an indictment for felony. The legislature had in mind that the grand jury frequently failed to indict persons for felony where examining trials had been held, and its purpose was to change the existing law so that no allowance should be made for services in examining trials where the grand jury failed to return an indictment for felony. Under the law as it stood when appellant was elected he was admittedly entitled to compensation for his services in the twenty-two cases sued for. If he is not entitled to pay for these services now it is only by reason of the act of March 21, 1902. It, therefore, necessarily follows that this act passed after his election changes his compensation and disallows pay for services which would have been allowed under the previous statute. If the statute, instead of restricting the character of cases in which the fees for holding examining courts might be paid out of the treasury, had enlarged them, as, for instance, if it had provided that the fees for holding examining courts on charges of misdemeanor should be paid out of the treasury where the defendant was subsequently indicted by the grand jury for a felony growing out of the same transaction, manifestly, under the rule laid down in the cases above referred to, it would have been invalid as to appellant and other officers elected before it was passed on the ground that under the rule heretofore

established their compensation must be governed by the law in force at the time of their election. The same principle must be applied where the law subsequently passed denies compensation allowed by the law in force at the time of the officer's election. The purpose of the constitutional provision is to secure to officers the compensation for their services fixed by law at the time of their election, on the faith of which they are presumed to have accepted the office. It applies equally to statutes reducing or increasing their compensation.

If the legislature had passed an act taking away from the police court jurisdiction to hold examining trials in felony cases then a different question would be presented. But here appellant has performed the services which he was authorized by law to perform, and under the Constitution his compensation can not be changed during his term.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the petition and for further proceedings consistent herewith.

FRAZIER, &c. v. MINERAL DEVELOPMENT CO.

(Filed May 8, 1905—Not to be reported.)

Land—Adjoining owners—Agreed division line—Verbal contract—Where parties own adjoining tracts of land and without knowing the exact location of the dividing line between them verbally agree upon and fix a certain drain as such dividing line, and thereafter for many years continue to reside on and claim their respective lands up to such agreed line, such agreement is enforceable in equity, although the period of fifteen years has not elapsed since such agreed line was established.

W. F. Hall, R. L. Greene, D. Hays and Salyers & Baker for appellants.

S. B. Dishman and D. D. Fields for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from the judgment of the Letcher Circuit Court enforcing an oral agreement made by adjoining land owners, whereby a line of division between their lands was established.

Philip Hall and Joseph Frazier were the parties to the oral agreement. Hall was the owner of a large boundary of land upon which his father and vendor, Eli Hall, had obtained a patent. Within the lines of this patent was a fifty-acre tract which had been patented to one Gideon Ison before the issual of the Hall patent. Joseph Frazier became the owner of the land covered by the Ison patent and was in the actual possession thereof, except a small quantity at one end of the survey that Philip Hall had in possession and under fence. Philip Hall was also in the actual possession of the land covered by the patent to his father, not included by the Ison patent, except two small parcels on either side of and adjoining the Ison patent that Frazier had taken into possession and enclosed by fence. It appears that neither Hall nor Frazier knew the precise location of the line between their lands, and in 1888 Hall procured D. D. Field, a surveyor, to run the line in question, and perhaps others of the patent, which he proceeded to do

In the presence of Philip Hall, Joseph Frazier, Zack Frazier and one Shepard. After some running of the line by the surveyor, which disclosed the fact that Hall had some of Frazier's land under fence, and Frazier some of Hall's land under fence, without taking time to ascertain the true line between their lands, or knowing whether it could be found, Hall and Frazier agreed that a certain "drain" on the left of a branch should constitute the division line of their lands, that is, that the dividing line should "run up a small drain on the southwest side of the Eastridge branch to the top of the spur, and from the mouth of the drain up the ridge on the opposite side of the branch from the mouth of the drain to the top of the ridge next to Turkey creek," and pursuant to such agreement no further surveying was done.

The dividing line as thus fixed and agreed upon by Frazier and Hall seems to have left in the possession of Frazier the two parcels of Hall's land he had cleared or fenced, and in Hall's possession that part of Frazier's land he had under fence. The fact that the line was agreed upon and established by the parties, as indicated, was fully proved by the deposition of the surveyor, Field, and also by that of Zack Frazier. The latter was a brother of Joseph Frazier, and though an unwilling witness, and somewhat unsatisfactory in many of his statements, his deposition as a whole is fairly corroborative of the testimony of Field. Only one witness, the widow of Joseph Frazier, a party to the action, contradicts Field and Zack Frazier. Her deposition is to the effect that she was present at the time of the surveying done by Field, and that no such agreement was made between her husband and Hall. She admits, however, that the agreement as to the line was proposed by Hall, but says she interfered and prevented her husband from accepting it.

There is, in addition to the testimony of Field and Zack Frazier, circumstantial evidence appearing in the record which strongly support their version of the transaction, and that is that Hall remained in possession of the land owned by him until its sale in 1889, and Joseph Frazier of the land of which he had the possession until his death in 1890, and each of them all the while recognized the validity and binding force of the agreement whereby the dividing line was established and acquiesced in its location, and each retained the land of the other left on his side of the dividing line as fixed by the agreement between them.

In 1889 Philip Hall sold and conveyed the land owned by him, including the parcel taken from the Ison patent by the fixing of the agreed line, to Altemus, McGeorge and Pepper, and removed to Jackson county. Later the last-named parties sold and conveyed it to the appellee and present owner. Appellee and its immediate vendors, Altemus, McGeorge and Pepper, following their purchase of the Hall land recognized the binding force of the oral agreement between Hall and Frazier, and acquiesced in the line as fixed by that agreement. The Frazier land has been occupied by his widow since his death, and she, too, seemed to have recognized and acquiesced in the line agreed upon by her husband and Hall until her son-in-law, the appellant, Ingram, by moving his fence inclosed the land covered by the Ison patent that fell to Hall when the dividing line was established by the latter and Frazier, which caused appellee to institute the action out of

which this appeal arose. There being, in our opinion, sufficient proof to establish the oral agreement as to the dividing line, it remains to be determined whether such an agreement is enforceable in a court of equity.

In *Jameson, &c. v. Petit*, 6 Bush, 670, it was said by this court, Judge Robertson writing: "The alleged oral agreement fixing a dividing line between the adjoining lands of the antagonist parties not being within the statute of frauds and perjuries, was specifically enforceable in equity."

In *Grigsby v. Combs*, 14 Ky. Law Rep., 652, an oral agreement between adjoining land owners fixing "the top or ridge of the mountain between Lot and Second creeks" as the line dividing their lands was enforced in an equitable action brought by the grantee of one against the grantee of the other to establish it. In the opinion it is said: "The questions presented on this appeal are, first, as a matter of fact was there an agreement between the two parties establishing the true line; secondly, as a matter of law, can such an agreement, admittedly not reduced to writing, be upheld as not being within the statute of frauds?"

After answering both questions in the affirmative, the court further said: "But it is insisted by appellants that this arrangement between the parties was merely in the nature of a swap of lands, it being conceded that the calls of each patent ran over and beyond the ridge from the patentee's main tract onto his neighbor's side, and that this swap can not be maintained because of the statute of frauds. We are of the opinion, however, that both in principle and by authority an agreement of this nature can be upheld. It is no more a swap of lands than results by reason of 'agreed corners' between neighbors, or 'agreed division fences,' and these amicable arrangements have been sanctioned by repeated adjudications."

The last foregoing quotation from the opinion in *Grigsby v. Combs*, supra, would seem to answer completely the contention of appellants that the agreement of Frazier and Hall, fixing the line dividing their lands, amounted to more than an exchange of lands. As a matter of fact there was no swapping of lands between them. The agreement was as to the fixing of the line dividing their lands, and the fact that some of the land of each party was left in the possession of and surrendered to the other, by the fixing of the dividing line, was a mere incident of the agreement, and necessarily followed it. It has long been the settled policy of the courts of this state to approve and uphold such agreements as tending to discourage controversies between neighboring land owners and prevent litigation. Other authorities in line with those cited may be found, among them being the case of *Campbell v. Campbell*, 23 Ky. Law Rep., 870.

We are of opinion, therefore, that the judgment of the chancellor is sustained by repeated adjudications of this court and by the evidence contained in the record. It does not accurately appear how long Frazier had possession of the two parcels of Hall's land he obtained by the agreed location of the dividing line, nor can it be definitely ascertained how long Hall's possession of that part of Frazier's land he obtained by the agreed line continued before the line was established. We do not, however, understand that fifteen years' recognition of the agreed line by the parties was necessary to authorize the chancellor to grant the relief asked in the case at bar.

It is sufficient that after agreeing upon the line Joseph Frazier and Philip Hall, as long as the former lived, and the latter remained the owner of the land included in the Eli Hall patent, continued to recognize and treat it as the line dividing their lands and that subsequent purchasers from either of them were led by their agreement and conduct to so regard it. Not only does this appear from the record, but it also appears that when Philip Hall sold his land to Altemus, McGeorge and Pepper the deed he made them called for and ran with the dividing line as fixed by the agreement he made with Frazier, and the same is also true of the deed from Altemus, McGeorge and Pepper to appellee.

As to the possession of the parties it appears that Frazier and Hall each had and held the actual possession of the land on his side of the dividing line from the time the line was agreed upon, and for some time previously, until the death of Frazier, and the sale by Hall of his land to Altemus, McGeorge and Pepper, and that the latter remained in the actual possession thereof by tenants until they sold and conveyed the land to appellee, whose possession continued until interrupted in the spring of 1902 by the act of Frazier's son in-law, Ingram, in crossing over the dividing line and inclosing under fence that part of appellee's land which had been surrendered by Frazier at the time of the agreement as to the dividing line. From the death of Joseph Frazier, in 1890, the land of which he was seized continued in the actual possession of his widow, and seems to be yet held by her. But it does not appear that she ever set up claim to the land claimed by appellee until Ingram entered upon and inclosed some of it in 1902, as already stated. So if it were necessary for appellee to show that the line in question has for more than fifteen years been recognized by Hall and Frazier, the vendees of the former and the widow and heirs at law of the latter, as the true line of division between their lands, we think that fact reasonably appears from the record.

Regarding the record free from error the judgment is affirmed.

McCOY, &c. v. CASSIDY, &c.

(Filed May 2, 1905—Not to be reported.)

Patents—Boundary—Mistake—Reversing calls—Intention—Where it is apparent on the face of the papers that a patent was intended for 175 acres of land and not for 2110 acres, and this may be shown by reversing the calls, the actual intention of the parties making the survey should control.

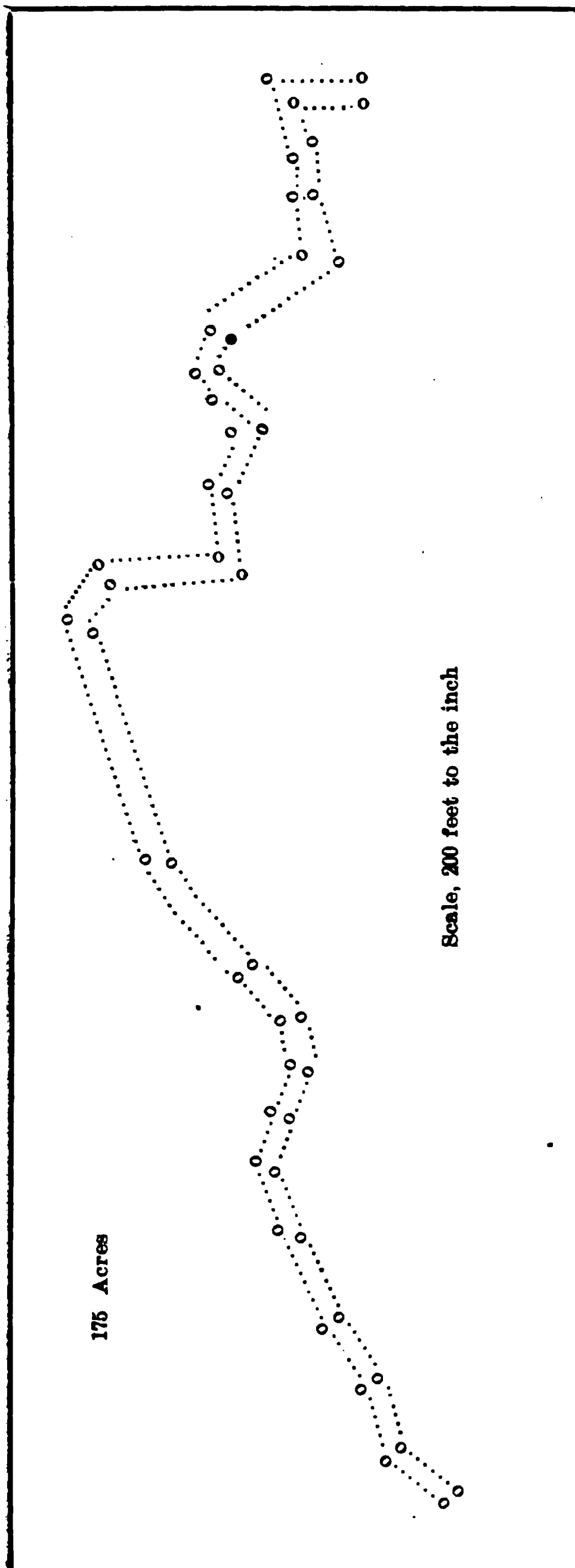
W. R. McCoy for appellants.

James Goble for appellees.

Appeal from Martin Circuit Court.

Opinion of the court by Chief Justice Hobson.

Thomas May obtained a patent from the Commonwealth on April 19, 1836, under which appellants claim. Moses B. Collinsworth obtained a patent on June 18, 1854, under which appellees claim. As the May patent is older than the Collinsworth patent it is superior to it if they conflict, and, therefore, it is necessary to determine the proper location of the May patent. The patent is as follows:



"Know ye, that by virtue and in consideration of two land office warrants, No. 24,034 and No. 24,041, there is granted by the said Commonwealth unto Thomas May, assignee of Thomas Witten and Harry Stratton, a certain tract or parcel of land, containing 175 acres by survey, bearing date of the 27th day of January, 1834, lying and being in the county of Floyd on Wolf creek, and bounded as follows, to wit: Beginning at a beech and poplar on the north bank of said creek, it being the upper corner of a 225 acre survey made for said May on said creek; thence running N. 40 W. 84 poles to a black oak on a steep point, S. $14\frac{1}{4}$ W. 68 poles to a beech, S. 49 W. 40 poles to a sour wood and beech at a large rock, S. 8 W. 58 poles to a sour wood and beech; thence N. 83 W. 108 poles to a white oak at the mouth of a drain, S. 69 E. 34 poles to a small beech, S. 22 W. 22 poles to a poplar and stooping sycamore, S. 52 poles to two lynns, S. 68 W. 58 poles to a sugar and dogwood, S. 87 W. 68 poles to a poplar and dogwood, N. 57 W. 108 poles to a beech on a steep point, N. $71\frac{1}{4}$ W. 52 poles to a lynn and dogwood at the forks, S. 24 W. 226 poles to a small spruce pine and sour wood, S. $13\frac{1}{4}$ W. 112 poles to a beech, S. 19 E. 64 poles to a poplar and beech; thence S. 35 W. 40 poles to a birch and beech, S. 59 W. 48 poles to a beech, S. 73 W. 58 poles to a chestnut, S. 15 W. 74 poles to a beech and small spruce pine, S. 27 W. 90 poles to a white oak near a road, S. 6 E. 48 poles to a birch and laurel, S. $28\frac{1}{4}$ W. 70 poles to a spruce pine in the forks of the creek, S. 5 W. 78 poles to a white oak, beech and sugar tree at the head of Wolf in the creek fork gap; thence S. 85 W. 18 poles to a stake; thence running back, by parallel lines, S. 43 E. 86 poles, N. $15\frac{1}{4}$ E. 68 poles, N. 49 E. 40 poles, S. 8 E. 56 poles, S. 83 E. 112 poles, S. 69 E. 38 poles, N. 22 E. 22 poles, N. 52 poles, N. 68 E. 56 poles, N. 87 E. 66 poles, S. 67 E. 108 poles, N. $71\frac{1}{4}$ E. 56 poles; thence N. 24 E. 226 poles, N. $13\frac{1}{4}$ E. 110 poles, N. 19 W. 62 poles, N. 35 E. 43 poles, N. 59 E. 46 poles, N. 75 E. 46 poles, N. 73 E. 68 poles, N. 15 E. 78 poles, N. 27 E. 90 poles, N. 6 W. 50 poles; thence N. 28 W. 70 poles, N. 5 E. 80 poles; thence N. 85 W. 18 poles to the beginning."

It will be observed that when we reach the call "S. 85 W. 18 poles to a stake" the next words in the patent are, "thence running back by parallel lines." But if you follow the calls given in the patent after these words you do not run back by parallel lines, and the patent contains 2,110 acres.

Appellants insist that the words "running back by parallel lines" should not be literally followed, and that the patent should be run out according to its calls, and thus be made to contain 2,110 acres. The original survey upon which the patent issued is as follows:

"Surveyed on the 27th day of January, 1834, for Thomas May, assignee of Thomas Witten and Henry Stratton, 175 acres of land by virtue of part of two Kentucky land office warrants, Nos. 24,934 and 24,031, lying in Floyd county aforesaid on Wolf creek. Beginning at a birch and poplar on the north bank of said creek, it being the upper corner of a 225-acre survey made for T. May on said creek; thence running N. 40 W. 84 poles to a black oak on a steep point, S. $15\frac{1}{4}$ W. 68 poles to a beech, S. 49 poles W. 40 poles to a sour wood and beech at a large rock, S. 8 W. 58 poles to a sour wood and beech, N. 83 W. 198 poles to a white oak at the mouth of a drain, S. 69 W. 34 poles to a small beech, S. 22 W. 22 poles to a poplar and stooping sycamore, S. 52 poles to two lynns, S. 68 W. 58 poles to a sugar and dog-

wood, S. 37 W. 68 poles to a poplar and dogwood, N. 57 W. 108 poles to a beech on a steep point, S. 71½ W. 52 poles to a lynn and dogwood at the forks, S. 24 W. 226 poles to a small spruce pine and sour wood, S. 13½ W. 112 poles to a beech, S. 19 E. 64 poles to a poplar and beech, S. 35 W. 40 poles to a birch and beech, S. 59 W. 48 poles to a beech, S. 73 W. 58 poles to a chestnut, S. 15 W. 74 poles to a beech and small spruce pine, S. 27 W. 90 poles to a white oak near a road, S. 6 E. 48 poles to a birch and laurel, S. 28½ W. 70 poles to a spruce pine in the forks of a creek, S. 5 W. 78 poles to a white oak, beech and sugar tree at the head of Wolf in the Brush Fork Gap; thence S. 85 W. 18 poles to a stake, then running back by parallel lines S. 40 E. 86 poles, N. 15½ E. 68 poles, N. 49 E. 40 poles, N. 8 E. 56 poles, S. 83 E. 112 poles, N. 69 E. 38 poles, N. 23 E. 22 poles, N. 68 E. 56 poles, N. 37 E. 66 poles, S. 57 E. 108 poles, N. 71½ E. 56 poles, N. 24 E. 226 poles, N. 13½ E. 110 poles, N. 19½ W. 62 poles, N. 35 E. 42 poles, N. 59 E. 46 poles, N. 73 E. 68 poles, N. 15 E. 78 poles, N. 27 E. 90 poles, N. 6 W. 50 poles, N. 28 E. 70 poles, N. 5 E. 80 poles, thence N. 85 W. 18 poles to the beginning."

If we disregard the words "running back by parallel lines," and follow the calls of the patent for course and distance instead of having a long, narrow figure as given in the above plat, containing in fact 183 acres, we have a figure about one-half as broad as it is long, and containing about eight times as much land as the patent calls for. The long, narrow figure follows Wolf creek, taking in the creek bottom. The proof on the trial tends to show that May took out the patent for the purpose of pasturing his cattle in the bottom, and that he did not claim anything more than the narrow strip of land eighteen poles wide and that no more than this was intended to be included in the deed under which appellants claim. But aside from all this, reading the survey, plat and patent together, we think it is reasonably clear that when the surveyor had reached the call S. 85 W. 18 poles he did not run the lines back to the beginning, but undertook to lay them down by protraction. In doing this he reversed the calls, but by a curious blunder failed to reverse the lines, that is, it is apparent that the calls S. 40 E. 86 poles, N. 15½ E. 68 poles, N. 49 E. 40 poles, etc., are simply the reverse of the first calls in the patent in the order in which they occur, when in reversing the calls the lines should have been taken in the reverse order. The mistake occurs not only in the patent, but in the entry; and it is apparent on the face of the papers, for it is evident that a patent for only 175 acres was intended and not a patent for 2,110. It is also evident that the whole trouble comes from the blunder of the surveyor in not reversing the lines when he reversed the calls and undertook to lay down by protraction "running back by parallel lines" to the beginning. The actual intention is shown not only by the plat, but by the words "running back by parallel lines," for these words are not to be rejected. The plat is potent evidence in cases of this character. (Hogg v. Lusk, ante, —, decided April 28, 1905, and cases cited.)

It is true there is an exclusion of 105 acres in the Collinsworth patent. Appellants do not claim under this exclusion, and under the evidence it must be presumed that the land in dispute is not within the exclusion. The discrepancies in the calls between the patent and the entry of the surveyor are slight and not material. As the corner called for is in each case the

ame, it is plain that simply a mistake was made in transcribing E. for W. and N. for S. As to the location of the fifty-acre patent, while the evidence is conflicting we must give some weight to the judgment of the chancellor, and we see no reason for disturbing his judgment under all the proof as to the location of this patent.

The judgment is affirmed on the original appeal. But the judgment follows the erroneous calls of the May patent. Instead of this he should have corrected the error and should have given the calls as above stated. On the cross appeal the judgment is reversed and the cause is remanded for a judgment as herein indicated.

LOGAN, &c. v. VANARDSDALL, &c.

(Filed May 8, 1905—Not to be reported.)

1. Land—Ejectment—Pleading—Demurrer—General relief—A petition for the recovery of land by persons claiming it as heirs of T., who is alleged to have been a lunatic at the time it was sold and conveyed by him to the defendants and their vendors, while it may not be sufficient to support an action in ejectment, is not demurrable, where the allegations, if true, would entitle the plaintiffs, under their prayer for all proper relief, to a cancellation of the deed, which would result in the restitution of the land, to be followed by an accounting for its detention on equitable principles.

2. Lunatics—Conveyance by—Unsound mind—Adjudication—Prima facie evidence—All deeds made by lunatics are not void, but voidable only. The fact that plaintiff's ancestor was properly adjudged to be a person of unsound mind, though conclusive evidence that such was his condition at the time of the inquest, is only prima facie evidence of his condition at the time he sold and conveyed the land, and being a mere presumption it may be rebutted by parol evidence.

3. Purchaser from lunatic—Remote grantee—Notice of infirmity—Though it may appear that T. was of unsound mind at the time he conveyed the land to V., that fact can not divest V.'s grantee, or other subsequent purchasers, of their title to the land unless they had at the time of the conveyance to them respectively notice that T. was of unsound mind at the time he sold and conveyed the land to V.

Breckinridge & Breckinridge for appellants.

J. F. Vanarsdall and W. L. Sumrall for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from the judgment of the Mercer Circuit Court sustaining a general demurrer to the appellant's petition and dismissing the action.

The action was instituted by appellants, who are children and heirs at law of James P. Terhune, deceased, against appellees to recover a certain tract of land in Mercer county containing 147 acres, of which the deceased was alleged to have been the owner at the time of his death. Two of the heirs at law, Charles W. Terhune and Lilian Croves, having, by affidavit, informed the court that they were named as plaintiffs in the petition without their knowledge or consent, their names were stricken therefrom, but being necessary parties to the action they were made defendants by an amended petition.

It was, in substance, alleged in the petition that at the April term, 1876, of the Mercer Circuit Court an inquest of lunacy, for the purpose of inquiring into the alleged mental unsoundness of James P. Terhune, was duly held before the judge of that court, and by the verdict of the jury empaneled and sworn to try the matter and the judgment of the court rendered thereon, he was adjudged to be a person of unsound mind and a fit subject for the lunatic asylum, to which institution he was, by the further judgment of the court, sent, and there confined; that no other or subsequent inquest was ever held whereby James P. Terhune was declared to be a person of sound mind, and that his unsoundness of mind continued until his death which occurred in the year 1903.

It was further alleged that on January 11, 1878, and while laboring under the same unsoundness of mind, James P. Terhune attempted to sell and convey to the appellee, C. S. Vanarsdall, the tract of land mentioned and then made, acknowledged and delivered to him a deed therefor, in consideration of \$5,932, of which sum \$1,154.38 was cash in hand paid, \$2,468.85 was paid in a house and lot in Harrodsburg and thirty-seven acres of land on Glen's creek, Mercer county, then conveyed him by Vanarsdall, and for the remainder of the consideration the latter executed and delivered to the grantor his two promissory notes of \$1,154.38, each payable January 1 and July 1, 1879, respectively, and both secured by lien on the land conveyed by the grantor; that on February 13, 1878, the land was sold and conveyed by the appellee, Vanarsdall, to one Thomas E. James for \$6,673.50, and thereafter James died testate, having by will devised the land to his widow, the appellee, Emma James, who sold and conveyed it to appellee, Enoch F. Godfrey, who had possession of same at the time of the institution of this action, claiming it as his own. Emma James and E. F. Godfrey were joined with Vanarsdall as defendants.

It was also averred that at the time of making the sale and conveyance to Vanarsdall, and continuously thereafter until his death, James P. Terhune was, by reason of his unsoundness of mind, mentally incapable of understanding or making a contract, or of selling or conveying his property, for which reason the deed to Vanarsdall was and is void, consequently no title passed thereby to Vanarsdall or through him to James, or any of the subsequent purchasers of the land. Finally it was averred that appellants are entitled to the immediate possession of the land in question, but that appellees are wrongfully depriving them of the possession and use thereof to their damage in the sum of \$8,000. By the prayer of the petition judgment was asked for the possession of the land, for \$8,000 damages, and all proper, general and special relief.

We are of the opinion that the lower court should not have sustained the demurrer. Whether the averments of the petition were sufficient to support an action of ejectment it is not necessary to decide. The petition did, however, present a state of facts, which, if true (and for the purposes of the demurrer they must have been so considered) would have entitled the appellants, under their prayer, for all proper relief, general and special, and in view of the transfer of the case to the equity docket, to a cancellation of the deed, which would of course, under the usual circumstances, result in the restoration to appellants of the land, to be followed by such an account-

ing by the appellees for damages for the detention thereof as may have accorded with the principles of equity. We do not agree with the contention to appellants that the deed from James P. Terhune to Vanarsdall was void. It has time and again been held by this court that the contract of a person of unsound mind, like that of an infant, is not void, but voidable only. (Arnett's Committee v. Owens, 23 Ky. Law Rep., 1410; Breckinridge's Heirs v. Ormsby, 1 J. J. Mar., 236.)

Assuming it to be true, as averred in the petition and as appears from the copy of the inquest of lunacy filed as an exhibit, that James P. Terhune was properly adjudged to be a person of unsound mind, that fact, though conclusive evidence that such was his condition at the time of the inquest, is only prima facie evidence of his condition at the time of the sale and conveyance to Vanarsdall or any subsequent period. Being a mere presumption it may be repelled by oral testimony. (Clark's Ex'or v. Trall's Adm'rs, 1 Met., 35.)

In the case at bar the sale and conveyance of the land by Terhune to Vanarsdall was made about two years after the time he was adjudged to be of unsound mind. Notwithstanding his mental unsoundness at the time of the inquest, he may have been of sound mind and altogether capable of contracting when he sold and conveyed the land to Vanarsdall, but this would have to be shown by proof. We can not anticipate what defense will be presented by the answer, but will say in passing that though it may appear that Terhune was of unsound mind at the time of the conveyance to Vanarsdall, that fact can not divest the latter's grantee, or the subsequent purchasers, of title to the land, unless they had, at the time of the conveyance to them respectively, notice that Terhune was of unsound mind at the time he sold and conveyed the land to Vanarsdall. (Arnett's Committee v. Owens, 23 Ky. Law Rep., 1410.)

For the reasons indicated the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

SEIBERT, &c. v. GRIEF (NOW MARY B. E. LORAINÉ).

(Filed May 3, 1905—Not to be reported.)

Motion to dismiss appeal—Notice—A motion to dismiss an appeal in this court because the transcript was not filed in time can not be considered unless notice thereof has been given to the adverse party, or unless such motion is made on the regular call of the case.

Crice & Ross for appellees.

Appeal from McCracken Circuit Court.

Chief Justice Hotson delivered the following response to motion to dismiss appeal granted by the lower court:

Appellees have entered a motion to dismiss this appeal because the transcript was not filed in time, and has filed with the motion a copy of the judgment and supersedeas. Rule 23 of the court is in these words: "Notice to the adverse party must be given of all motions made in this court, where it

can be reasonably done: Provided, however, That this rule shall not apply to motions made on the regular calling of the cases."

No notice of the motion appears to have been given. The rule is an important one, and must be complied with when the motion is not made on the regular call of the cases.

The motion here can not, therefore, be considered.

GAYLE v. RIGG.

(Filed May 8, 1905—Not to be reported.)

Cammack & Perry for appellant.

Moody & Bourne for appellee.

Judge —— delivered the following response to petition for rehearing (Per Curiam):

Whether A. M. Rigg established the warehouse on his tract of land mentioned in the opinion, or whether it was established by his father, A. M. Rigg, is not material and can not control or influence the rule of law applicable to the case. The fact was that the old warehouse was discontinued, and a new one established at the points indicated in the opinion. It may also be true that the present passway, the one in dispute in this case, was not always used by the public in getting to the old warehouse. At one time the road ran near to the river, but the river bank caved in so that the road was destroyed. The public's way of travel over that immediate locality was then shifted, according to the evidence, to the present passway by permission of the then owner of all of the land, namely, A. M. Rigg, Sr. The same principle must apply to the facts as stated.

The petition for rehearing is overruled.

COLLINS v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed May 8, 1905—Not to be reported.)

1. Damages—Master and servant—In an action by appellant against appellee for damages alleged to have been sustained by injuries to him by sulphuric acid escaping from carboys which he was transporting and injuring him, instructions by the court submitting the duty of appellee to furnish appellant a reasonably safe place to work, and reasonable material with which to work, and that it was also its duty to apprise appellant of the dangerous nature of the thing he was handling, and that if the carboys were defectively stopped and this fact was known to appellee, or could have been known by the exercise of ordinary care, and that such defect was not known to appellant and he was not informed of it, the jury should find for the plaintiff, fairly embraced the law of the case.

2. Same—Appellee was not required to insure the safety of the condition of the material with which its servant was put to work; it was merely required to exercise ordinary care and to take ordinary precautions to protect its servants from injury.

Win. A. Earl for appellant.

Benjamin D. Warfield and Helm, Bruce & Helm for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge O'Rear.

Appellant was a teamster in the employment of appellee. While engaged in transferring some carboys of sulphuric acid from one point of the city to another a quantity of the liquid was spilt upon his person, seriously and probably permanently injuring him. The suit for damages against appellee charges it with having negligently failed to see to it that the carboys were securely stopped, and with having negligently failed to apprise him of the dangerous nature of the contents of the vessels; that he, in ignorance alike of their dangerous nature as well as that they were not securely stopped, and while in the exercise of ordinary care in attempting to unload one of them from his wagon, jostled it so that some of its contents were spilled, with the result stated. The case went to the jury. The verdict was for the defendant.

The errors alleged against the verdict and judgment are based upon the instructions given to the jury. These instructions aptly submitted to the jury appellee's duty to furnish appellant a reasonably safe place to work, and reasonably safe material with which to work, and that it was also appellee's duty to apprise appellant of the dangerous nature of the thing which he was handling; that if the carboys, or any of them, were defectively stopped or closed, which made it dangerous to one handling or hauling it, and that such condition was known, or by the exercise of reasonable care could have been known, to the defendant or its agents or servants superior in authority to the plaintiff at the time plaintiff was directed to haul it, and that the defective stopping was not known to the plaintiff, or he was not informed thereof by the defendant or its agents in superior authority to him, whereby he was injured, the jury should find for the plaintiff. We think this fairly embraced the law. Appellee was not required, as contended for by appellant, to insure the safety of the condition of the material with which its servant was put to work, nor was appellee bound at all hazards to know its condition. It was required merely to exercise ordinary and reasonable care in apprising itself of the condition, if it did not know it, and then to take such precautions to safeguard its servants as an ordinarily prudent person would have taken to protect himself from injury from the contents of the carboys under like circumstances.

The verdict of the jury was evidently based upon the third instruction, which submitted to them appellant's contributory negligence. There was testimony by a number of witnesses, the servants of the company superior to appellant, to the effect that they had told appellant before the injury, and when directing him to move the carboys of acid, of their contents, and of its dangerous nature, as well as of the care that he should take in handling them. There was also evidence to the effect that appellant was hurt while handling one of the carboys roughly, and without due regard to his own safety, considering the nature of its contents, and that he so admitted to a number of persons who were witnesses. The instruction covering appellant's contributory negligence was in the usual form and is unobjectionable.

We are unable to find a prejudicial error in the matters complained of by appellant, and the judgment is, therefore, affirmed.

MOORE v. ROGERS.

(Filed May 8, 1905—Not to be reported.)

Petition for new trial—Where a petition for a new trial shows, if the facts relied on are true, that with the slightest diligence those facts could have been ascertained before the trial, and where a homestead is sought to be reached and there is no allegations showing an abandonment of such homestead, a demurrer was properly sustained to the petition.

Wm. Cromwell for appellant.

J. A. Violet for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal in this case, the opinion on the former appeal being in 24 Ky. Law Rep., —. The judgment appealed from on the former appeal was rendered January 26, 1903, and was against the appellee in this case, depriving her of a homestead right in fifty acres of land left by her deceased husband. That judgment was reversed. This appellant sought to have that judgment affirmed because she had made a sale of her homestead right. This court, in the former opinion, decided against appellant upon that point. After the reversal of that case, and on the 15th of April, 1904, the lower court, in conformity with the mandate, entered judgment in the action in favor of this appellee adjudging her a homestead in the land. And on the next day this petition was filed seeking to vacate that judgment upon the ground of newly-discovered evidence, to wit: That on the 22d day of February, 1902, the appellee had purchased from one King a small piece of land with a house upon it at the price of \$75, and that she took possession of the house and land upon that date and continued to reside therein, and thereby abandoned her homestead in the fifty acres left by her deceased husband. It was alleged that this deed was not recorded, and for that reason appellant did not discover this fact.

The former record has been filed as a part of the record on this appeal. It appears that it was shown on the former trial that appellee was left alone when her husband died, and that the dwelling on the fifty acres was not habitable and that she could not remain there; that she left this fifty acres of land and went to live with her brother in the immediate vicinity and rented this land from year to year; that she had not resided on the homestead since her husband's death for the reasons stated. It also appears from the petition that she purchased this small piece of land on the 22d day of February, 1902, nearly twelve months before the first trial and judgment, and immediately took possession of it and had resided there ever since. And if these facts be true, with the slightest diligence the facts alleged in the petition could have been discovered before the first trial and judgment.

In addition to this the appellant did not allege in his petition that the appellee had taken up her residence on this small piece of land with the view of making it her permanent residence or had permanently abandoned the fifty acres, nor is there any facts stated showing such permanent abandonment. For these reasons the petition is defective, and the lower court was correct in sustaining a demurrer to it.

Wherefore, the judgment is affirmed.

BOONE v. RIDDLE, JUDGE BREATHITT CIRCUIT COURT, &c.

(Filed May 8, 1905—Not to be reported.)

1. Writ of prohibition—Conflict of jurisdiction—Feltner was under bond for his appearance, charged with the commission of a felony in Breathitt county, and upon the calling of his case for trial in that county it appeared that he was in jail in Clark county, where he had failed to execute bond in a contempt case against him in that county. The appellant, the jailer of the latter county, acting upon the advice of his attorney and the circuit judge of that county, refused to surrender Feltner to the authorities of Breathitt county upon the order of the circuit judge of the latter county. Held—It is apparent that the appellant was acting in good faith and meant no disrespect under the circumstances, and should not be punished for contempt in acting in disobedience to either of the courts. The error, if any, was not upon the part of appellant.

2. Same—Practice—Where one is charged with two offenses, one a misdemeanor and the other a felony, the proper practice in the administration of the law is to waive for the time being the trial of the misdemeanor in order that the felony charge may be investigated and tried, and as the Breathitt Circuit Court was in session at the time, it would have been in keeping with the orderly administration of the criminal laws of the State for the prisoner to have been surrendered to that county.

3. Same—It is unnecessary to consider the question of jurisdiction of the Court of Appeals at this time as the Breathitt Circuit Court is not in session, and while the Clark Circuit Court may try the prisoners for contempt, it should surrender them to the Breathitt Circuit Court when it is in session and upon demand.

D. L. Pendleton and Pendleton & Bush for plaintiff.

B. A. Crutcher for defendant Benton.

Hazelrigg & Hazelrigg for defendant Riddle.

Opinion of the court by Judge Nunn.

The facts leading up to the application for this writ of prohibition are in substance as follows: One Mose Feltner was indicted for murder in the Breathitt Circuit Court at some date prior to October, 1901, and upon his trial was convicted and sentenced to the penitentiary. Feltner appealed to this court, and his case was reversed for errors on the trial. (23 Ky. Law Rep., 1110.) This case was remanded to the Breathitt Circuit Court for a new trial. Feltner gave bond on the return of the case, but at the succeeding term did not appear, and his bond was forfeited. He remained a fugitive from justice until some time in 1904, when he was apprehended, or surrendered himself, and again gave bond for his appearance in that court.

His case was set for trial at the February term, 1905. On the call of the case in the Breathitt court, about February 22, 1905, it was learned that Feltner, who lived in Leslie county, was in jail in Clark county, he having failed to give bond for his appearance in the Clark Circuit Court to answer a charge of contempt for failing to appear as a witness in a civil case tried in that court. It was also learned that one Sam Fields, an important witness for the Commonwealth against Feltner, was also in the Clark county jail on the same charge as that of Feltner; that Fields was either under bond or on recognizance to appear as a witness against Feltner. On motion

of the Commonwealth's attorney the Breathitt Circuit Court made and entered an order appointing a special bailiff to go to Clark county after Feltner and Fields. This order directed the jailer of Clark county to deliver Feltner and Fields to the special bailiff to be by him taken to the Breathitt Circuit Court for the purposes above indicated. A warrant of arrest also seems to have been issued for Feltner. These orders were disobeyed by Boone, the jailer of Clark county, under the advice of his attorney and the judge of the Clark Circuit Court. The judge of the Breathitt Circuit Court issued a rule for contempt against him, and in response thereto he stated that he was advised, as above, and also stated that Feltner and Fields had been summoned as witnesses in a civil action in the Clark Circuit Court some time in the fall or winter of 1904, but had left and failed to testify. Thereupon a rule was issued against them for contempt in disobeying the subpoenas, and they were brought to Clark county and placed in jail in default of bond, to await a hearing on the rule to be tried at the next term of the Clark Circuit Court, which convened in April. He also stated that in disobeying the orders of the Breathitt Circuit Court he meant no disrespect whatever, but refused to obey solely upon the advice of his counsel and the direction of the judge of the Clark Circuit Court. The Breathitt Circuit Court considered this response insufficient, and caused a jury to be empaneled to try him for contempt. This jury brought in a verdict fining him \$500. On the day of this trial the plaintiff appeared in this court, filed his petition and obtained a temporary writ of prohibition against the judge of the Breathitt Circuit Court, prohibiting him from further proceeding to punish him for contempt until the matter could be fully heard by this court. The judge of the Breathitt Circuit Court, on learning of the temporary writ, entered the following order:

"Commonwealth of Kentucky
"v.
"James Boone, Jailer of Clark County. }

"It is ordered by the court that capias pro fine not to be entered on the judgment entered against him for contempt for \$500 until further orders of this court."

Here we have the jailer of Clark county, under orders issued from the Clark Circuit Court and judge of his own county, being commanded to hold these two prisoners in the county jail to await the further orders of that court at its ensuing term for the trial of these parties on a charge of misdemeanor; and at the same time the same jailer is ordered by the Breathitt Circuit Court to deliver up the same prisoners to its special bailiff, to be taken to Breathitt county, one of them to be tried for murder and the other to be sued as a witness against him, and both of these tribunals are of equal power and authority under our laws.

It is apparent that the jailer was acting in good faith and meant no disrespect, and under the circumstances he should not be punished for contempt in acting in disobedience to either of the courts. The error, if any, was not upon the part of the jailer. We are unable to find anywhere in the past history of the State where any such conflict of authority has existed, and the question is before us for the first time. The method pursued by the Breathitt Circuit Court in sending after the accused, Feltner, in order to

try him in accordance with the mandate of this court and on principles consistent with that opinion, was the usual and ordinary method, except, perhaps, as a matter of courtesy, the judge of the Breathitt Circuit Court or his Commonwealth's attorney should have communicated with the judge or Commonwealth's attorney of the Clark Circuit Court previous to the order to the jailer of Clark to surrender the prisoners.

Where a person is charged with two offenses, one a misdemeanor and the other a felony, it had been the usual and proper practice in the administration of law to waive, for the time being, the trial of the misdemeanor in order that the felony charge might be investigated and tried. But even if this was not the proper procedure in the present case the Breathitt Circuit Court had jurisdiction both of the subject-matter of the killing of Fields by Feltner and of the person of the accused long before the failure of Feltner to obey the subpoena in the Clark Circuit Court. It is true that the Clark Circuit Court had jurisdiction of the subject-matter and of the person of Feltner, on the penal charge of contempt. The custody of the body of Feltner was in the jailer of Clark county, an officer of the Commonwealth. Now the question is, should the Breathitt Circuit Court, under the existing circumstances, have had the body of Feltner for trial? The Breathitt court was then in session and the Clark court would not convene until April following.

We are of the opinion that it would have been in better keeping with the proper and orderly administration of the criminal laws of the State for the prisoners to have been surrendered to the Breathitt Circuit Court. If the principle be once admitted that for some misdemeanor another court may take away, even temporarily, the right of the first court to proceed against a person charged with felony, the result will be a most disastrous interference with the orderly administration of justice. Persons charged with a felony will readily avail themselves of the principle to obtain continuances and vexatious delays in their trials. A man under indictment for a felony in one county would step over into an adjoining county and commit some insignificant offense, and be incarcerated in the jail of that county until the term at which he was to be tried for the felony had passed. A departure from the rule of, according to the court having the jurisdiction of a criminal, the right to proceed to try him, and the adoption of the contrary principle that this jurisdiction, though first acquired, may be interfered with until divers and sundry minor offenses be disposed of would indeed be injurious to the proper administration of the criminal law. The question is seriously argued by the counsel for the judge of the Breathitt Circuit Court that this court has not the jurisdiction to grant the writ of prohibition under the facts in this case.

We deem it unnecessary to consider this question as at this time the writ would serve no purpose, even if granted. The Breathitt Circuit Court is not in session, and we are convinced that the judges of the Breathitt and Clark Circuit Courts and the jailer of Clark county were all actuated by proper motives, and did what they thought to be right. The mistake was in the advice given the jailer, which we are convinced will not occur again. The Clark Circuit Court can try Feltner and Fields for the contempt, but

should surrender them to the Breathitt Circuit Court when it is in session and upon demand as indicated.

For these reasons we do not grant the writ.

Writ denied.

Whole court sitting.

WITT, &c. v. MIDDLETON.

(Filed May 4, 1905—Not to be reported.)

1. Land—Patents—Call lines—As the patent under which appellants claim title is superior to the patent under which appellees claim title, the title of the former is superior if it includes the land in controversy, but to compare the patent and survey the calls of the survey is duplicated in the patent, but it must be presumed that the patent was intended to follow the survey, and the repeating of the call in the patent is a clerical error.

2. Same—The proof shows that appellee Middleton settled upon the land in 1868, acquiring it under a title bond from the patentee, and that he and his co-appellee have been living upon and claiming it ever since, and appellant Hensley always acquiesced in the construction Middleton placed upon his deed, and where Hensley conveyed to Frost as being all of the land deeded to me by James Brittain to the foot of Black mountain containing 400 acres, the court only adjudged Middleton the land to the Frost line, the land in controversy being north of Black mountain, and this view of the chancellor seems to be correct.

Clay & Hardin for appellants.

W. A. Brock and N. B. Hays for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Chief Justice Hobson.

On July 5, 1846, James Brittain obtained a patent for 275 acres of land. Appellants claimed under this patent. On May 27, 1868, James Howard obtained a patent for 200 acres, under which appellees claim. As the Brittain patent is superior to the Howard patent, appellants' title is superior to appellee's if it includes the land in controversy. On this question the facts are few and simple. If the Brittain patent is run out according to the calls, extending the last line so as to close the survey, it will include the land in controversy. But if we compare the patent with the survey and plat upon which the patent issued we find that one of the calls of the survey is duplicated in the patent, the reading of the patent being as follows: "Thence S. 85 W. 109 poles to two chestnut oaks; thence S. 49 W. 60 poles to two chestnut oaks; thence S. 49 W. 60 poles to six sugar trees on the mountain at the head of the left hand fork of the Lick branch."

The survey at this point reads thus: "Thence S. 85 W. 109 poles to two chestnut oaks; thence S. 49 W. 60 poles to six sugar trees on the mountain at the head of the left hand fork of the Lick branch."

If the land is run out by the original survey without duplicating the call S. 49 W. 60 poles it gives a body of land the shape given in the plat on the survey and does not include the land in controversy. If we duplicate the call S. 49 W. 60 poles as in the patent it produces a very different shaped

body of land, and will include the land in controversy. It must be presumed that the patent was intended to follow the survey, and certainly there is no reason for repeating the call S. 49 W. 60 poles. The repeating of this call in the patent is merely a clerical error, and the circuit court properly so held.

It follows that appellants have no title to the land in controversy, but it is insisted for them that the action was brought by appellee to quiet his title, and that he must succeed on the strength of his own title and not on the weakness of their title. It is also insisted that the patent of Howard for 200 acres was void as all the land was embraced in an older patent in the name of Smith, Skidmore and Ledford. But appellants do not claim under them. The proof shows that Howard, the patentee, sold the patent boundary to Moses Middleton by a title bond; that Middleton settled upon the land about the year 1868, and that he and appellee, Walter Middleton, who claims under him, have been living on it ever since, claiming it as their own. While there is much in the evidence from which it might be concluded that Middleton's deed does not cover the land, still it is apparent that he always understood that it did, and that appellant Hensley, under whom the other appellant claims, always acquiesced in this construction of Middleton's deed. In February, 1903, Hensley made a deed to W. H. Frost, in which he described the land conveyed to Frost as "being all of the land deeded to me north of the foot of Black mountain by James Brittain, containing 400 acres." The court only adjudged Middleton the land up to the Frost line, the land in controversy being north of the foot of Black mountain. On the whole case the chancellor's judgment seems to be in accord with the right of the matter.

Judgment affirmed.

L. A. BECKER CO. v. ALVEY.

(Filed May 4, 1905—Not to be reported.)

1. Contracts—Writing—Fraud or mistake—Burden of proof—Question for jury—In an action on a written contract made by a drummer on December 17, 1903, for the sale of a soda fountain at an agreed price and upon agreed payments, which writing specified that "this order can not be countermanded, and this is fully understood by the signer, and there are no other conditions or agreements with your salesman except these herein stated, and no claim will be made for any goods not specified herein." The purchaser answered, alleging that "the salesman agreed with him at the time of the making of the contract that he was to have until the 1st day of January thereafter to rescind the order, and agreed to insert this agreement in the writing, but by fraud or mistake he failed to do so, and that he, defendant, at the time he signed it believed it had been so inserted, and within six days after the signing of the contract he notified plaintiff, in writing, that he had declined to accept the fountain," which allegations were controverted. The burden was on the defendant to sustain his plea of fraud or mistake in the writing, and the issue being one purely of fact, was properly submitted to the jury.

2. Sale by agent—Subject to approval of principal—Notice of acceptance—Right to countermand—Where a sale of property is made by a drummer subject to the approval of the principal, it is a mere order for the goods and is revocable at any time at the option of the party giving it until accepted by the principal and notice of such acceptance is given to the purchaser, and

the order may be withdrawn at any time by the purchaser before its final acceptance.

Eaton & Drake and D. G. Park for appellant.

Flournoy & Reed for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barker.

The appellant, L. A. Becker Co., is a corporation engaged in the business of manufacturing soda fountains in Chicago, Illinois. The appellee, W. F. Alvey, is a druggist in Paducah, Ky.

On the 17th day of December, 1903, the appellee, at his store in Paducah, gave to E. B. Davis, a salesman of appellant, an order in writing for a soda fountain to be thereafter delivered to him, the selling price of which was \$1.875. This order was reduced to writing by Davis, and signed in duplicate by the appellee, each party retaining a copy. The writing sets out in detail a description of the fountain, the time and manner of delivery, the cash payment to be made on delivery, and monthly payments thereafter until the whole of the selling price should be paid. None of these details are necessary to be set out here, as they constitute no part of the controversy between the parties.

Among other things, there was printed on the left hand side of the order, in capital letters, the following: "This order can not be countermanded, and this is fully understood by the signer," and on the right hand side was printed: "There are no other conditions or agreements with your salesman, except those herein stated, and no claim will be made for any goods not specified herein."

This order was mailed by the salesman to his principal as soon as signed. On the 23d day of December, six days later, the appellee sent to appellant a letter cancelling the order. To this appellant refused to accede, and some correspondence resulted, appellee insisting he had a right to cancel, the appellant controverting this proposition.

Appellant proceeded to carry out its part of the contract by manufacturing the fountain according to the terms and stipulations of the agreement, and in due time shipped it to appellee, who refused to receive or pay for it. Thereupon appellant was forced to take charge of the fountain, notifying the appellee that it held it at his risk. Appellee persisting in his refusal to pay appellant in accordance with the terms of the contract, it instituted this action to recover the contract price. The answer, among other things, contains the averment that the writing sued on did not contain the whole of the contract between the parties; that at the time the order was given it was agreed between appellee and appellant's salesman that the purchaser should have until the 1st day of January, 1904, in which to cancel the order, if he so desired, and that it was agreed and understood that this should be incorporated in the written contract, but either by fraud or mistake on the part of appellant's salesman, who wrote the contract, this part of the agreement was omitted from the writing; that one of these two statements was true, but appellee did not know which. This was denied by appellant, and

the case coming on for trial was submitted to the jury, who found a verdict in favor of appellee; and from the judgment predicated on this verdict this appeal is prosecuted.

Upon the trial of the case the court held that, under the pleadings, the burden of proof was on appellee, there being only one issue, whether or not, either by fraud or mistake, the writing did not contain the whole agreement between the parties. On this issue the appellee, who testified for himself, deposed, positively, that it was agreed between him and Davis that during the time between the 17th of December, 1903, and the 1st day of January, 1904, a period of fourteen days, he was to have the right to cancel the order for the fountain; that there was a probability that he would change his business the first of the coming year, and if this change took place he would have no use for the fountain, and that he would not have purchased it without this condition in the contract; that the order was written by Davis, and he signed it, supposing that the right to cancel was embraced therein; that, although he kept a duplicate of the original, he did not read it, or know of the omission. Two of his clerks deposed to facts which tended to corroborate appellee; they both heard him insist upon the right to cancel, but did not see the order written. On the other hand, Davis deposed with equal positiveness that he made no such agreement with appellee. He admitted that appellee wanted to make such an agreement, but stated that he informed him that, under the orders of his employer, he had no authority to do so, and exhibited to appellee a letter from his company forbidding the acceptance of contracts with conditional sales in them. The issue thus made was one of veracity. There was no room for mistake. If appellee's evidence was to be believed, the omission from the written contract of the right to cancel was a deliberate fraud on the part of Davis, the salesman. If, on the other hand, Davis was right, appellee swore falsely.

At the close of the testimony the court refused all instructions tendered by either side, and gave the following on his own motion:

"Gentlemen of the jury—You will find for the plaintiff, L. A. Becker Co., the amount sued for in the petition, to wit, \$1,375, unless you shall believe from the evidence in this case, that it was mutually agreed between defendant, W. F. Alvey, and the witness, Davis, as agent and traveling salesman of the plaintiff, as a part of the contract of sale of the soda fountain in the controversy in this suit, that defendant should have the right to countermand the purchase of said soda fountain, at any time before the 1st day of January, 1904, and that defendant, Alvey, relied on plaintiff's said agent to insert such terms in the written contract sued on; and that said agent, through fraud or mistake on his part, failed to insert said terms in the written contract of sale between plaintiff and defendant, and that defendant Alvey did not discover, and by the use of ordinary diligence, such as an ordinarily prudent man would have used under like circumstances, could not have discovered, such failure on the part of said agent before he signed and delivered the writing sued on to plaintiff's agent, then the law would be for the defendant, and you will so find."

This instruction is certainly as favorable to appellant on this branch of the case as it deserved, and this being true, it is not necessary to notice or

discuss those tendered by the parties and refused by the court. By it the jury were told, peremptorily, to find for the appellant unless they should believe that, by fraud or mistake, the agent of appellant failed to insert in the order the agreement that appellee should have the right to countermand the purchase of the soda fountain at any time before the 1st day of January, 1904, and that the appellee relied on the agent to insert the terms named, and did not discover, and could not have discovered, by the exercise of ordinary diligence the omission.

We do not feel that it is necessary to discuss the merits of the testimony adduced upon the trial. As usual, where the facts are in controversy, much could be said on either side. The issue was one purely of fact, and the jury were the final arbiters as to the facts. There is another point in the case which seems fatal to the right of appellant to recover; the order given by appellee to its salesman did not close the contract; it was a mere order which had to be approved by the bookkeeper of the company in Chicago. On this subject Mr. Nash, the bookkeeper in question, who alone deposed as to it, was asked this question:

"Q. State who, in person, accepted the written agreement sued on for your company, and what authority, if any, had Mr. Davis of it except the delivery of it for your company, and State whether or not the delivery to him was in any manner subject to the approval of any one else for your company."

"A. I approved the contract myself. Mr. Davis acted as our agent in making the contract, and I approved it on behalf of the company, and the delivery of the contract to Mr. Davis and acceptance by him was subject to the approval of the company through me."

On cross-examination he was asked:

"Q. If the written agreement referred to and accepted by Mr. Davis was in any manner subject to the approval of any one else for your company, state whose approval it was subject to."

"A. The written agreement referred to and accepted by Mr. Davis was subject to my approval on behalf of the company, and to no one else's."

It is not contended for appellant that it ever gave appellee notice that it had accepted the contract before it received his letter countermanding the order, and it does not definitely appear at what precise date appellee concluded to accept the order. On the back of the contract is indorsed "approved," and that it received a commercial report on the 23d day of December, and gave the factory order on the same date. As said before, however, of this appellee was not notified. The order did not become irrevocable upon delivery to the salesman, Davis; he had no authority to accept it for his company; he could only receive and forward it for approval to the home office. The rule as to a mere order for goods, such as that involved in this case, is that it is revocable at the option of the party giving it until acceptance and notification by the other party.

In the case of *Charles Brown Grocery Co. v. Becket, &c.*, 25 Ky. Law Rep., 393, it was said: "The general rule is that the acts of an agent bind his principal within the scope of his apparent authority, but that the principal is never bound where the person dealing with the agent knows, or has reason to know, that the agent is exceeding his authority, or is perpetrating

a fraud on his principal. The general rule in regard to the authority of commercial travelers is thus stated in the Am. & Eng. Enc. of Law, volume 6, page 227, 2d edition: 'In the absence of special authority to bind his principal the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal.' It has been held that when the purchaser completes his transactions with the drummer no binding contract has been made, nor any sale, absolute or conditional; the purchaser may countermand his order at any time before the goods are shipped, or the house may refuse to accept the order; that it is a mere proposal to be accepted or not as the house may see fit, and may be withdrawn by the purchaser at any time before its final acceptance. (McKindley v. Dunham, 65 Wis., 515; Bensberg v. Harris, 46 Mo. App., 404.)'

In the case of John Matthews' Apparatus Co. v. Renz & Henry, 22 Ky. Law Rep., 1528, which was similar to that at bar, the rule on the question under discussion was thus stated: "We consider that the main and only necessary question for us to determine is whether the transaction in question was a contract, or merely an offer or order, which either party was at liberty to decline before final acceptance. The indisputable facts are that Russell, the traveling salesman of appellant, was a 'drummer,' a term that has come to have a fixed and proper place in our language, as well as in our law; that this transaction was the usual taking of an order by the drummer, and transmitting it to his 'house' for action, approval or rejection. The custom of so doing business is of such long standing, so extensive and so important in the commercial world, especially in the United States, that the courts will take notice of it. They have done so, and this court has. In the Charles Brown Grocery Co. v. Becket, 22 Ky. Law Rep., 894, we recognized in this State what appears to be the general rule in most or all of the States, quoting it in this language: 'In the absence of special authority to bind his principal the drummer can merely solicit and transmit the order, and the contract of sale does not become completed until the order is accepted by his principal.' Any other construction of these transactions would tend to so materially hamper and cripple this important means of conducting mercantile business, as to well nigh destroy its effectiveness, now so generally understood, employed and recognized. The blank form used in the case at bar, executed in duplicate, one signed by the proposed buyer (which was forwarded by the drummer to his principal), the other signed by the salesman and delivered to the proposed buyer, bore a customary memoranda of what had occurred to evidence the contract should the minds of the contracting parties finally meet. It was in no sense a closed transaction, and the correspondence between the parties shows conclusively that neither of them then regarded it as closed."

In 9 Cyc., 184, it is said: "On the other hand, an offer, if not under seal, may be revoked or withdrawn at any time before it is accepted, and the acceptance communicated when communication is necessary, for until then there is neither agreement nor consideration. A bid at an auction, which is an offer to purchase the property put up, may be withdrawn at any time before the hammer goes down. An order given to an agent who has no authority to accept it, but only to forward it to his principal for approval, is

revocable at any time before it is accepted by the principal and the acceptance communicated to the offerer. Where an offer is accepted before it is revoked the contract is as obligatory as if both promises were simultaneous. Here, as in other like cases, if both parties meet, one prepared to accept and the other to retract, whichever speaks first will have the law with him; and this question is one of fact to be decided by the jury. The offerer may revoke his offer before it is accepted, even though he has expressly declared in it that he will not, or has, by the very terms of the offer, allowed the offeree a certain number of days in which to accept it, as in the case of options or refusals, unless the offer is under seal, or the agreement to hold it open is supported by a consideration. But the offer is a continuing offer until it is withdrawn, and the withdrawal communicated, and if it is accepted, and the acceptance is communicated before the offer is withdrawn and notice thereof given, and within the time expressly or impliedly limited, the agreement is complete, and the offer is no longer revocable."

Until the offer to purchase was accepted there was no contract between the parties, it being the rule that contracts must have mutuality to be binding. There was no consideration for the agreement that the offer should not be revoked. If A. proposes to B. to sell him property at a given price, and states that B. is to have a given time within which to accept the proposition, this is called an option, and in effect contains the agreement that for the given time the offer is irrevocable; but unless there is a consideration for the option it is revocable, nevertheless, by the offerer at any time before the acceptance of the offeree. The case of *Litz v. Goosling*, 98 Ky., 185, involved an option given to purchase mineral lands at a specified price, for a given time, and in an action to enforce this contract, it was said: "Reciprocity of obligation is, however, essential to the validity of a contract, and it is a general rule that in order to be binding upon or enforceable by one party, it must be so as to both. This is the very essence of it. The act to be done upon the one hand need not necessarily be simultaneous with the consideration paid, or to be paid, upon the other, but it is elementary that mutuality of obligation is, in general, necessary to uphold a contract. If one agrees, at the option of another, to convey to him land at a certain price, and the consideration is unexecuted, such an agreement is not enforceable, because it rests altogether with one party whether it shall be carried out. There is no mutuality of obligation in it. A mere naked option to one party, where no advantage or disadvantage, necessary as a consideration to support a contract, moves between the parties, is not enforceable. It is a nudum pactum because there is not a legal obligation upon each side to perform. (*Smith, &c. v. Canaler*, 88 Ky., 367; *Bank of Louisville v. Baumeister, &c.*, 87 Ky., 6.) If the contract for an option to purchase real estate at a certain price within a certain time be based upon a sufficient consideration, which may consist, of course, either in an advantage moving to the one party or a disadvantage to the other, then it is enforceable; but where a mere naked option, destitute of consideration, is given to one, it is not enforceable, because there is no mutuality of right and remedy."

In the case at bar the proposition of appellee was to buy a soda fountain from appellant at a given price, with the express stipulation that this offer would not be withdrawn until appellant had exercised its option of accept

ance. Appellant was not bound by this contract until after it chose to accept it, and until it was bound appellee was not bound. There was no consideration for the additional and independent contract that the offer was to remain open until after appellant exercised its option of acceptance. This being true, it follows that until the notification to appellee by appellant that it had accepted his offer there was no contract between them, and appellee had the right to withdraw his proposition to purchase. There having been no contrariety as to the essential facts on this branch of the case, appellee was entitled to a peremptory instruction in his favor.

Judgment affirmed.

CHESTNUT v. GREEN.

(Filed April 25, 1905.)

Sale of timber—Written contract—Right of purchaser to remove timber—Where a written contract is made for the sale of all the timber on a tract to be removed therefrom in fifteen months, the purchaser acquired no right to cut or remove any timber from said land after the expiration of fifteen months from the date of the contract.

Jas. M. Hays for appellant.

James Sparks for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from the judgment of the Laurel Circuit Court in favor of appellee for \$200 as damages against appellant for cutting timber trees on a certain tract of land. The appellee claimed to have purchased the timber on a tract of land owned by G. W. Brewer and wife. The written contract, as produced by appellee in evidence, is to the effect that for the consideration of \$58.30, agreed to be paid by appellee to the Brewers in lumber at certain prices, the Brewers conveyed to him all the timber on the land which they owned, and that appellee was to have, as alleged by appellee, thirty months in which time to remove the timber from the land. This contract was dated May 31, 1901.

Appellant purchased and received a conveyance from the Brewers to this land upon which the timber was situated December 26, 1903, and there was no reservation in the deed of the timber sold to appellee. Appellant after this cut the timber from the land and sold it, and appellee brought this action against him for damages, claiming that the timber was worth \$650. Appellee upon the trial did not show by his evidence, nor even give an opinion as to the number of trees that stood upon this land or the amount of lumber the trees should have made. He only stated that the poplar was worth \$6 per thousand and the other timber \$4 per thousand. Appellant proved that all the trees on the land only made eighty five thousand feet of lumber, the poplar worth \$2 per thousand and the other \$1 per thousand feet. Appellant stated he knew of the contract of sale by Brewer of this timber to appellee, but understood the limit given in it to the appellee to get the timber off of it to be fifteen months, and that his purchase was long after that time had expired.

Upon these facts the court gave the following instruction: "Gentlemen of the jury, if you shall believe from the evidence that the plaintiff, James C. Green, purchased the timber in this controversy from George and Sallie Brewer by the contract introduced in evidence, and that plaintiff was to have either fifteen or thirty months in which to remove such timber, and that the defendant knew of such purchase of such timber by plaintiff, and then went upon the land in controversy and cut and removed any timber embraced by such contract, then you shall find for the plaintiff by the way of damages the fair cash value of the timber taken, not exceeding \$650. If you do not believe, as required by instruction No. 1, you will find for the defendant."

Upon one point the instruction is erroneous and prejudicial to appellant, in that the court stated that the appellee was entitled to recover whether he had fifteen or thirty months to remove the timber from the land. The appellant introduced Brewer, who made the contract with appellee, who stated that the written contract with reference to the sale of this timber to appellee only gave him fifteen months within which to remove the timber from the land, and that the word "fifteen" had been erased, or partially erased, since the execution of the contract, and the word "thirty" inserted, making it read thirty months. And also that the contract stated that he, Brewer, was to pay for spruce pine lumber at \$6.50 per thousand and "\$6.50" had been erased and "\$7.50" had been inserted, and that these changes had been made without his authority. It appears that the witness pointed out these changes, he having the original writing present. There was other evidence introduced to corroborate this witness' statements.

We presume the lower court took the view that the time in which appellee should remove the timber from this land was not material as there was no provision in the contract stating to whom the timber should belong in case it was not removed within the time named. In this we think the court was mistaken. In the contract it was expressly stated, according to appellant's contention, only fifteen months to remove the timber from the land. Brewer still owned the land and permitted appellee to enter upon it during the time named to get the timber. Under the contract, if appellee had entered upon the land after the expiration of that date without the consent of Brewer, he would have been a trespasser. In the case of *Boisauvin v. Reed*, 1 Abb., 161 N. Y., a contract similar to the one before us was under consideration. There the party under the contract was given ten years to remove the timber from the land, and in the tenth year he cut many logs that he was unable to remove within the period named, and he afterwards undertook to remove them and the owner of the land enjoined him; and in discussing that case Judge Mason, of the Supreme Court, said: "I am not able to distinguish this case from the case of *Howard v. Lincoln*, 18 Me., 122, where the plaintiff sold to one Smith all the pine timber, white and hard, fit for boards, logs, etc., which was then standing, lying or being on certain premises, describing them, the said Smith to have the term of three years from the date of the contract to haul the timber. In that case the court held it was only a sale of the timber which the vendee might remove within the three years, and no more." This case was appealed from the Supreme Court to the Court of Appeals, and Judge Leonard, of the court,

said: "The defendant cut down more timber than he could remove within his term. He knew that his right to enter and carry away expired at a particular day. He attempted to overreach the letter of his covenant, and must be allowed to bear his loss without remedy." (Pease v. Gibson, 6 Greenl., 81; Warren v. Leland, 2 Barb., 622, N. Y.)

In the case at bar it was agreed that the Brewers did not sell to appellant the timber in controversy until several months after appellee's contract had expired, if appellant's contention concerning the fifteen months' limitation is correct, and as appellant introduced evidence to sustain his contention, the court should have instructed the jury on this question, and in effect should have told the jury that if they believed from the evidence that in the sale of the timber by Brewer to appellee he was limited to fifteen months within which to remove the timber they should find for appellant, but if the limit was thirty months they should find for appellee the value of the timber as it stood in the tree.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

HOGG v. LUSK.

(Filed April 28, 1905.)

Land—Boundary—Conflicting surveys—How corrected—Where there are erroneous calls and an omitted line in a survey of land, they should be corrected by the plat and the patent established. In ascertaining a boundary of a tract of land where there is an apparent lap of an adjoining tract, they should be corrected by the original plat and patent established, that the intention of the parties in making the survey may be effectuated, and the mere mistakes of the officer in transcribing the field notes should not be allowed to frustrate this intention if there is evidence by which they may correct it.

W. F. Hall, John Baker and Robt. L. Greene for appellant.

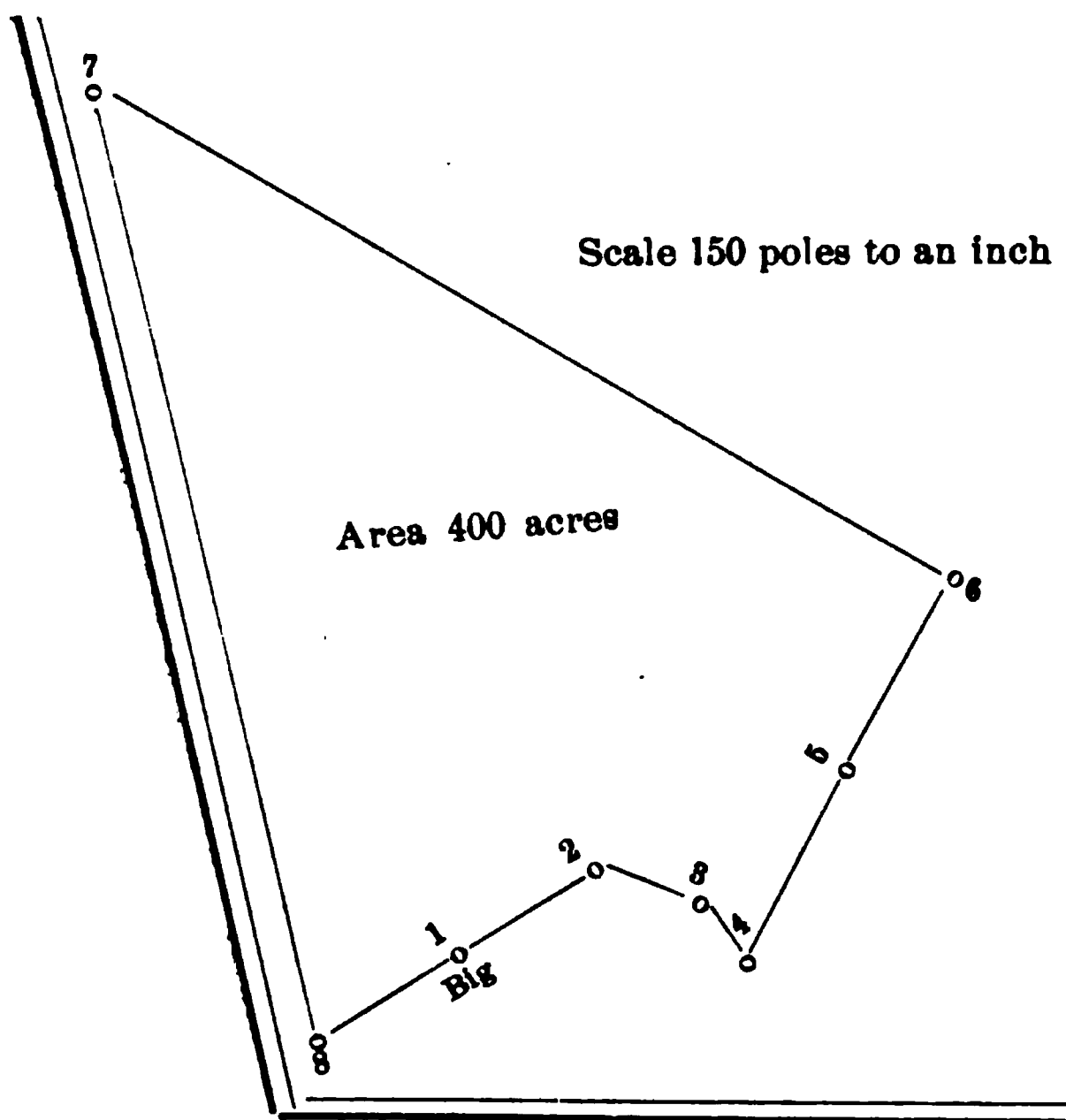
E. E. Hogg for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Barker.

This controversy arose from a dispute as to the title of land, and depends for adjudication upon the validity of a patent for 400 acres issued to Allen Christian in 1844. In 1850 a patent was issued to the appellee, John W. Lusk, for 800 acres. Both of these grants are in Perry county, Kentucky, and are situated near each other. The question is, do they lap? If so, the land within the interference belongs to appellant, as the remote vendee of Allen Christian, the patentee of the elder grant. The land involved is unenclosed and unoccupied, and no title by adverse possession was shown by either claimant. The procedure was a bill in equity by appellee to quiet title to his 800 acres. The answer claimed title in appellant to the extent of the interference. The chancellor decreed that the patents did not lap, and that appellee's title to the whole boundary of his patent be quieted, with appropriate restraining orders. From this judgment this appeal is prosecuted.

Appellant admits, and it is obviously true, that if his patent is sought to be established by the courses and distances of its calls it runs wild, and can in no way be so closed as to constitute a valid muniment of title; and if these calls must be adhered to the judgment of the chancellor must be affirmed. But he insists that certain of the calls are evidently clerical errors, which can be corrected by reference to the plat in the surveyor's certificate, and that when so corrected his patent will be established so as to embrace from 80 to 100 acres of the land within the lines of appellee's 800-acre patent. The calls in the surveyor's certificate are the same as those in the patent, and, therefore, contain the same errors, and if they are to be corrected, this must be done alone by the plat drawn by the surveyor. The plat presents the following figure, and is drawn to a scale of 100 poles to the inch:



On this plat we have numbered the corners 1, 2, 3, 4, 5, 6, 7 and 8, No. 1 being the point of beginning. The following are the calls from the surveyor's certificate: "Beginning at a white oak and two dogwoods on the north of said creek (Bull creek of Kentucky river); thence N. 45 E. 62 poles to a chestnut beginning of a survey in the name of said Christian; then with a line of the same S. 55 E. 46 poles to a white oak, S. 15 E. 28 poles to a beech, N. 55 E. 120 to a stake, N. 50 E. 100 to a stake, N. 60 E. 500 poles to a stake; thence S. 15 W. 460 poles to the beginning." The first, second, third and fourth calls are not in dispute, nor is there any trouble with five and six, as it is clear there is a corner nearly halfway between four and six which should be No. 5, and we have so marked it on the plat. In other words, the

two calls, N. 55 E. 120 and N. 50 E. 100, carry from the fourth to the sixth corner on the plat, there being only a variation of five degrees in their courses, which is not visible, on the line, but the two distances added make 220 poles, which, according to the scale, is the distance from No. 4 to No. 6 on the plat.

In the line from six to seven comes the first difficulty. This call is N. 60 E. 500 poles, and if adopted renders any further attempt to establish the patent, under which appellant claims, abortive. A reference, however, to the surveyor's plat shows that instead of this call being N. 60 E. 500 poles, it should be N. 60 W. 500 poles, there evidently being a mistake in the transcription of the field notes. A second error is found in the line from seven to eight. This call in the surveyor's certificate and in the patent is S. 15 W. 460 poles to the beginning. The plat shows this to be error, and that "west" in the call should be "east." But with these corrections the patent does not close, for the want of a line from eight to one, the point of beginning. This line appears on the surveyor's plat, and thus establishes a third mistake in the transcription of the field notes. This brings us to the question of law, which is decisive of this case. May we resort to the surveyor's plat, which is a part of the record, to correct the calls both of the certificate and the patent based upon it?

In the case of *Alexander v. Lively*, 5 Mon., 159, there was involved a question almost identical with the one at bar. There both the patent and the certificate described a figure of five lines and angles, while the plat annexed to the certificate of surveyor presented the figure as one of six lines. The calls in the certificate and patent would not close the figure, and unless these could be corrected alone by the plat the effort to establish the patent failed. The court said: "Thus the calls of the patent and certificate alone go far, when all the calls are taken together, to point out what and where the mistake is, that is, that the surveyor omitted an entire line. But we are not left to decide the case here, for when the plat is inspected it exhibits to the eye at once a figure precisely corresponding with the one which we have construed by inserting the omitted line, and indeed exhibits the third line itself, which was the one omitted."

"The plat is a necessary part of the surveyor's report required by law, and is, therefore, proper evidence in ascertaining the position of the land and what is included, and must settle the figure in this case, and prove the mistake. * * * We, therefore, conclude that the plat in this case must be held sufficient under these circumstances to supply this omitted course, and to correct the silence or omission of the certificate and patent, and that the court below erred in refusing to supply this omitted line and sustain the patent, and the judgment must be reversed."

In the case of *Mercer, &c. v. Bate, &c.*, 4 J. J. Mar., 834, on the subject of the value of the plat in the surveyor's certificate to correct errors in the patent, the court said: "The official acts of the surveyor are to be accredited. The court must presume that he did his duty, and that his report is accurate, the more especially as there is nothing which can tend to even a suspicion that there was any mistake or fraud. The original plat is not only admissible as evidence, but it is intrinsically one of the most potent facts which can be adduced; and hence it has been often admitted by the court as always either preponderating or alone conclusive."

In the case of *Steele's Heirs v. Taylor*, 8 Mar., 225, on the same subject, it was said: "If the lessors of the plaintiff had a right to resort to the original plat and certificate of survey, for the purpose of supplying the defect or omission in the description of the tract contained in the patent, there is no difficulty in the case, and we can perceive no principle which would be violated in permitting them to do so. The survey is matter of record of equal dignity with the patent itself, is referred to by the patent, and is the only source from which the description of the boundaries contained in the patent was originally taken."

In the case of *Bruce v. Taylor*, 2 J. J. Mar., 160, the court said: "In this case there is a manifest mistake in the calls of the patent for course and distance. If they must be literally pursued for ascertaining the boundary, much of the land which the patent will be made to include will be covered by the Ohio river, and some of it will be in the State of Ohio. It was not intended to appropriate the river, nor land on the north of it; it was not practicable to do either. Then here is a plain mistake in the patent; how is it to be rectified? There must be some deviations from the calls, and consequently some other line than that which would be described by them must be established. This line is evidently the river. Disregard the calls for course and distance, and no rational mind can doubt that it was the intention of the government, the patentee and the surveyor, to bound the 8,200 acres on the north by the river. These calls must be disregarded, because they are incongruous and false. * * * But in addition to all this the original survey is exhibited, and shows the river as the northern boundary. This is decisive. The survey is the foundation of the patent. It is of record, and in that respect equal in dignity to the patent. It does not contradict, but only renders fixed and certain, some of the calls of the patent. The survey may be used to aid in supplying omissions, or in correcting mistakes in patents."

In the case of *Patrick v. Spradlin*, 19 Ky. Law Rep., 1038, all of the foregoing cases were reviewed and approved, and the principle of correcting the calls of the patent by the surveyor's certificate upheld.

In the case of *the Bell Co. Land and Coal Co. v. Hendrickson*, 24 Ky. Law Rep., 371, the principle is reaffirmed that the original plat of the survey may always be used in evidence to show the position of the land, and is evidence of the most potent kind in determining the original location of the lines and corners.

The case of *Zimmerman v. Brooks and Carter County v. Brooks*, 25 Ky. Law Rep., 2284, involved the validity of the act establishing the county of Beckham, and it was insisted that the act was void because the boundaries of the proposed county would not close, and in fact included part of the State of Ohio. The court, through Judge Hobson, said: "The act must be treated like a patent, and will not be rejected as void because of a mistake in one of the calls, if from the whole act what was meant can be reasonably determined. The rule is that the court will inspect the whole act, and if the actual intention of the legislature can be thus obtained, the false description will be rejected or words substituted in the place of those used by mistake, so as to give effect to the law; thus south may be read for north, or east for west in a call where, from the act as a whole, the mistake is ap-

parent; for it is a matter of common knowledge that mistakes of this character are sometimes made in transcribing. (Palms v. Shewano County, 61 Wis., 211; Rabun County v. Haversham County, 79 Ga., 248.) In the latter case the word 'river' in the enrolled bill was read 'ridge,' it being manifestly a clerical error. It is not presumed that the legislature intended to include in the county part of the State of Ohio. The calls may be reversed, as one line in the survey is of as much dignity as another, and if, on all the facts, a mistake in one of the calls is manifest, the actual intention of the legislature should not for this reason be disregarded. (Creech v. Johnson, 25 Ky. Law Rep., 657.)"

It must be presumed that the State, the surveyor and the grantee intended to establish a valid patent, and not to do merely a vain and useless act; and, therefore, we must conclude that the two erroneous calls, and the omitted line, which make the work abortive, should be corrected as shown by the plat, and the patent established. We know that such mistakes are readily made, and easily escape detection when read over. But when we observe the completed figure of the plat, which shows what the surveyor intended to accomplish by his calls, there is no room for mistake; an omitted line is detected by the eye at a glance, and an erroneous direction wholly destroys the figure. By the aid of the plat we have no difficulty in correcting the manifest error made in transcribing the field notes. The principle is, that the intent of the parties must be effectuated, if possible, and the mere mistakes of the officer should not be allowed to frustrate this intention if there is evidence by which they may be corrected. This evidence we have in the surveyor's plat, which plainly points out the errors.

The patent of appellant, when thus corrected, clearly laps on the Lusk patent, and to the extent of the interference the land is the property of appellant. As the judgment of the chancellor is at variance with this conclusion it is reversed, with directions to dismiss the petition.

JOINER, &c. v. TRAIL.

(Filed May 4, 1905—Not to be reported.)

1. Lands—Defect of title—In this action to enforce lien for unpaid purchase money for land the defense interposed was that the conveyance was without reservation, and that after accepting the deed it was ascertained that certain mineral rights in a former conveyance had been reserved and a counterclaim for their value was pleaded. Appellee admitted the defect of title, but pleaded that he had put appellant Joiner in possession, and that he had not been disturbed or evicted; that the land was conveyed to him by deed of general warranty, and that his vendor held by such deed, and that in these deeds there was no reservation of mineral rights; that he had no notice of such a claim for mineral rights, and offered to rescind the sale, and on final hearing the court adjudged a rescission of it. Held—The appellant is in no position to complain of the judgment. There was no fraud in the transaction, and no allegation of insolvency on the part of the grantor.

2. Same—The rule is that where the vendee has accepted a deed he cannot, when sued for the price, defend on the ground that the grantor's title

was defective, unless the grantor is insolvent or a nonresident, or has been evicted by a paramount title. In such cases he must look to the warranty for such damages as he may sustain.

Hendrick & Miller and J. E. Hodge for appellants.

Bush & Grassham for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee Trail conveyed to appellant Joiner a tract of land in consideration of \$800. Joiner paid \$810 of the purchase money, and failing to pay the remainder Trail filed this suit against him to recover on the notes and to enforce the lien on the land. Joiner answered, alleging that Trail represented to him that his title to the land was good, and that he accepted the deed believing this to be true, but as he had since learned Trail did not own one half of the minerals, gas and oil in the land; that the land had formerly belonged to A. E. Edwards, who, on December 11, 1888, had conveyed it to John F. Schaefer reserving in the deed a one half interest in all the mineral rights in the land, including oil and gas; that the one-half interest in the mineral rights was of value at least \$1,200. This he pleaded as a counterclaim, and prayed judgment over against Trail. Trail replied, admitting the defect of title set up in the answer, but pleaded that he had put Joiner in possession of the land, and that he had not been disturbed in any way or evicted; that the land was conveyed to him with general warranty by James Threlkeld, who held a warranty deed from John Lockhart, and that Lockhart held a warranty deed from George Aydelott, who bought it from Schaefer, and that in none of these deeds after the deed to Schaefer was there any reservation of mineral rights, the deed from Schaefer to Aydelott having been made on December 19, 1888, and the land having been held since then by the various purchasers as their own; that he had no notice of the claim of Edwards to one-half of the mineral rights when he sold to Joiner. He offered to rescind the sale to Joiner, and pleaded that he had so offered as soon as he learned of the defect in the title. On final hearing the court rescinded the sale and Joiner appeals, insisting that he was entitled to his bargain and that the chancellor erred in rescinding the contract.

The court based his judgment upon the ground that it was impossible from the evidence to determine whether there are minerals, oil or gas in or under the land, or to determine whether the defendant had been damaged anything by the fact that Edwards reserved one-half of the minerals in the land, and being unable to so determine, he concluded that as the defendant was unwilling to take the land at the price he had agreed to pay for it and the plaintiff was willing to rescind the trade, that equity required a rescission.

We do not see that appellant is in a position to complain of the judgment. The evidence shows no fraud in the transaction. There was simply a mistake of both parties as to the title. Trail held a warranty deed to the land, and conveyed it as it was conveyed to him. The evidence is purely speculative as to the value of the mineral rights, and it would indicate that the probabilities are that these rights are without value. Appellant had accepted a warranty deed for the property; there was no allegation of insol-

venancy or nonresidence on the part of the grantor and no proof of this. He had not been evicted or disturbed in any way and may never be disturbed. The rule is settled that where the vendee has accepted a deed he can not, when sued for the price, defend on the ground that his grantor's title was defective unless the grantor is insolvent or a nonresident, or he has been evicted from the premises by a paramount title. In such cases the rule is that he must look to the warranty for any damages he may sustain. (Hieronymous v. Hicke, 26 Ky., 701; Upshaw v. Debow, 70 Ky., 442; Buford's Adm'r v. Guthrie, 77 Ky., 677; Smith v. Jones, 97 Ky., 670.)

It is true that a vendee of land where there is a deficit may offset the value of the deficit against the notes when sued for the price, or recover therefor in an independent action where he has paid the price. But in those cases there can be no eviction, and there could be no recovery at all if the rule were otherwise than as stated. In those cases the vendee has all that he bought, but it turns out that a mistake was made by the parties as to the quantity of land contained in the boundary. The rule there announced is only an application of the more general rule allowing a recovery of money paid under mistake. But the plea here is that the defendant has not title to all that he bought. It is simply a case of defective title as to a part of the land, for the land includes all that is under it.

There is no cross appeal, and the judgment being more favorable to appellant than he was entitled to, is affirmed.

AETNA LIFE INSURANCE CO. v. SUGG.

(Filed May 5, 1905.)

Life insurance—Default—Paid-up policy—Demand—Limitation—S. took out a life policy for \$5,000 in appellant company on the twenty payment plan, payable to his wife, the annual premium being \$203.90, on which he paid nine annual payments and defaulted, and died four years and eleven days after making the first default. The policy under its terms gave the insured after making three annual payments, the right to surrender his policy and demand a paid-up policy within twelve months after making default, which insured failed to obtain. The beneficiary within five years after the first default demanded that such paid-up policy be issued to her for \$2,150, which appellant refused and offered her the "legal reserve," amounting to \$1,190, which she refused. Held—That she is entitled to recover the value of the paid-up policy, \$2,150, as though it had been applied for by the insured within twelve months after the first default in the payment of the premium.

Thum & Clarke for appellant.

H. S. McCutcheon and Sam D. Hines for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Settle.

Henry H. Sugg, of Logan county, at forty-five years of age procured on his life what is called a twenty-pay policy of insurance for \$5,000 in the appellant company, and the annual premium on which was \$203.90. He paid nine annual premiums, but failed to pay any subsequent premium maturing before his death, which occurred four years and eleven days after the

first default in the payment of premium. After his death, and within five years of the time of the first default in the payment of premium, his widow, the appellee, Mary E. Sugg, beneficiary in the policy, demanded of appellant that it issue to her a paid-up policy for \$2,150, or pay her that sum as provided by the terms of the first policy, and her demand not being complied with, she brought suit against appellant to recover of it \$2,150, the value of the paid-up policy, as of the death of the insured.

The answer of appellant denied that appellee was entitled to a paid-up policy for \$2,150 or any other sum, or to recover of it that sum, or any other, as the value of such policy, but admitted that she was entitled to receive what is designated in the policy issued on the life of her husband as the "legal reserve," amounting to \$1,198, which it paid into court and tendered appellee in satisfaction of her claim, but which she refused to accept. The lower court sustained a demurrer to appellant's answer, and it failing to plead further judgment was rendered in appellee's behalf for \$2,150, as the value of a paid up policy, and of that judgment appellant now complains.

Sections 2 and 3 of the policy issued by appellant on the life of Henry H. Sugg contain the provisions bearing on the questions presented by the record. They are as follows:

"Section 2. When the premiums of this policy have been paid as they become due for three years or more, and default thereafter occurs in the payment of any premium, a paid-up nonparticipating stock policy will be issued in accordance with the printed table on the reverse of this page, provided this policy is surrendered and returned to this company and application made for said paid-up policy within twelve months from the time of the first default of the payment of premium, otherwise this policy shall become and be null and void, except as provided in section 3 of these conditions; and in determining the amount of paid-up insurance to be issued the premiums paid for entire years only will be considered.

"Section 3. In every case where this policy shall be or become void, if the premiums for three entire years have been paid, the legal reserve at the end of the last policy year for which the entire premium has been paid, calculated according to the actuaries' table of mortality and 4 per cent. interest shall not be forfeited to said company, but the same shall be due and payable ninety days after satisfactory proof of the death of the said insured."

It is contended by appellant that though the insured under section 2 of the policy would have been entitled to a paid-up policy for \$2,150 if he had applied for it within twelve months after the first default in the payment of premium, as he failed to do so the policy became null and void, notwithstanding which, under the condition expressed in section 3, he automatically became entitled to the legal reserve at the end of the last policy year for which the entire premium had been paid, calculated according to the actuaries' table of mortality and 4 per cent. interest, payable in ninety days after satisfactory proof of the death of the insured. In other words, it is appellant's contention that two substantial surrender values are provided in the policy, and that where this is the case, and one of them may be had if applied for within a given time, but is not applied for within such time, then the other surrender value must take effect. The limitation of time is valid and should be enforced as any other condition of the contract. In

support of this view appellant cites the cases of *Crutchfield v. Union Central Life Insurance Co.*, 28 Ky. Law Rep., 2300; *Drury v. New York Life Ins. Co.*, 25 Ky. Law Rep., 68; *Mutual Benefit Life Ins. Co. v. Howey*, 25 Ky. Law Rep., 1992; *New York Life Ins. Co. v. Minken*, 25 Ky. Law Rep., 8118; 2 May on Insurance, section 844, b. note.

In each of the cases cited the policy allowed the insured in payment of premium, after the third premium had been paid, in the event of default, to have his legal reserve applied in payment of other paid-up insurance, if applied for in a given time and the first policy surrendered; but if no demand was made for such paid-up insurance in the specified time, then the reserve was applied by the terms of the policy to the purchase for the insured of extended or term insurance, payable after the death of the insured, if such death should occur within a limited time after default in payment of premium; that is, the insured had two options which, by the terms of the policy, had to be exercised within a given time, consequently time was of the essence of the contract. But while the failure of the insured to surrender the old policy and demand a paid-up policy within the specified time constituted a bar to his right to thereafter demand a paid-up policy, it did not forfeit his reserve (i. e., that portion of the annual premiums the company is by law required to set apart for the payment of the policy at a certain date, or at the death of the insured). The failure to demand the paid-up policy was treated, however, as an election on the part of the insured to take the term or extended insurance which thereupon automatically went into effect.

The policy in the case at bar is unlike those involved in the cases supra. Under its provisions the reserve of the insured could be used by him in the purchase of but one kind of insurance, the paid-up life, therefore, he had but one option, which was to surrender the policy and demand of the company a paid-up policy. His failure, however, to make such demand did not forfeit the reserve or authorize its application to the purchase of extended or term insurance; it was simply retained by the company until his death.

Section 3, in the policy, can have no effect until "the policy shall be or become void," as provided by section 2.

Should it be held by this court that the failure of the insured to demand a paid-up policy within twelve months after default in payment of premium rendered the policy void, it would result in confining appellee's recovery to the amount of the legal reserve, which being much less in amount than the value of a paid-up policy, would in effect cause a forfeiture to the extent of the difference in these amounts.

This court has in recent years, in numerous cases, held that five years is a reasonable time in which a demand might be made for a paid-up policy or its value. (*Washington Life Ins. Co. v. Mills*, 23 Ky. Law Rep., 1705; *Equitable Life Ins. Co. v. Warren Deposit Bank*, 25 Ky. Law Rep., 839; *Washington Life Ins. Co. v. Glover*, 25 Ky. Law Rep., 1827; *Washington Life Ins. Co. v. Lyne*, 24 Ky. Law Rep., 1070.)

The demand was made in this case and brought within five years next after the first default in payment of premiums by the insured. Finding no reason for distinguishing the policy in this case from those of the cases in which the five-year rule was applied, the judgment is affirmed.

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COURT OF APPEALS OF KENTUCKY.

KENTUCKY SUPERIOR COURT.

COUNTY OF JEFFERSON v. YOUNG.

(Filed May 5, 1905.)

1. Fiscal courts—Appropriations—Appeal to circuit court—Bill of exceptions—Under sections 724, 731 of the Civil Code, regulating appeals from fiscal courts to the circuit court, such cases are to be tried anew when appealed to the circuit court as if no judgment had been rendered, and no bill of exceptions is necessary.

2. Jurisdiction—Authority over assessments—County assessor—The fiscal court is one of limited jurisdiction and authority, and has no power to make an assessment of the property of the county for taxation, and has no control over the county assessor, and such court has no authority to employ a surveyor or to purchase plats of land made by such surveyor in order to enable the county assessor to fix the boundary of lands to be assessed for taxation in said county.

R. W. Bingham and Bingham & Davis for appellant.

O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Chief Justice Hobson.

The fiscal court of Jefferson county on December 2, 1902, made the following order:

“Moved by Shively, seconded by Shadburne, that, whereas the assessor of Jefferson county has notified this court that the records of the county outside the city of Louisville are in such condition that it is difficult, and in some cases impossible, to make a correct or accurate assessment of property in said locality for taxation, and that the county is in danger of losing revenue by reason of the condition of such records, and the impossibility of

correctly ascertaining the quantity and ownership of such land without a survey;

"And it appears that R. H. Young, county surveyor, has, at considerable expense and labor, made accurate plats of a portion of the land referred to, and is willing to sell the same to the county for a reasonable compensation;

"It is resolved that this court shall purchase the said plats, a list of which has this day been filed with this court, and will pay the said R. H. Young therefor the sum of \$2,000 out of the map fund, and that the clerk of this court is ordered to issue a warrant for the same on the delivery of the said plats.

"Ayes and noes were called for and resulted five in favor and four against, and the motion was declared carried."

The county attorney took an appeal to the circuit court. The circuit court held that a bill of exceptions was necessary, and there being none, dismissed the appeal on the ground that the order was within the authority of the fiscal court. From this judgment the appeal before us is prosecuted.

Section 978, Kentucky Statutes, so far as material, reads: "Appeals may be taken to the circuit court from all orders and judgments of the fiscal court or quarterly court in civil cases where the value in controversy, exclusive of interest and costs, is over \$25."

As the amount in controversy is over \$25 the appeal to the circuit court may be maintained, and the county attorney was authorized to prosecute it when so directed by the county court. (Jefferson County v. Waters, 111 Ky., 286.) The statute above quoted does not provide how the appeal shall be taken. Sections 700-723 of the Civil Code regulate proceedings in quarterly, police, county and justices' courts. Sections 724-781 regulate appeals from their judgments. Fiscal courts are not named in these sections, but county courts are. At the time of the adoption of the Code the fiscal court had not been established. The powers now vested in the fiscal court were then exercised by the county court when sitting as a court of claims. Section 978, Kentucky Statutes, is a re-enactment of the General Statutes' provision as to appeals from county and quarterly courts, the words fiscal courts being added after the creation of that court under the new Constitution. Under the General Statutes appeals were taken from orders of the county courts when sitting as a court of claims under the provisions of the Code above referred to, and in re-enacting the statute the legislature plainly had in mind only continuing the old law. The Code of Practice has not been revised since 1877, and, therefore, fiscal courts are not named in it, but all the powers exercised by the fiscal court were exercised by the county court under the old law. In providing that appeals may be taken from the orders of the fiscal courts without any provisions as to how they are to be taken, it must be presumed that the legislature in re-enacting the old statute did not intend to change the method of taking these appeals as it was silent on this subject. The fiscal court being only another name for the same body which was designated in the Code by the words county courts, and the law allowing appeals from these judgments having been simply re enacted without change, it must be presumed that the legislature did not contemplate changing the old law as to the method in which appeals should be taken.

We, therefore, conclude that sections 724-731 of the Civil Code regulate appeals from fiscal courts to the circuit courts, and that as the cases are to be tried anew as if no judgment had been rendered, no bill of exceptions is necessary.

It remains to determine whether the fiscal court had authority to make a contract with appellee to pay him \$2,000 for the plats referred to in the order. It is insisted that the fiscal court was authorized to buy the plats in order to secure a proper assessment of the taxpayers of the county and thus protect its revenues, if, in the judgment of the fiscal court, it was necessary to do so. The jurisdiction of the fiscal court is regulated by section 1840, Kentucky Statutes, which is as follows: "The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair necessary public buildings, secure a sufficient jail and comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges and other structures and superintend the same; to regulate and control the fiscal affairs and property of the county; to make provisions for the maintenance of the poor, and provide a new house and farm, and provide for the care, treatment and maintenance of the sick poor, and provide a hospital for said purpose, or contract with any hospital in the county to do so, and provide for the good condition of the highways of the county, and to execute all of its orders consistent with the law and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court of levy and claims."

It will be observed that the fiscal court is authorized by the statute to appropriate the county funds authorized by law to be appropriated; to erect and keep in repair public buildings, including a jail and place for holding court at the county seat; to erect and keep in repair bridges and other structures; make provision for the poor; provide for the good condition of the highways of the county, and that it had jurisdiction of all such other matters relating to the levying of taxes as is by any special act conferred on the court of claims or county court. It is impossible to read this section, which so carefully enumerates what the fiscal court may do, without concluding that the legislature intended to restrict the fiscal court to the things named, and such matters as were incidental thereto. The power to regulate and control the fiscal affairs and property of the county must be read in connection with the other provisions of the section. If these words were intended to give the fiscal court unlimited jurisdiction over the fiscal affairs of the county, then it was entirely unnecessary to stipulate in such detail what powers the fiscal court might exercise. It will be observed that the statute confers on the fiscal court no power to make an assessment of the property of the county. By section 1882, Kentucky Statutes, the fiscal court is authorized to levy a tax, but by section 1883 it is provided that the assessment made for State purposes, when supervised as required by law, shall be the basis for the levy and collection of the tax. The fiscal court may supervise the collection of the tax when levied, but it is given no authority in the matter of assessment. If any property is omitted by the assessor it may be assessed by other officers or by a proceeding in the county court under section 4241, Kentucky Statutes, but no assessment can be made by the fiscal

court for simply county purposes. The assessment is made by the State, and the county levy is collected upon the State assessment. The assessor is paid by the State for making the assessment. The fiscal court has no authority over him. If it bought plats from appellee it could not require the assessor to use them. If the fiscal court had made an order employing a man in each magisterial district, at an annual salary, to go around with the assessor and see that no property was omitted from assessment, it would hardly be claimed that this was within the power of the fiscal court, although the court believed that the additional revenue thus derived by the county would more than pay the expense. The assessor is an officer of the law. If he fails in his duty he and his sureties are liable, but as he does not derive his authority from the fiscal court, and as it has no jurisdiction over the assessment of property, it was without power to buy the plats referred to for the purpose of securing a better assessment of the property of the county.

We are referred to *Burnett v. Markley*, 23 Ore., 436, and *Huffman v. Board of Commissioners*, 96 Ind., 84. In the Oregon case an order of the fiscal court, much like the one in controversy, was sustained, but the opinion is based upon the ground that there it is the "business" of the county authorities "to see that all the property within the county liable for taxation is placed upon the assessment roll." As we have said, no such power or duty rests upon the fiscal court in this State. In the Indiana case the court upheld an order of the fiscal court securing an accurate index of the records of the county. But this decision is rested upon the ground that the county authorities are clothed with power to keep their records in such condition as to make them subserve the purpose for which they were intended. This case has no application to the question before us.

The deed books kept in the county clerk's office are a public record, kept at the county seat for the use of the people of the county. They are in a sense county property, and are a necessary adjunct to the county seat. The fiscal court may properly preserve these records or make them accessible, for it must provide suitable conveniences for the county seat. But it has no more power to buy plats to aid the assessor than it would have to employ an attorney at the cost of the county to assist the auditor's agent in all proceedings under section 4241, Kentucky Statutes, to list omitted property.

Its powers are special not general. (*Morgantown Deposit Bank v. Johnson*, 108 Ky., 507; *Jefferson County v. Waters*, 114 Ky., 48; *Erskine v. Steele County*, 28 L. R. A., 645; *Daniel v. Putnam County*, 54 L. R. A., 292; *Bicknell v. Amador County*, 30 Cal., 237; *McCan v. Otoe County*, 9 Neb., 324; *Manitowoc County v. Sullivan*, 5 Wis., 115; *Merrick County, Com. v. Batty*, 10 Neb., 176; *Gould v. Sterling*, 23 N. Y., 463.)

Judgment reversed and cause remanded for a judgment as herein indicated.

NORTH BRITISH MERCANTILE INS. CO. OF LONDON AND EDINBURGH v. UNION STOCK YARDS CO., &c.

(Filed May 5, 1905.)

1. Fire insurance—Increasing hazard—Misrepresentation by insured—Appellant had a policy on a building in which baled rags were stored, which are extra hazardous, and allowed a rebate on the risk by reason of informa-

tion given by Wood, the secretary of the insured, that the rags had been removed. The policy provided that "this entire policy shall be void if the insured shall conceal or misrepresent in writing, or otherwise, any material fact concerning the insurance or the subject-matter thereof, or if the hazard be increased by any means within the control or knowledge of insured." This information, though false, was believed by the informer to be true. He did not profess to have any personal knowledge as to the removal of the rags, but upon inquiry of the insurer informed the inquirer of his course in learning whether the rags had been removed, which answer he believed to be true. Held—That such answer was not a concealment or misrepresentation.

2. Knowledge of agent—Sub-agent—If Wood, the agent of insured, knew that rags were stored in the building and concealed it from the insurer, such a fact would have been binding on the insured, but the knowledge of Wood's agent, who was not the agent of Wood's principal, is not imputable to the latter.

3. Acts of insured's tenant—Ignorance of insured—The fact that the rags were stored in the building by O'Brien, who was the tenant of insured, although in violation to the tenant's rightful use of the premises, does not affect the policy if the insured was ignorant of it, although it was a matter which he might have controlled had he known it, or although he knew of it, yet if it was a thing beyond his control the policy is not affected by it.

4. Increasing risk—Restoring conditions—Liability of insurer—The fact that the risk was increased after the issuing of the policy, by the storing of rags without the consent of the insurer, yet if the extra-hazardous condition was removed before there was a fire, then the condition remained precisely as when the contract was made, and while the liability of the insurer was suspended during the time of the existence of the condition, if the fire had then occurred insurer would not have been liable. But if before loss, and during the time covered by the policy, the original condition was restored, the liability of the insured was restored also and it was thereafter liable for the loss.

Henry Burnett and Dallam, Farnsley & Means for appellant.

Gibson, Marshall & Gibson for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge O'Rear.

Appellee Union Stock Yards Co. owned a lot of land in the eastern part of Louisville, about 200 feet square, on which were situated their stock pens and a two and one-half story brick house. An insurance against loss by fire was effected by policies written by several different companies, including one by appellant company, which is in suit. The stock pens constituted a frame building or shed, two stories high. On the ground floor were stalls for cattle or horses; on the second floor were pens for sheep.

Some time after the policy was issued appellee rented the brick building to one O'Brien for storing rags. The original rate of insurance on the buildings was \$1.50 on the \$100, but when used for storing baled rags it was \$2.50 per \$100. A "rider" was put on the policy as follows: "Privilege to make additions, alterations or repairs, and to store baled rags in brick buildings insured under this contract."

The Stock Yards Co. contends that it rented to O'Brien only the brick

building. O'Brien testified that he rented the whole of the property, subject to the right of his landlord to rent it to others, whereupon he was to surrender the portions so let to others. O'Brien was to quit whenever notified, upon five days' notice. The following February the stock yards company leased the whole of the property to Hudson Bros. as a horse and mule market, and notified O'Brien to give immediate possession. Carpenters and other workmen began work remodelling and repairing the buildings for occupancy by Hudson Bros., who in fact moved in on April 1. April 4 the stock yards company notified the insurer that O'Brien had quit the buildings rented to him, and that his rags were removed. Whereupon an additional rider was added to the policy, as follows: "In consideration of \$16.50 returned assured, the privilege to store rags in buildings assured under this policy is hereby rescinded, the rate now being \$1.50."

On April 26 the buildings were totally destroyed by fire. It then developed that O'Brien had used not only the brick building for storing baled rags, as permitted by the policy, but had stored baled and loose rags in considerable quantities in the brick building and the frame buildings indiscriminately. In fact there was quite a quantity of loose rags in the sheep pens of the frame building when the fire occurred. The insurer denied liability and resisted payment under the policy on the grounds, first, that the policy had become void by reason of material and false misstatements made by the assured concerning the removal of the rags; and, second, that the hazard had been increased without its consent by the assured having, through its tenant, suffered the premises to be used in an occupation more hazardous than that contracted.

These two defenses arise under the following conditions in the policy: "This entire policy shall be void if the insured shall conceal or misrepresent, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof, or in case of false swearing or fraud by the insured, touching any matters relating to this insurance, or the subject thereof, whether before or after the loss. This entire policy, unless otherwise provided for by agreement, endorsed thereon or attached thereto, shall be void if the hazard be increased by any means within the control or knowledge of the insured."

The verdict of the jury and the judgment of the court having been adverse to appellant, this appeal is taken to correct what it is urged are prejudicial errors committed against appellant on the trial. The defenses outlined above were put at issue, and were submitted under an instruction which will be noticed particularly further along. An analysis of the defenses will better enable us to apply the trial court's instruction. It may be conceded that the fact that rags when stored in the buildings in considerable quantities became a material circumstance concerning the insurance. The parties, by their conduct, have so treated it, and it would seem, from the very nature of the thing, to be so. Consequently a concealment or misrepresentation of that fact by the assured, if it was a fact, came within the provision just quoted.

Baled rags to be stored in the brick building was consented to, and the privilege and risk paid for. When the assured applied for a rebate of the unearned portion of the premium for that additional risk (some months yet

which were covered by the policy not having expired), its secretary, Wood, was inquired of by the agents of the insurer whether the rags had been removed. He answered that he would ask the superintendent, Birch, to see in person and report. Birch was called by telephone and told to examine and report whether O'Brien had removed the rags. In about thirty minutes he reported that O'Brien had vacated the leased premises, and that the rags were gone. Wood repeated this statement to the insurer, whereupon the unearned extra premium was paid back, and the second rider above quoted was pasted upon the policy. Now, as a matter of fact, Birch did go and examine the brick building, and O'Brien had vacated it, and had then removed from it all his rags. Birch, who had made the contract of renting with O'Brien, understood that O'Brien had rented the brick building only, and had occupied it alone for storing his rags. Consequently he did not examine the cattle and sheep pens in the frame buildings, and testified that he had no thought that O'Brien had any rags stored there, as he had no right to do so. Still the truth was that O'Brien at that time did have loose rags stored in the frame buildings in considerable quantities. The question is, was this a misrepresentation or concealment of the fact by the assured? It was not a concealment unless it was actually known at the time, but it was not known. At least such is the result of the jury's verdict, which seems to us to be sufficiently supported by the evidence. But a misrepresentation may be made without knowledge of its falsity. If the representation was made, was material and was untrue, the motive and the knowledge of the maker are alike immaterial. The policy would be avoided. The insurer who had knowledge aside from the statement upon the policy that rags, even in unallowed condition and places, had been kept on the insured premises, inquired of the assured's managing agent whether they were then (April 4) there. This agent did not profess to have any personal knowledge on the subject. Indeed he disclaimed having any, but informed the inquirer of his course in learning whether the rags permitted by the policy had been removed. That course was adopted. The inquiry made through the medium of Wood became the direct inquiry of appellee. The act of Birch in assuming to acquaint himself with the facts so as to answer it, and in answering it, represented the assured. So it turned out that the insurer having in mind rags stored, baled and loose in the brick as well as in the frame buildings, made an inquiry in general terms, not specifying anything beyond what was inferable from the language used in the rider, and Birch knowing nothing of any rags other than those which had been stored in the brick building, and not understanding that O'Brien had any right whatever to store any elsewhere on the premises, answered the question literally, truthfully, and conscientiously so, so far as this record shows. It is not enough that the insurer may have been misled by the form of the inquiry. Both acted honestly. Birch's statement being true within itself, and as he fairly may have understood, and did understand, the inquiry, could not, in any sense, be a misrepresentation. It turned out that by misunderstanding the inquiry Birch made no response in fact to it. It was then in fact unanswered; that the insurer was misled into an erroneous belief is doubtless true, but Birch was also misled, the effect being that the inquiry was of one thing, while the answer was by

mistake concerning another. Nor under this phase of the case is it material whether O'Brien was in fact rightfully occupying the whole premises. As Birch understood that he was occupying the brick building only, his statement was made with reference to that fact. His statement was not inconsistent with his assumption, and with it in mind, was in every sense the truth. It will be admitted that if Birch had had in mind the same premises which the inquirer had, but had by oversight or mistake misrepresented the fact in his answer, it would have been a misrepresentation, motive having no part in the matter. But no statement can be a misrepresentation of a fact that was not made with reference to such fact, but was made of an entirely different, although a similar, one.

It is claimed that the policy was avoided also because of Wood's concealment or misrepresentation of the fact that baled and loose rags had been stored in both the brick and frame buildings, when he knew it was in violation of the implied, if not the express, prohibitions of the contracts. The firm of Wood, Bacon & Co., of which appellee's secretary, Wood, was a member, was a brokerage firm, writing and procuring fire insurance contracts. This firm obtained a policy for O'Brien on rags stored in these buildings, both brick and frame. It is claimed that this fact brought the matter at least to Wood's constructive knowledge. Wood testified that he had not seen that policy till after the fire, and did not know it contained such description. The facts were, it was issued by one of the clerks of the firm, who testified that she had not called Mr. Wood's attention to it; that she had copied the description of the buildings from the registry of an old policy issued to appellee stock yards company, and had mistakenly supposed the rags were to be stored in all the insured buildings. Wood's knowledge, however obtained, would have been the knowledge of his principal in the latter's affairs. But the knowledge of Wood's agent, who was not the agent of Wood's principal, is not imputable to the latter.

The second clause of the section of the policy quoted constitutes really the storm center of the case. The argument is that as O'Brien was the tenant of appellee stock yards company, he was under its control; that if he used the insured premises so as to increase the hazard insured against, it is the same as if the assured had done it. There are authorities which undoubtedly so hold. Where the tenant is using the leased premises in the manner contracted there can be no doubt that his use is the same as that of the landlord in affecting the risk. The cases which hold that the tenant's misuse of the insured premises, whereby the hazard is increased, is imputed to the landlord, although in violation of the tenant's rightful use, and without the knowledge or consent of the landlord, are all founded upon that class of contracts where the provision is against such use at all, and are express covenants treated as warranties, or are cases bottomed on those of that character. In the policy being considered the stipulation is not in any sense a warranty. On the other hand, it admits, at least by implication, that extra-hazardous use may be made of the insured building without the policy being affected, for it is provided that the policy will be voided only in the event the "hazard be increased by means within the control or knowledge of the assured." If the assured was ignorant of it, although it was a matter which he might have controlled had he known it, the policy is not

affected. Or, although he knew of it, yet if it was a thing beyond his control, neither is it affected. Such seems to us to be the reasonable construction of the language as setting forth the intention of the parties.

A further argument is that the insured premises were during the tenancy of O'Brien used for storing and baling loose rags, whereas the only thing permitted with reference to rags was the storing of baled rags. This with reference particularly to the brick building, which all admit was leased to O'Brien. It is also argued that this extra-hazardous use, being beyond the risk assumed by appellant under the contract, became a violation of it under the clause quoted hereinbefore, and operated to make it void by the express provision of the agreement, although the loss was not occasioned or contributed to thereby. Authorities are not lacking apparently supporting the contention. The contract was intended to insure appellee against loss or damage by fire during the term for which the consideration was paid. The amount of consideration was calculated upon the nature of the risk, as stated, and not upon some other or greater. The insurer had the right to stipulate that it would not assume other hazards than the particular one indicated in the contract, and that if it was increased the insurer's liability was not to cover it. If the assured did or permitted anything to increase the hazard, then while that condition lasted the contract was not in operation. However, if the extra-hazardous condition was removed before there was a fire, then the condition remained precisely as when the contract was made. The insurer, without complaint, retained the premium or consideration for its carrying the liability. To declare the contract at end for all time would be to forfeit the unearned premium to the insurer. It would be the imposition of a money penalty against the assured for violating a condition of his contract, although no damage had ensued from it.

Such forfeitures are repugnant to the law. The better reason, and the right of the matter seems to us to be, that while the forbidden condition is permitted by the assured to exist the contract will be suspended. If loss then occurs the insurer would not be liable. But if before loss and during the term covered by the policy the original condition is restored the liability of the insurer is also. This gives to the assured precisely what he bargained for. It exacts nothing from the insurer beyond what it has assumed and taken pay for. Consequently the use of the leased premises for even forbidden purposes, but which had been discontinued long before the fire, was not an obstacle to the right of appellee to recover upon the policy, and the trial court was correct in so holding.

The instruction given to the jury was as follows: "The court instructs the jury that they should find for the plaintiff in the sum of \$2,500, with interest from the 10th day of July, 1902, unless they shall believe from the evidence that when the fire occurred which destroyed the insured premises there were rags stored upon the said premises with the knowledge of plaintiff which increased the hazard of the defendant on the policy sued on; or that on or about the 4th day of April, 1902, the plaintiff falsely represented to the defendant that all the rags had been removed from the said premises, and that in consideration of that representation a part of the premium theretofore paid was returned to the plaintiff; if either of said statements is the fact the law is for the defendant, and they should so find."

This instruction did not submit to the jury whether O'Brien's lease covered the entire property, or the brick building only. There are two reasons for this: One, if it did cover the whole property, still O'Brien had leased only to store baled rags; if he, without the knowledge or consent of the assured, stored loose rags there, it was what he had not the right to do, and was as if done by a trespasser. Again, although the lease may have been of the whole property, it was admittedly determinable upon five days' notice by the landlord, which was given more than two months before the fire, and was apparently acted upon. Therefore, O'Brien was not a tenant of any part of the premises at the date of the fire. His failing to remove all his property left him in the attitude of a trespasser, whose acts, unknown to the owner, no authority holds can be imputed to the owner as his in working a forfeiture of his insurance contracts, although such trespasser's acts may have increased the hazard or even caused the fire.

The presence of any rags, a very small and inconsiderable quantity, is not as a matter of law an increase of the hazard. The hazard caused by their presence necessarily depends upon their quantity. It was, therefore, proper under the evidence in this case to submit to the jury whether in fact the hazard was increased by the quantity of rags that were there. While it was admitted that some few rags and trash were left on the insured premises by O'Brien, it was denied that they were such as to increase the original hazard. The submission to the jury of the question whether appellee's agent falsely misrepresented that the rags had been removed was not to submit to them whether the rags had all been removed, for it was conceded that they had not been, but whether appellee's agent had so stated.

We perceive no error in the record and the judgment is affirmed.

HOWARD v. WESTERN UNION TELEGRAPH CO.

(Filed May 5, 1905.)

Contract—Where to be performed—Negligence—Where it is admitted that the telegram was to be delivered at Pineville in this State, it follows that the contract could not be fully performed without such delivery in this State, and if the failure to deliver it within a reasonable time was negligence, it is immaterial whether the negligence was that of its West Virginia or its Kentucky agent, as in either case it caused a breach of its contract in this State, which entitled appellant to receive some part of the damage claimed.

A. G. Patterson for appellant.

Richards & Ronald, Geo. Fearons and Wm. Low for appellee.

Appeal from Bell Circuit Court.

Judge Settle delivered the following response to petition for modification of opinion:

We are asked to modify the opinion herein to the extent of withdrawing so much thereof as holds that the demurrer to the third paragraph of the answer was properly sustained by the lower court.

The paragraph in question contains the averments that the contract for the transmission and delivery of the telegram, informing appellant of the

wounding of his son, was made in the State of West Virginia, the consideration there paid, and that the contract was to be performed in that State; that the parties contracted with reference to the laws of that State and intended that the contract should be construed according to the laws thereof; that the breach of the contract, if any there was, occurred in that State; and further, that under the laws of West Virginia and the decision of its court of last resort, recovery for damages of mental pain and suffering, such as were claimed by appellant for the alleged negligent failure of appellee to deliver the telegram, are not allowed, because unaccompanied by physical injury.

The paragraph in question does not deny that Pineville, Ky., was the place at which the telegram was to be delivered. Indeed it is elsewhere in the answer admitted that Pineville, in this State, was the point of delivery, and this fact is shown by the telegram itself. It follows, therefore, that the averments of the answer as to the contract having been made with respect to the laws of West Virginia, and as to its alleged performance in that State, and the like, are mere conclusions of the pleader, contradictory of the admitted facts, and inconsistent with other matters of defense relied on in the answer.

In view of the undisputed fact that the telegram was to be delivered at Pineville in this State, appellant's place of residence, it inevitably follows that the contract could not be fully performed without its delivery, within a reasonable time, to appellant at that place, hence the place of performance was in this State. If appellee's failure to deliver the telegram in a reasonable and the customary time resulted from its negligence, we think it immaterial whether the negligence was that of its West Virginia or Kentucky agent, as in either event it affected the performance of the contract in this State by delaying the delivery therein of the telegram, thereby causing a breach of the contract in this State, which would have entitled appellant to recover some part of the damages claimed but for his failure to prove, as held in the opinion, that he could have reached his son before his death if the telegram summoning him to his bedside had been delivered in the proper or reasonable time.

As we are unable to perceive any satisfactory reason for modifying the opinion the petition is overruled.

COMMONWEALTH, FOR USE, &c. v. DONNELL.

(Filed May 5, 1905—Not to be reported.)

W. S. Buckler for appellants.

Holmes & Ross and Morgan & Hughes for appellee.

Appeal from Nicholas Circuit Court.

The court delivered the following response to petition for rehearing:

After a careful consideration of the petition and supplemental petition for rehearing we are of the opinion that the opinion heretofore rendered correctly settled the legal questions involved.

Wherefore, the petition is overruled.

THE CITY AND SUBURBAN TELEGRAPH ASS'N, BY, &c. v.
WOODWORTH.

(Filed May 5, 1905—Not to be reported.)

1. Damages—Evidence—Sufficiency of to support verdict and judgment—In this action against appellant and the Union Light, Heat and Power Co., the defense being that the latter was not the owner of the electric light wire, and that the copper wire by which appellee was injured was owned by the South Covington and Cincinnati Street Railway Co., was not sustained by the evidence. Under the instructions of the lower court the jury could not have found for appellee unless they believed from the evidence that appellants were the owners of these wires, or had an interest in and controlled them, and the evidence was such as to support the finding of the jury.

2. Same—Conflict of evidence—Instructions—Upon the issue of negligence in this action for damages against appellants for so erecting and maintaining their wires as to result in the injury complained of, the proof was conflicting, but the issue having been submitted under proper instructions, and the verdict being in favor of appellee it will not be disturbed.

Myers & Howard for appellant City and Suburban Tel. Ass'n.

L. J. Crawford for appellant Union Light, Heat and Power Co.

Phil. J. Ryan and T. L. Michie for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Campbell Circuit Court in favor of the appellee and against the Union Light, Heat and Power Co. for the sum of \$3,000, and a like sum against the other appellant city and Suburban Telegraph Association.

It appears from the record that the appellant, the Union Light, Heat and Power Co., was engaged in furnishing electric lights in the city of Newport, and that the other appellant was alleged to have been engaged in furnishing telephone service for that city and other surrounding cities. The appellant, Union Co., in connection with the South Covington and Cincinnati Street Ry., operated a power house in which electricity was generated, which was situated in the vicinity of a bridge across Licking river, connecting the cities of Newport and Covington; that an electric wire was connected with the feed wires leading out of the power house and ran to the office of the Kanawa Coal Co., going by way of this bridge, and was attached thereto. It was alleged in the petition that this wire belonged to the Union Co., and that it wrongfully, willfully and negligently kept and maintained this wire at and over the bridge without having it properly insulated so as to prevent the escape of the electric current therefrom, and wrongfully, willfully and negligently kept and maintained this wire in too close proximity to the telephone wires. All these allegations were controverted by the Union Co., and it pleaded contributory negligence on the part of appellee.

As to the other appellant, it was alleged that it kept and maintained at and over this bridge certain telephone wires; that a certain telephone wire, made of copper, which was a conductor of electric current, was kept and maintained by this appellant at and near this bridge and in too close prox-

imity to this electric light wire, and over it, and that it negligently failed to insulate its wire where it passed over the electric light wire, and also, wrongfully and negligently failed to support its wire by telephone poles, placed at the usual and safe distance apart, and so failed to securely fasten its wire to prevent its falling or coming in contact with the electric wire; that this telephone wire, without any fault or neglect on the part of the appellee, fell upon the electric light wire and thereby became charged with electricity, and came in contact with the body of appellee and severely burned and injured him and rendered him a cripple for life.

This appellant also pleaded contributory negligence on the part of the appellee and controverted all the allegations of the petition, except it did not deny that it had telephone wires attached to and running across this bridge. The real defense of these appellants was developed on the trial. The Union Co. endeavored to show by the proof that it was not the owner of this electric light wire, but that it was owned by the South Covington and Cincinnati Street Railway. The other appellant endeavored to show that this copper wire was owned and operated by the Citizens Telephone Co.

There was much proof heard on these defenses, but we do not think that it would be beneficial to any one to discuss it in detail. It is sufficient to say that the jury, under the instructions of the court, could not have found in favor of appellee unless they believed from the evidence that the appellants were the owners of these wires, or had an interest therein, and controlled, operated and maintained them, and we are of the opinion that the verdict was not without evidence to support it. The appellants make no serious contention that the verdict was excessive or that the appellee contributed in any way to his injuries. Upon the issue as to the negligence of the appellants in erecting and maintaining their wires the proof was conflicting. This issue was submitted to the jury by proper instructions, and the jury found in favor of appellee.

Wherefore, the judgment is affirmed.

GUTHRIE v. CARNEY.

(Filed May 9, 1905—Not to be reported.)

Damages—Negligence—In this action for damages for injury sustained by appellee by reason of being struck by appellant's elevator car, while it may be admitted that she knew of the danger likely to result by standing on the second floor looking down the shaft, with the elevator above her, still she had the right to presume that having been called there by appellant, he would not move the elevator while she was answering the call; and the question of negligence and contributory negligence having been submitted to the jury, their verdict will not be disturbed in awarding her damages, the proof tending to support her claim.

Wheeler & Hughes for appellant.

Bloomfield & Crice and R. T. Lightfoot for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Nunn.

During the year 1902 the appellant was a merchant in Paducah, Ky., con-

ducting his business in a three-story building, using all of the floors. The upper stories were reached by means of an electric elevator which was constructed and operated by the appellant. This elevator was operated by means of a rope which was attached to the elevator, and could be operated by any one standing on either of the floors. The shaft of the elevator was enclosed on three sides, the other was left open except there were two gates which opened in the center, made of wooden slats 47 inches in height.

The appellant employed appellee as a saleslady. After she had been there so employed for about a month, and on the 26th of March, 1902, the appellant directed her to go with another clerk and two customers from the first to the second floor. She, with the other parties, went upon the elevator, which was operated by the appellant from the first floor, and went to the second story. Soon after she arrived on the second floor she, according to her proof, was called to the elevator shaft by the appellant. She responded to his call and went to the elevator shaft to answer, it being the custom of the appellant to communicate or converse with his clerks through the elevator shaft. At the time she went up to the shaft the elevator cab was stationary at the third floor. When she reached the gates which enclosed the elevator shaft she glanced up and saw the cab still at the third floor, and then stooped her head slightly and looked down the shaft where appellant was standing. About this moment appellant started the elevator down from the third floor by means of the cord, and it struck and seriously injured the appellee at the moment she was in the act of answering appellant's call. She instituted this action for damages, alleging that this elevator was negligently and improperly managed, operated and constructed, and that by reason of appellant's negligence this cab fell upon and injured her. The appellant controverted the allegations of the petition and made the usual plea of contributory negligence, which was controverted by the appellee. On the first trial the jury rendered a verdict for \$2,200, which was set aside by the lower court. On the second trial the jury gave her \$1,000, which the court refused to set aside, and appellant has appealed.

The instructions given by the court to the jury were as favorable to appellant as he could have asked, and the amount recovered was small considering the extent of her injuries. The only serious contention of appellant's counsel is that the court erred in refusing to give a peremptory instruction to the jury because of appellee's contributory negligence in attempting to answer the call of appellant in the manner in which she did; that she knew of the danger likely to result therefrom. Admitting this last statement to be true, appellant also knew of the danger, and she had the right to presume that he would not move the elevator while she was answering his call. This question of negligence and contributory negligence was submitted to the jury and they found against appellant, and we see no reason for disturbing their finding as the proof, while conflicting, tended to sustain her claim. (Peltier v. L. & N. R. R. Co., 16 Ky. Law Rep., 500; Phisterer v. Peter & Co., 25 Ky. Law Rep., 1605; Sherman and Redfield on Negligence, Par. 487, 4th edition.)

Wherefore, the judgment of the lower court is affirmed.

GATES v. DAVIS.

(Filed May 9, 1905—Not to be reported.)

Motion to strike bill of exceptions from record—It appearing from the record that the sixty days allowed by the lower court for the filing of appellant's bill of exceptions had expired before the order was made extending the time, the motion to strike the bill of evidence from the record will be sustained.

L. W. Gates, W. D. Crabb and A. M. Sea, Jr., for appellant.

Samuel Avritt for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

On November 11, 1904, the following order was made in this case: "The court being sufficiently advised, it is considered and adjudged that the defendant's motion for a new trial herein be and is overruled, to which the defendant excepts, and sixty days be and is given the defendant within which to prepare and tender her bill of exceptions herein."

On January 11, 1905, an order was made as follows: "Ordered, that the defendant be and is given thirty days in addition to the sixty days heretofore given to prepare and tender her bill of exceptions herein."

The bill of exceptions was filed on February 9, and within thirty days after the latter order was made; but it is insisted that the sixty days originally given expired on January 10, and that, therefore, the court was without power to extend the time on January 11. A motion has been entered to strike out the bill of exceptions on this ground. If we do not count November 11, then there were nineteen days remaining in November, thirty-one in December, making fifty days, and ten days in January will make sixty. It follows, therefore, that the sixty days allowed by the order of November 11 expired with the 10th day of January. If, on the other hand, we count November 11 as one of the days on which the bill of exceptions might be filed, we have twenty days in November, thirty-one in December, and nine in January, making sixty days within which the bill of exceptions might be filed. We think, though, the meaning of the order was to give the defendant sixty days after the 11th to file the bill of exceptions, but as shown, even on this basis, the time had expired before the order extending the time was made. Counsel have briefed the case on the idea that the order giving the sixty days' time was made on the 12th of November, but the record does not so read.

The motion to strike out the bill of exceptions is, therefore, sustained.

UNITED STATES FIDELITY AND GUARANTY CO. v. BOARD OF
EDUCATION OF SOMERSET.

(Filed May 9, 1905—Not to be reported.)

1. Appeals—Reversal—Return to circuit court—Effect—On the return of a case from this court to the circuit court, where the entire judgment is reversed, the case stood as though it had not been tried, and the principles

announced by this court in its opinion must control the circuit court on the subsequent trial of the case; the language of this court must be understood to refer to the facts then shown to the court. But if on another trial the proof should be different, then other questions might be presented for decision which were not before this court on the other appeal.

2. Taxes—Collector—Liability of surety—Informality in giving notice—Waiver—In an action on the bond of a tax collector of city taxes for school purposes, such collector can not excuse his failure to collect the taxes on the ground that no notice of the time and place of the meeting of the board of equalization was given, as such notice is required to be given for the benefit of the taxpayer, and if he waives it and pays his taxes the collector must account to the board for the money collected.

3. Assessor—Failure to give bond—In an action on the bond of a tax collector of city taxes for a graded school, where a part of the district lies outside the city, the failure of the board to take a bond from the assessor of tax did not render the assessment void as to the property lying outside the city, as the assessor was a de facto officer, having been regularly appointed and recognized by the board as the assessor.

4. Void levy—Record of board—The board of education in levying taxes must speak by its records. If the order levying the tax for the year 1899 was void, under the Constitution it was a nullity and gave no authority to the collector to collect tax or retain the money when collected. His obligation as to the money collected is to the taxpayer and not to the public.

Bodley, Baskin & Flexner and J. R. Cook for appellant.

V. P. Smith, O. H. Waddle and R. B. Waddle for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant was the surety of H. H. Gragg as tax collector of appellee for the years 1899, 1900 and 1901. Appellee filed three suits, one for each year's taxes, to recover of appellant as the surety of Gragg on account of the taxes which he received for collection and failed to account for. The three suits were submitted to the court on the law and facts. The court made a special finding to the effect that Gragg had failed to collect and pay over to appellee the sum of \$5,957.11 of the tax lists for the three years; but as to how much he collected or how much he failed to collect the court made no finding, nor did he find separately the amount due for each year's taxes. A judgment was entered on the special findings of the court for the sum of \$5,957.11, with interest, and the defendant appealed to this court. On the appeal it was held that the order of the board of education levying the tax for the year 1899 entered on their order book was void, as it did not distinctly specify the purpose for which the tax was levied. The opinion, after discussing the various questions made in the case, concludes with these words: "The appellee is entitled to recover on the bonds for the years 1900 and 1901; if there is no order except the one in question making the levy for 1899, it is not entitled to recover on the bond executed for that year. The judgment is reversed for proceedings consistent with this opinion." (U. S. Fidelity and Guaranty Co. v. Board of Education of Somerset, 26 Ky. Law Rep., 246.)

On the return of the case to the circuit court the defendant tendered an amended answer. The court refused to allow it to be filed. The defendant

excepted to this ruling of the court, but the amended answer is not made part of the record either by order of court or the bill of exceptions. The plaintiff then tendered an amended petition as to the taxes for the year 1899. The court refused to allow the amended petition to be filed, and it was made part of the record by bill of exceptions. The case thereupon came on for trial and no evidence being heard the court dismissed the petition as to the year 1899, and entered judgment against the defendant for the years 1900 and 1901 for the sum of \$2,838.65, with interest, and from this judgment the defendant appeals.

On the trial the defendant offered in evidence the testimony of several witnesses which was objected to by the plaintiff and none of the testimony was admitted, and of this the defendant complains. The plaintiff has prosecuted a cross appeal from so much of the judgment as refused to allow its amended petition to be filed and dismissed the action as to the taxes for the year 1899. As the amended answer is not made a part of the record it can not be considered. But under the issue as originally formed, the burden was upon the plaintiff to make out its case, and the actions being ordinary, when the judgment was reversed the cases stood for trial anew. On the former appeal this court could not direct a judgment to be entered for the amount of the taxes for the years 1900 and 1901 because there had been no special finding by the court of those taxes. There was only a single finding of the gross amount of the taxes for the three years, and as there could be no recovery for the year 1899 the court reversed the entire judgment. On the return of the case to the circuit court it stood as though it had not been tried. The principles announced by this court in its opinion must control the circuit court on the subsequent trial of the case, but if on another trial the proof should be different, then other questions might be presented for decision which were not before this court on the other appeal. The language of this court, to the effect that the plaintiff was entitled to recover on account of the taxes for the years 1900 and 1901, must be understood to refer to the facts then shown the court. On the return of the case to the circuit court, if the evidence had been the same as on the former trial, it would have been the duty of the court under that opinion to ascertain from the evidence the amount of the taxes for the years 1900 and 1901 and give judgment therefor. In order to enter any judgment it was necessary for the proof to be given just as it was on the first trial, so that the court could intelligently ascertain what the amount of these taxes was. The other facts necessary to make out the plaintiff's case should have been proved on the second trial just as on the first; for on the reversal of an ordinary action it stands for trial as though it has not been tried before, although on the trial the court will follow the principles laid down in the opinion on the appeal where they are applicable under the evidence given on the second trial.

On the trial the defendant introduced Walter Elrod, and offered to prove by him that he was one of the board of supervisors of the city of Somerset for the year 1900, and that no printed notice was published of the place or time of the sittings of the board. It introduced R. B. Dugger and J. H. Gibson, and offered to prove by them the same facts as to the years 1900 and 1901. It also offered to show by Gibson that he was the custodian of the records of appellee, and that as shown by these records the board of educa-

tion at no time sat as a board of equalization of the property outside of the limits of Somerset. It also introduced H. H. Gragg, and offered to prove by him that he made the assessment upon all of the property within the taxing district of the city of Somerset for the years 1900 and 1901, and that he gave no bond as assessor for either of these years, and that no notice was given that the assessment had been returned or giving the taxpayers three days in which to appear before the board of trustees; also that the taxes levied on taxpayers and property outside of the city of Somerset for the year 1900, which have been unaccounted for and uncollected, amounted to about \$70.

We will pass upon the competency of this evidence as the case must go back for a new trial. Section 3542, Kentucky Statutes, regulating the board of supervisors in cities of the fourth class, and providing for the notice of their meetings above referred to, contains the following: "Any failure or informality in the election of city supervisors, or in their meetings or proceedings, shall not affect the validity of the tax."

The evidence offered, therefore, if admitted, would have been valueless as to the want of notice of the meetings of the board of supervisors, for the legislature in creating this board and in defining its duties had authority to declare that these errors or omissions should not invalidate the tax. If the board of education made no change in the assessment of property outside of the city it must be presumed the board was satisfied with the assessment of this property as made by the assessor. The notice of the time and place of the meeting of the board of equalization are for the benefit of the taxpayer. If no notice is given he may waive this, and if he does waive it and pay his taxes the collector must account to the board for the money collected. If the taxpayer does not pay, he must be presumed to stand on his rights, and in that event the collector is not responsible for failure to collect on the property outside of the city where notice of equalization was not given. The failure of the board to take a bond from Gragg as assessor did not render the assessment by him void as to the property lying outside of the city of Somerset. We do not find in the statute any requirement of a bond from him. He was a de facto officer, having been regularly appointed and having been recognized by the board as the assessor.

In 23 Am. & Eng. Ency. of Law, 855, the rule is thus stated: "The failure of a person duly elected or appointed to an office to take the prescribed oath or give a bond as required, or either, does not, when he has proceeded to exercise the functions of the office, invalidate his acts so far as the public or third persons are concerned. As to them, his acts are so valid as though he were an officer de jure. His title to the office can not be attacked collaterally, but only by direct proceedings in the nature of quo warranto. The failure to qualify constitutes a ground for ousting him from the office."

Certainly this rule should be applied as against Gragg himself; and his surety on his bond as collector can not collaterally raise the objection that he had not given bond as assessor as a defense so far as he actually collected the taxes. As to the cross appeal we see no error. The board of education in levying taxes must speak by its records. If the order levying the tax for the year 1899 was void under the Constitution, it was a nullity and gave no authority to the collector to collect the tax or to retain the money when

collected. His obligation as to the money collected is to the taxpayer and not to the public. (Whaley v. Commonwealth, 23 Ky. Law Rep., 1292.)

As there is nothing in the record warranting the judgment for \$2,888.65, or showing that it is correct, the judgment is reversed and cause remanded for a new trial.

CITY OF PADUCAH v. EVITTS.

(Filed May 4, 1905.)

1. Ordinances—City jailer—Salary—Deputy—Under Kentucky Statutes, section 8145, providing for the election of a city jailer by the voters of cities of the second class, and fixing his compensation at not less than \$1,500, nor more than \$2,500 per annum and allowing him a deputy jailer, an ordinance of a second class city fixing the salary of the city jailer at \$1,320 per annum in full of all payments for cooks or other help, which the city jailer may see fit to employ, is invalid to the extent that it allows him less than \$1,500 per annum, and denies him a deputy jailer.

2. Janitor of city hall—Duties of city jailer—An ordinance of a second class city which provides that the jailer shall perform the duties of janitor of the city hall and the building adjacent thereto, in which is located the offices of the city engineer and the city street inspector, is valid under section 8145, Kentucky Statutes, which provides that the jailer "shall perform such duties as the general council may by ordinance prescribe."

E. H. Puryear and Campbell & Campbell for appellant.

J. C. Flournoy for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Paynter.

This action involves the question as to the validity of certain ordinances of the city of Paducah, a city of the second class. Section 8145, Kentucky Statutes, provides for the election of a city jailer in cities of the second class by the qualified voters; and that he shall hold his office for four years and until his successor is elected and qualified, and that his compensation shall not be less than \$1,500 nor more than \$2,500 per annum, and that he shall be furnished a deputy jailer by the city. The general council of the city of Paducah enacted an ordinance, a part of which reads as follows: "That the city jailer of the city of Paducah, Kentucky, elected in pursuance of the general laws governing cities of the second class, shall receive as his compensation for his services the sum of \$1,320 per annum, payable in monthly installments as other "salaries are paid. And said salary is to be in full of all payments of cooks or other help which the city jailer may see fit to employ."

The question then is, did the general council have the right to fix a less compensation for the jailer than that fixed by the statute for the government of cities of the second class?

Section 3064, Kentucky Statutes, provides that the general council, unless otherwise provided by law, shall fix the salaries and compensation and prescribe the duties of all officers and deputies and employees of the city, except as to persons in office when the act took effect. It is evident from this section that the legislature did not intend that the general council of cities of

the second class should fix the salaries of officers where they were fixed by the statute. It, therefore, follows that the general council acted without authority in fixing the salary of the jailer and in effect denying him a deputy. The ordinance is in conflict with the statute in fixing the compensation at less than the minimum salary fixed by the statute.

It is urged that the ordinance is valid, because of the case of *City of Lexington v. Thompson*, 24 Ky. Law Rep., 384. The correctness of that case is seriously questioned in a case now pending in this court. Assuming that opinion to be correct, it does not announce a doctrine different from the conclusion we have reached in this case. In that case the court treated firemen as simply employes of the city, and that their control and compensation received was left entirely to the municipality. And this was upon the idea that the right to employ and pay a fire department is not a governmental function which should be exercised or regulated by the legislature. The reasoning in that case shows that the control of the police system of a city is a governmental function and forms a part of the State government, and is subject to legislative control.

In the case of *Police Commissioners v. City of Louisville*, 3 Bush, 597, this court held that the legislature had the right to take entire control of the police system in cities unless restricted by some Constitutional provision. The office of jailer in cities is a necessary adjunct to the enforcement of the penal and criminal laws of the State. It is just as essential to have some place to confine violators of the law and those charged with offenses as it is to have officers to arrest and courts to try them. It is an office established for governmental purposes and essential to the enforcement of the criminal and penal statutes of the State. The office is filled by an election of the people, and is a four-year term.

There is another ordinance, the validity of which is here questioned, which provides that the jailer shall perform the duties of janitor of the city hall and the building adjacent to the city hall property in which is located the offices of the city engineer and city street inspector. It is insisted that the jailer should not be burdened by the duties imposed by this ordinance, and the city had no right to impose it. Section 3145, Kentucky Statutes, provides that the jailer "shall perform such duties as the general council may by ordinance prescribe." When the appellant was elected and accepted the duties of the position he did so with the knowledge that the general council had the right to prescribe his duties from time to time, thereby we are of the opinion that the ordinance imposing this duty is valid.

The judgment is affirmed.

ANDERSON v. MT. STERLING TELEPHONE CO., &c..

(Filed May 4, 1905—Not to be reported.)

1. Contract for building telephone line—Remedy for wrongful attempt to remove box—Where a parol contract was made between appellant and appellee by which, in consideration of the use of his land for the construction of its telephone line, appellee was to give appellant free telephone service, an action to enjoin appellee from removing the box and interrupting his service is not an action within the meaning of the statute to charge appel-

lies upon a contract for the sale of real estate, and is not an action upon a verbal contract which was not to be performed within a year.

2. Same—Under the facts as above recited appellant did not have a complete remedy at law, and, therefore, an injunctive proceeding was the proper one to preserve his rights.

Allie W. Young and Nesbitt & Watson for appellant.

John G. Winn for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Paynter.

This appeal brings here for review the judgment of the court sustaining the demurrer to the petition. In the petition it is substantially averred that appellees were engaged in erecting a telephone line from Mt. Sterling to Levee, a village about eight miles from Mt. Sterling; that it was to pass over the farm of the appellant, George W. Anderson; that as a consideration for the privilege of placing the telephone poles on the farm of appellant and attaching the wires to his trees, appellees agreed to erect and maintain a telephone in his house; that this contract was in parol; that in 1895 it was executed by the appellees erecting poles on his farm and attaching wires to his trees and placing a telephone box in his house; that the appellees have continued to occupy his land with poles and wires and have cut off his connection with the telephone line and are threatening to remove the telephone box from his house; that appellant lives three miles from Mt. Sterling and that he conducts all his business at that point and that the telephone is necessary to its proper conduct. The appellant sought to prevent the removal of the telephone from his residence and to require the connection to be maintained at Mt. Sterling, so as to enable him to continue to use the telephone.

It is contended that the action can not be maintained for the following reasons: First, that it is for an interest in land; second, that it was not to be performed in one year; third, that there was no mutuality to support the contract; fourth, that appellant had a complete remedy at law.

The statute provides that no action shall be brought to charge any person upon any contract for the sale of real estate or any lease thereon for a longer term than one year. The appellees, under the contract in question, obtained the use and occupancy of appellant's land with its telephone poles and wires for the consideration that they would furnish him the telephone service stated. The appellees' purpose is to hold what they obtained under the contract and take from appellant that which they gave as a consideration for it. The appellees are not giving up the benefits which they obtained under the contract, although they seek to hold the consideration which they gave for them. This is not an action to recover the consideration which appellees gave for the benefits received, and, therefore, it is not an action in the meaning of the statute to charge appellees upon a contract for the sale of real estate. The appellant is resisting appellee's effort to regain the consideration which they gave for the valuable right received and which they now enjoy. "It is a resisting equity" which the appellant has, and which he invokes to prevent the attempted wrong of appellees.

For the reasons given above it is not an action in contemplation of the

statute upon a verbal contract which was not to be performed within a year. We fail to see a lack of mutuality in the contract. The appellees received a thing of value, and for which they agreed to render a valuable service to the appellant. Under the facts of the case the appellant did not have a complete remedy at law, and, therefore, the injunctive process of the court was the proper remedy to preserve his rights. We do not think this view is in conflict with the cases of *Williams v. Maysville Telephone Co.*, 26 Ky. Law Rep., 945, and *Cumberland T. and T. Co. v. Hendon*, 24 Ky. Law Rep., 1271, because this action is based upon an entirely different state of facts from those which were the bases of these opinions.

The judgment is reversed for proceedings consistent with this opinion.

PIERCE, CEQUIN & CO., &c. v. MEADOWS, &c.

(Filed May 9, 1905—Not to be reported.)

Contracts—Construction—Building house—Monthly payments—Failure to pay—Rights of assignee—G. and M. agreed in writing with M. to build a house on M.'s lot at \$5 per month for the lease of the lot until the house was built, and then \$5 per month for the rent of the house until the cost of the building of the house was paid for, and if they left it before paying for it, it was to belong to M. G. and M. procured appellants to build the house at an agreed price and assign them the contract as collateral, and abandoned the building before paying for it, and M. then took possession and refused to pay the contractors. Held—That the contract was such as gave G. and M. a longer lease than two years and was assignable without M.'s consent, and the appellants, as assignees of G. and M. were entitled to the house by paying M. the agreed rent of \$5 per month until the cost of the building was paid for.

W. J. Webb and H. T. Smith for appellants.

Ed. Thomas and Robbins & Thomas for appellees.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from a judgment dismissing appellant's petition upon the ground that they were not entitled to any relief.

It was alleged in the petition that the appellants were contractors in the city of Fulton, Ky., and that the appellee, Meadows, was the owner of what is known as Meadow's Park; that on April 28, 1902, appellee Meadows entered into the following contract with the firm of Crossley & Martinetti:

"Contract and agreement by and between Crossley & Martinetti, of Columbus, Ky., and W. W. Meadows, of Fulton, Ky., entered into this April 28, 1902: Witnesseth, that said Crossley & Martinetti are to build on Meadow's Park, in Fulton, Ky., near the meat shop fronting on Commercial avenue, a building to be used by them as photograph gallery, and bind and obligate themselves to pay to W. W. Meadows, for the lease of ground upon which the building is to be erected, \$5 per month, and said rent is to be applied to cost of building until the building shall have been paid for; then said \$5 per month shall be paid by Crossley & Martinetti to W. W. Meadows. It is agreed by Crossley & Martinetti and W. W. Meadows that after the

amount of rent, at \$5 per month, shall be as much or equal the cost of the building, or should Crossley & Martinetti vacate or leave said building, then, in either or any event, the building is to be, and is hereby declared, the property of W. W. Meadows. W. W. Meadows furnishes the ground and gives to Crossley & Martinetti the first option to rent said building, after it shall have been paid for by rent, as \$5 per month, at same price per month."

On the next day after the date of this contract the appellants entered into a written contract with Crossley & Martinetti, by which they agreed to furnish the material and labor necessary to the building of the house called for in the contract with Meadows for the price of \$314.30, to be paid as follows: Fifty dollars when the work was commenced and the balance in installments of \$10 per month until the entire amount was paid, and to secure the appellants in the payment thereof Crossley & Martinetti, in the writing referred to, transferred and assigned their lease from Meadows as collateral to appellants. The appellants erected this building in accordance with the contract, and Crossley & Martinetti paid them the first \$50, but failed to make any other payment. Crossley & Martinetti took possession of the building and kept it for a short time, and left it, and appellee, W. W. Meadows, took possession thereof. Appellants sought to dispossess appellee by a writ of forcible entry and detainer, and failing in this, they instituted this action, by which they sought to recover of appellee the rent of this house at the price of \$6 per month from the time he took possession, and also to enforce a lien upon the property for the balance of their claim and for all other proper and equitable relief.

Appellee contends, and the lower court agreed with him, that when Crossley & Martinetti vacated or left the building and he took possession thereof by the consent and acquiescence of Crossley & Martinetti, that he was entitled to the immediate possession of the property under the contract, and that neither he nor his property were liable to any one for the erection of the building or the material used therein. The appellants failed to file the statement with the county court clerk and take the steps necessary to continue their lien under the statutes as applicable to mechanics and materialmen. Their claim is based only upon the contracts above referred to.

When Crossley & Martinetti obtained this contract from the appellee they owned it and held it as their property, a thing of value, and we are not aware of any law that prohibited them from selling and transferring it to another. The contract was such that it necessarily gave them a longer lease than for a term of two years. That being true, it did not require the written or other consent of appellee Meadows to enable them to dispose of their interest in this leased property. But the appellants, upon receiving and accepting the assignment of this lease, did not and could not have any right or take any greater interest in this property than their assignors, the lessees owned and held. Consequently the appellants are not entitled to recover of appellee \$6 per month, but can only recover \$5 per month, the amount fixed in the contract, for the time the appellee has had the possession of it, and they are also entitled to the possession of it, to be used for the purposes contemplated in the contract, a sufficient length of time to reim-

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burse themselves at the rate of \$5 per month, less the time the building was occupied by Crossley & Martinetti.

When Crossley & Martinetti abandoned or left the property they had no right to surrender or turn over the possession to the appellee for the reason that prior thereto they had transferred their interest in the leased premises to the appellants, and this abandoning of the property was not such a vacating as was contemplated by the contract. Under our construction of this contract the appellee does not suffer any loss. He obtains the house, paid for in rents as stipulated, but under his construction of the contract he would get the house with but little cost to himself, which was never contemplated by the parties. (*Frazier v. Broadvax*, 2 Litt., 249; *Trabue v. McAdams*, 6 Bush, 74.)

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

LUTTRELL v. EAST TENNESSEE TELEPHONE CO.

(Filed May 11, 1905—Not to be reported.)

Sale of telephone poles—Agency—Upon a contract of sale of telephone poles by appellant to Peck, appellee's agent, the evidence shows that the contract was with appellant alone, and the settlement made with Walker was unauthorized, and a peremptory instruction to find for appellee was improperly given, there being evidence to sustain appellant's claim. An instruction should have been given telling the jury that if appellant sold and delivered the poles to appellee, or if appellee received them from appellant, under an agreement to pay the contract price for them, the verdict should have been for appellant. If it received them from appellant and appropriated them to its own use, and that appellant had not agreed to deliver them upon Walker's contract, the verdict should have been for appellant for the reasonable market value of the poles at the time of their delivery, and it should have been further submitted as to whether Peck was appellee's agent for the purpose of buying the poles.

Taylor & Lucas for appellant.

Wheeler, Hughes & Berry for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant sued appellee in express assumpsit claiming a sale of 648 30-foot chestnut poles at 80 cents each.

Appellant testified that he made the contract with one Peck on behalf of appellee, and delivered the poles as agreed to appellee's manager at Paducah, who received them, but did not pay for them. Appellant further testified that the Paducah agent promised to report the delivery to the treasurer of the company at Nashville, who would send appellant a check for the amount due at 80 cents for each pole. Appellee denied that it bought the poles of appellant, though at the trial it admitted having received them. But it claimed to have bought them from Walker, and to have paid Walker for them. It was clearly shown that appellant did not sell the poles to

Walker, but on the contrary positively refused to do so. Whereupon Peck assured appellant, so the latter claims and so Peck virtually admits, that Walker had nothing to do with the contract. Without detailing the evidence, we will say that the case impresses us as presenting this state of facts: Walker and Peck had jointly engaged, or Walker had, to furnish the telephone company, probably the two companies known as the Cumberland and the East Tennessee, quite a quantity of poles of different sizes. Appellant had undertaken to furnish some 700 of them, 25 feet long, to the Cumberland company, but lacking the means, Peck, who was a banker, agreed to finance the undertaking for him. Whether Peck did all he agreed to do is not made clear, nor is it material in this case; but at any rate appellant claimed he had not, and thereupon abandoned the contract. It was afterward that Peck induced appellant to enter into the contract to furnish the lot of poles now sued for, which were of different length, and at a higher price. The poles were delivered by appellant as stated. Instead of the pay being sent to him, Walker went to Nashville, to appellee's headquarters, and settled for these poles, taking a margin above the price at which they were contracted from appellant. The balance of the price was then sent by appellee to Peck, who undertook to apply it to appellant's unfulfilled contract for the 25-foot poles. At the close of the evidence the court instructed the jury peremptorily to find for appellee, which was error. There was evidence to sustain appellant's claim, and it should have been submitted to the jury. The court should have told the jury that if appellant sold and delivered poles to the appellee, or if appellee received them from appellant, under an agreement to pay him 80 cents each for them, the verdict should be for the plaintiff; or if it received them from appellant, and appropriated them to its own use, and that appellant had not agreed to deliver them on Walker's contract, the verdict should be for the plaintiff for the reasonable market value of the poles at Paducah at the time of the delivery, not exceeding 80 cents each. Furthermore, it should have been submitted whether Peck was, in the matter of buying the poles, appellee's agent. For, although he may not have been at the time of the purchase, yet there was evidence that appellee sent the purchase money to him to be paid for the poles, showing that appellee knew, or had some knowledge, that the transaction was not with Walker, but with some one else, of whom Peck had bought them and caused them to be delivered to appellee. It is not contended by anybody that Peck himself sold the poles to appellee, or bought them from appellant for himself. Therefore, if the poles were bought by Peck for appellee, and delivered to it under that contract, and appellee sent the money to Peck to pay for them for it, his agency was thereby ratified, and for that transaction was sufficiently established. Peck, as agent representing appellee in paying out its money for the poles, had no right to appropriate it himself without the consent of the payee upon a debt owing by the latter to Peck. Appellant's right was to receive the pay from appellee for the poles, unless he had sold them to Walker, and had delivered them on Walker's contract. Unless the sale was to Walker, as indicated, there being no controversy that the poles were received by appellee and appropriated by it, appellee was bound to see that appellant got his pay. In that state of case, if the evi-

dence is true, Peck was appellee's agent at least in making the payment to appellant, and having failed to do it, appellee is liable for the amount.

The judgment is reversed and cause remanded for a new trial under proceedings consistent herewith. On the return of the case the amended petition tendered should be filed.

SPROWL v. SOUTHERN NATIONAL BANK.

(Filed May 11, 1905—Not to be reported.)

1. Banks and banking — Dishonor of draft — Mistake—Damages—The evidence upon the trial of this action in the lower court for damages, resulting to appellant from the dishonor of his draft upon appellee, does not show that appellant suffered any substantial damages by the failure of the payee to pay his check, but shows that the whole trouble grew out of a mistake by which the proceeds of the note in question were placed to the credit of another. The finding of the jury was evidently upon the ground that the bank did not agree to credit appellant's account with the proceeds of the note, but that from the nature of the circumstances it had the right to assume they were to be credited to C. K. Sprowl, and the verdict was supported by the evidence.

2. Same—Evidence relating to the dishonor of a previous check some time before was properly not admitted as it had no connection with the transaction sued on.

B. F. Gardner for appellant.

Bennett H. Young for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Chief Justice Hobson.

Appellant, E. R. Sprowl, had an account with the Southern National Bank in the name of "E. R. Sprowl, agent." He had a note for \$35, due at the bank on February 4, 1903. He desired to pay \$10 on the note and renew for the remaining \$25. He executed to his brother, C. K. Sprowl, a note for \$25, which C. K. Sprowl endorsed, and he then took the note to the bank and the bank gave him his \$35 note, but when it came to credit the proceeds of the \$25 note it credited the amount, \$24.45, to the account of C. K. Sprowl. On March 17 E. R. Sprowl gave Robert Grigsby a check for \$35, who presented it to the bank, and the bank refused to pay it on the ground that Sprowl had not that amount of money to his credit. Previous to this, on March 1, the bookkeeper of the bank had called C. K. Sprowl's attention to the fact that the \$23.45 was credited to him individually, and he then gave a check and had the amount passed to the credit of C. K. Sprowl & Son. On March 30, or thirteen days after the Grigsby check had been presented, C. K. Sprowl & Son had the \$24.45 passed to the credit of E. R. Sprowl, agent. The Grigsby check was then again presented for payment and was paid. On May 2, 1903, E. R. Sprowl filed this suit to recover damages of the bank in the sum of \$5,000 on the ground that he had been injured in his business and credit, and had endured great mental and physical suffering by reason of the nonpayment of the check. The jury to whom the case was submitted found for the defendant, and the plaintiff appeals.

The evidence falls to show that the plaintiff suffered any substantial damages by the failure of the bank to pay the check when first presented, and it leaves no doubt that the whole trouble grew out of a simple mistake by which the proceeds of the \$35 note were placed to the credit of C. K. Sprowl, instead of E. R. Sprowl. When the plaintiff received from the bank the \$35 note and he had given no check for the amount, he could not but understand that the note was to be charged to his account, for he knew he had not paid it in money, and on his own version of the transaction he could not but know that there must be charged to his account at least the difference between the \$35 note and the proceeds of the \$25 note. The difference was \$10.55, and he must have contemplated that this \$10.55 was to be charged to his account. It is thus shown that although the account was in the name of E. R. Sprowl, agent, it was treated by him in this transaction at least as his personal account. His account was balanced up on March 1, showing that he then had to his credit in the bank only \$63.19. There was sufficient evidence to warrant the court in submitting to the jury the question whether the defendant ratified the charge of the \$35 note to his account as agent; for from the form of the transaction he should have understood this, and the bank had a right to understand that he so understood. The finding of the jury for the defendant was apparently based upon the ground that the bank did not agree to credit the plaintiff's account with the proceeds of the \$25 note, but that from the nature of the transaction, and the form of the note, it had a right to understand that the proceeds of this note was to be credited to C. K. Sprowl; and we do not think that the verdict of the jury is on either ground unsupported by the evidence. The evidence relating to the dishonor of a previous check some time before was properly not admitted as it had no connection with the transaction sued for. The statement of the cashier of another bank to Grigsby was also properly not admitted as what this cashier said was not evidence against appellant.

Judgment affirmed.

KENTUCKY AND INDIANA BRIDGE AND RAILROAD CO. v.
CLEMMONS.

(Filed May 11, 1905—Not to be reported.)

Action for damages for injury to property and for taking property—Parties to action—Liens—A demand against a railroad company for the taking of property where judgment has been procured against it is a lien upon the corpus of the property superior either to a prior or subsequent mortgage, and can not be defeated by a sale of the road unless the lienholder is made a party to the foreclosure proceedings.

Humphrey, Burnett & Humphrey for appellant.

J. L. Clemmons for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Hobson.

Appellee Clemmons, on January 5, 1894, brought an ordinary action against the Kentucky and Indiana Bridge Co. to recover damages to a dwelling house and lot owned by him on Montgomery street, in Louisville, Ky., be-

tween 30th and 31st streets, by reason of the construction of railroad tracks in front of his house in the street, the purpose of the action being to recover for the permanent injury to the property from the location and operation of the railroad tracks in the street. On May 1, 1899, he recovered a judgment against the company for \$400 and costs, and his execution having been returned no property found he instituted this action against appellant, who was then in possession of the railroad property and came by it in this way: The Kentucky and Indiana Bridge Co. made a mortgage on its property and pending the action above referred to proceedings were instituted in the United States Circuit Court for the District of Kentucky to foreclose the mortgage. A foreclosure sale was made at which the property was bought in for three railroad companies using the bridge, and subsequently appellant corporation was formed and took over the property from them. Mortgage bonds to the amount of \$2,500,000 were issued, and a part of the proceeds of these bonds was set aside for the payment of charges upon the property. Appellee was not a party to the foreclosure suit, and appellant refused to pay his judgment. On these facts the circuit court entered a judgment in favor of the plaintiff, and the defendant appeals.

The claim of the plaintiff in his ordinary action, in which he recovered the judgment sued upon, is for the permanent injury of his property by the location of the railroad tracks in the street. Such a demand is a claim for the taking of property, and is a lien upon the corpus of the railroad superior either to a prior or subsequent mortgage, and can not be defeated by a sale of the road unless the lienholder is made a party to the foreclosure proceeding. (*Stickley v. C. & O. R. R. Co.*, 93 Ky., 327; *Ball v. Maysville, &c., R. R. Co.*, 102 Ky., 486; *Maysville, &c., R. R. Co. v. Ball*, 108 Ky., 241; *Tolle v. Owensboro, &c., R. R. Co.*, 111 Ky., 623.) As appellee was not a party to the foreclosure proceeding, and had a lien on the railroad property held by appellant, the court properly enforced his judgment against it.

Judgment affirmed.

SAULSBERRY v. FITZPATRICK.

(Filed May 11, 1905—Not to be reported.)

Indemnifying bonds—Liability of surety—Action by owner of property wrongfully sold—Limitation—Where a sheriff levied an execution on personal property in the possession of the execution debtor, which belonged to another, but before sale required an indemnifying bond from the execution creditor, the owner of the property may recover its value from the surety on such bond, unless it be shown that the execution debtor had been in possession of such property for five years prior to the levy and sale.

N. B. Hays for appellant.

J. G. Fitzpatrick and O. V. Riley for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Nunn.

In the month of November, 1898, one Rennebaum sold to Boll & Son, of Kuttawa, Ky., a lot of machinery. Rennebaum immediately loaded this

machinery upon cars to be transported to the purchasers. The sheriff of Bell county had an execution in favor of Canter Lumber Co. against Rennebaum for over \$600, which he levied upon this machinery, but before the sheriff would make a sale of the property he demanded an indemnifying bond, which was given with the appellant as one of the sureties thereon. The sheriff then sold the property, and a member of the lumber company purchased and shipped it to Boli & Son. In this lot of machinery there was a tubular boiler and engine which appellee claimed as his property. He instituted this action in the indemnifying bond for \$800 damages, the value of his property.

Appellant answered and traversed the allegations of the petition, and alleged that Rennebaum was the owner of the boiler and engine, and that he had been in the actual possession of same for more than five years before the institution of appellee's action, and relied upon section 1909 of the statute as a bar to appellee's claim, and by an amended answer he pleaded that he had not executed the bond sued on. The issues were formed, the parties waived a trial by jury and submitted the case to the special judge, who found from the evidence that the boiler and engine was the property of appellee and the value of the machinery to be \$250, and gave judgment against appellant for that sum, with its interest and the cost of the action. It appears from the proof that appellee purchased this boiler and engine from the Louisville Banking Co. in the month of February, 1895, and in the fall of that year he loaned it to Rennebaum in consideration that he would make certain repairs on it. Under this arrangement Rennebaum retained possession thereof until December, 1898, when the sale was made under the execution in favor of the Canter Lumber Co.

The lower court found from the evidence that the appellant executed the indemnifying bond sued on, and it is not seriously contended by appellant that this was error. The real claim of appellant is that appellee lost his right to this boiler and engine by reason of the length of time Rennebaum had the possession and use thereof; that the provisions of section 1909 settles this question against appellee. This section, in so far as it applies, in substance provides that when a loan of personal property is made to any person, and possession of the property shall have remained five years with the person to whom loaned, without demand and pursued by due process of law on the part of the pretended lender, the absolute right to the property shall be deemed to be with the possession, in favor of a purchaser without notice or any creditor of a person so remaining in possession unless written evidence of the loan be recorded in the county where the person who has the possession resides.

In our opinion the provisions of this section of the statutes can not avail appellant under the facts of the case. Rennebaum had not the possession of this property for the term of five years, but had only held it about three years when it was taken from his possession and sold under the execution stated. At the time appellant and his principals caused this property to be taken from the possession of Rennebaum, the right and ownership of the property was not in Rennebaum, but was in appellee, and appellee's cause of action accrued upon the indemnifying bond from the date of the sale under the execution. The time which has elapsed since the execution sale,

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up to the institution of this action can not be reckoned in counting the five years as contended for by appellant.

It may also be proper to remark that the proof shows that the sale of this boiler and engine to Boli & Son by Rennebaum was made by a previous arrangement between appellee and Rennebaum, whereby Rennebaum was authorized by appellee to sell this property whenever he could get a satisfactory price and deposit the price in the bank to the credit of appellee.

For these reasons the judgment of the lower court is affirmed.

BRAMBLETT v. COMMONWEALTH LAND AND LUMBER CO., &c.

(Filed May 12, 1905—Not to be reported.)

The opinion of this court in this case as found in 26 Ky. Law Rep., 1176, and the response to the petition for rehearing found in 27 Ky. Law Rep., 156, are on a second appeal interpreted as follows:

1st. The appellee, C. L. and L. Co., by itself or through its minority stockholders, was entitled to redeem the land purchased by Bramblett upon the payment to him of the various sums of money which he expended for the benefit of the corporation in the payment of purchase money and in the purchase of judgments against the corporation, which are specifically enumerated in the former opinions. Unless this was done Bramblett's purchase is to stand.

2d. In the event the appellees elect to redeem the land Bramblett is to be dealt with as a creditor of the corporation. The court did not intend that he should contribute money to pay any part of the sums which it was adjudged he should receive in the event they elected to redeem the land from his purchase, but only that part of the \$10,000 which was expended for the benefit of the corporation.

3d. Part of the \$10,000 was expended on property which was adjudged to Bramblett, and part of it was paid by Bramblett for the benefit of appellee, C. L. and L. Co., in the purchase of property adjudged to it. As it was one transaction this stock should be prorated between Bramblett and the corporation according to the part of it expended for himself and the part which he expended for the corporation. This, however, only applies to the stock assigned to Bramblett, and which was not pledged to secure the Hargis and Fetter debts.

4th. If the land is not redeemed from Bramblett as set out in the judgment it remains his property, and, therefore, neither the corporation nor minority stockholders have any interest in contracts Bramblett had or can make with reference to the sale of the land, and he should not be required to disclose his private affairs to persons who can only acquire the land by complying with the terms of the judgment as heretofore stated.

Helm, Bruce & Helm for appellant.

O. A. Wehle and Albert S. Brandeis for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

This appeal involves the interpretation of the opinion delivered herein (26 Ky. Law Rep., 1176) and the response to the petition for a rehearing (27 Ky. Law Rep., 156). The appellant and appellees differed as to the meaning of

the opinion and response to the petition for rehearing, and each offered a judgment which was claimed by the parties respectively to carry out the mandate of this court. In this opinion we will simply deal with the questions which arise from the difference of opinion as to what the court adjudged on the former appeal.

By the opinion it was adjudged that Bramblett was to be paid various sums of money which he expended for the benefit of the corporation in the payment of purchase money and in the purchase of judgments against the corporation and the stock of the corporation, etc., which are specifically enumerated. Upon the payment of the various sums ascertained and to be ascertained the Commonwealth Land and Lumber Co. by itself or through the agency of the minority stockholders, aided by the receiver to be appointed, were entitled to redeem the land from Bramblett's purchase. Unless this was done Bramblett's purchase is to stand. Because Bramblett was a stockholder in the corporation he could not be required to contribute any part of the money that was adjudged to be paid to him in the event there was an election to redeem the land. In the event the parties elected to redeem the land, Bramblett was to be dealt with as a creditor of the corporation. The court did not intend that he should contribute money to pay any part of the sums which it was adjudged he should receive in the event the parties entitled to under the judgment elected to redeem the land from his purchase.

The lower court fell into an error in concluding that he should do so, because in the response to the petition for a rehearing the court adjudged that Bramblett was not entitled to be reimbursed the full amount of the \$10,000 which he paid for the judgments and stock, etc. The reason the court adjudged that he was not entitled to be paid the full sum was, because part of that sum was paid for judgments and stock, etc., which were adjudged to Bramblett. In the event there was a redemption from Bramblett's purchase, he was not entitled to be reimbursed money which went to pay for property which was adjudged to him, but only that part of the \$10,000 which was expended for the benefit of the corporation. For the same reason the court did not adjudge that Bramblett should be required to advance any part of the \$10,000 which was paid out for the corporation. It did not adjudge that he should be required to advance any of the money to enable the corporation to pay the other sums which it is adjudged that he is entitled to receive in the event that there is an election to redeem the land from his purchase. If this court on the former appeal had intended to adjudge that Bramblett should advance any money to discharge a debt found to be due himself, it would have said so. If the court had intended that Bramblett should be forced to join with the minority stockholders in an election to redeem the land from his own purchase, it would have said so. If the corporation by itself, or through the minority stockholders, elect to redeem the land from Bramblett's purchase, they must pay him as a condition precedent the sums of money ascertained, and to be ascertained, by the terms of the opinion and response to petition for rehearing delivered on the former appeal. We are not considering this case with reference to Bramblett as a stockholder in the corporation. Necessarily if the corporation incurs a liability in redeeming the land from Bramblett, the value of his

stock in the corporation would be affected by such indebtedness, and in the final settlement of the corporation's affairs his stock may be made of more or less value, depending entirely in the wisdom of incurring the debt in making the redemption.

The stock of the Commonwealth Land and Lumber Co., which had not been pledged to secure the Fetter and Hargis debts, and which was owned by the bank and assigned to Bramblett, should, in the event of a redemption of the land from Bramblett's purchase, go to Bramblett and the Commonwealth Land and Lumber Co. Part of the \$10,000 was expended on property which was adjudged to Bramblett, and part of it was paid by Bramblett for the benefit of the Commonwealth Land and Lumber Co. in the purchase of property adjudged to it. As it was one transaction, this stock should be prorated between Bramblett and the corporation according to the part of the \$10,000 expended for himself and the part of it which he expended for the corporation. The preceding paragraph of the opinion only applies to the stock assigned to Bramblett, and which was not pledged to secure the Hargis and Fetter debts.

Unless the land is redeemed from Bramblett's purchase as provided in the judgment the land remains the property of Bramblett. Therefore, the corporation and minority stockholders have no interest in the contracts Bramblett had or can make with reference to the sale of the land. Their right to redeem does not depend upon what disposition he has or can make of the property. He should not be required to disclose his private affairs to persons who can only acquire the land by complying with the terms of the judgment as heretofore stated.

The judgment is reversed for proceedings consistent with this opinion.

J. W. RECCIUS & BROTHER v. THE COLUMBIA FINANCE AND TRUST CO.

(Filed May 12, 1905.)

Landlord and tenant—Tenant by the month—Notice to quit—Where a tenant's lease on premises has expired, and the landlord agrees that he may continue in possession and use of the premises as tenant by the month, but to have one month's notice before being required to quit, he is not a tenant at will or by sufferance, but a tenant from month to month, which tenancy may be terminated by the landlord giving him one month's previous notice, which notice may be verbal.

O'Neal & O'Neal for appellants.

Trabue, Doolan & Cox for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge O'Rear.

Appellant was the tenant of appellee, having rented from it a storehouse on Fourth street, in the city of Louisville, originally for the term of one year. At the expiration of the year, the parties being unable to agree upon a renewal of the lease, it was agreed that the tenant should continue in the

possession and use of the premises as tenant by the month, but was to have one month's notice before being required to quit. This was a tenancy from month to month, with the option to the tenant to renew at the beginning of each monthly period, unless he had had at least one month's previous notice if the landlord should require the possession at the end of the month.

In this proceeding for forcible detainer it was conceded that the facts of the renting were as stated above, and that the landlord gave to the tenant at least one month's notice to quit. The notice was verbal, not in writing. Appellant's contention is that it was a tenancy at will or by sufferance, and that he was, therefore, under section 2326, Kentucky Statutes, entitled to one month's notice in writing to quit. A tenancy at will is essentially undeterminate by its own terms. It will not end at any certain time by its own mere force.

"A tenancy by sufferance is where a person who has originally come in possession by a lawful title, holds such possession after his title has determined." (Mendel v. Hall, 13 Bush, 282; Irvine v. Scott, 85 Ky., 262.)

Such a tenancy arises generally where a tenant holds over without the consent of his landlord, but merely through the inaction of the latter after the expiration of the term of the lease. It was deemed the slightest possible estate at the common law, and could be terminated without notice merely by the entry of the landlord and his eviction of the tenant, as could also a tenancy at will. The harshness of this rule led to the adoption of the custom, and finally of the statutes, requiring notice to the tenant to quit. We have such a statute in this State. Section 2326 is as follows: "A tenancy at will or by sufferance may be terminated by the landlord giving one month's notice, in writing, to the tenant requiring him to remove."

This, however, is subject, or must be read in connection with sections 2295-2296, the former relating to tenancies for a year or more, and the latter to less than a year, it being provided that if by contract a tenancy for a year or more is to expire on a certain day, the tenant shall abandon the premises on that day, unless by express contract he secures the right to remain longer. But if without such contract he holds over, he does not thereby acquire any right to remain on the premises for ninety days after said day, and the possession may be recovered without demand or notice, if proceedings are instituted within that time. But after the expiration of the ninety days the tenancy is deemed to be renewed for another year. It was held in construing this section, that although such tenant within ninety days after the expiration of his term was a tenant by sufferance, still the notice mentioned in section 2326 (then section 1, article 4, chapter 66, General Statutes) was not required to be given because section 2295 itself provided otherwise. (Mendel v. Hall, supra; Irvine v. Scott, supra.) Likewise, by section 2296, it is provided that if by contract a tenancy for less than a year is to expire on a certain day, the tenant shall abandon the premises on that day unless by express contract he has the right to remain longer. But if without such contract to remain longer the tenant shall hold over, he does not thereby acquire any right to hold for the next thirty days after that day, during which possession may be recovered without

demand or notice. It will thus be seen that the legislature has provided three proceedings by which tenancies by sufferance may be terminated.

Counsel for appellant inquire to what state of case can section 2226 be applied, in view of sections 2295 and 2296, if not to the one presented at bar. It will be observed that sections 2295 and 2296 deal alone with tenancies by sufferance, and of those only that arise upon determination of a tenancy by contract for fixed and definite periods. From the definition heretofore given of tenancies by sufferance in general it is obvious that there may be still another class of such tenancies where they arise by operation of law by the termination or expiration of an uncertain term, as, for example, a tenancy per autre vie, or a tenancy terminable upon the happening of a condition or other contingency, as where the tenant holds over after the death of the person for whose life he held, or holds after the happening of the contingency or condition by which his term is ended. In the class of cases last illustrated section 2326 would apply. But we are clearly of opinion that the tenancy in this case was neither a tenancy by sufferance nor a tenancy at will. The duration of the term was certain, that is, the term was for one month. The fact that a lease for a fixed period gives to the lessee an option of renewal will not affect its character as a lease for a fixed period. (*Jones v. Kroll*, 116 Penn. St., 85; *Munson v. Wray*, 7 Black, Indiana, 403; *Myers v. Kingston Coal Co.*, 126 Penn. St., 582.) The parties, of course, have the right to provide that the option should itself be subject to condition, such as that it should not be exercised if the lessor gave notice for an agreed length of time that the tenancy was to cease. The only reason, therefore, that notice was required at all in this case was because the parties had agreed so. The legislature has seen fit to provide, in section 2326, that a tenancy at will, or by sufferance, might be terminated by the landlord giving one month's notice in writing. It has not been required in any other instance. Except for that legislative provision the notice would not have to be in writing. At the common law notice to a tenant to quit, unless otherwise stipulated by the agreement of the parties, was sufficient if verbal. (*Haley v. Hickman's Heirs*, *Littel's Select Cases*, 266.)

The court's instruction to the jury, therefore, that they should find the defendant guilty of the forcible detainer, if they should believe from the evidence that the plaintiff, the landlord, gave the defendant thirty days' notice to quit previous to the terminal day claimed by plaintiff, to wit, April 10, 1903, was right.

Wherefore, the judgment is affirmed.

DANIELS v. DANIELS, &c.

(Filed May 11, 1905—Not to be reported.)

Deeds—Fraud in procuring writing—Where in a sale of decedent's estate to pay debts his widow purchased a valuable farm, and after paying part of the price was induced by her daughter, aided by other interested parties, by falsely representing to her that she would lose what she had paid, to sign a transfer of her bid, and to execute a writing, directing the commissioner to convey the land to her said daughter, and to sign a receipt that she had been paid the full amount of the bonds for purchase money, when in fact

not a cent had been paid, she being an uneducated woman, the lower court properly adjudged the writing to have been fraudulently obtained, and directed a conveyance of the land to the widow, subject to the unpaid balance owing by her on the purchase price.

J. S. Cline for appellant.

J. F. Butler, Roscoe Vanover, J. R. Johnson, Jr., and R. L. Greene for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn.

Appellee, Mary Daniels, became the administratrix of her deceased husband's estate, and there not being sufficient personal property with which to pay debts against the estate she instituted an action to settle it. Such proceedings were had in the action as authorized the court to, and it did, make an order, directing the sale of sufficient real estate to pay the debts and costs, amounting to near \$1,800. Appellee, Mary Daniels, became the purchaser of the land at the commissioner's sale, and it appears, though it is not clear from the record, that all of the decedent's land was sold at this sale except a homestead which was set apart for the benefit of appellee and her infant children. The indebtedness against the estate was composed of a claim due her son, Nelson Daniels, amounting to \$389.81, and to another son, Perry Daniels, amounting to \$508.72; the balance, besides the cost of the suit, being claims due her which she had paid to creditors of the estate out of her individual means. At the sale she executed two bonds for the purchase price, one due in six months and the other in twelve months. The sale was made in January, 1903. Before the first bond became due she paid on it something over \$400 in cash. She was also entitled to credits for the amount of the claims paid by her as stated. After the first bond became due she did not have the cash with which to settle the balance and she approached her daughter, the appellant, and appealed to her to see one C. P. Taylor, with whom she lived, and if possible obtain a loan from him of sufficient money to pay the balance of the purchase money, proposing in her language, to give a deed of trust to secure the repayment of the loan. About this time her son, Nelson Daniels, who it seems desired a division of the whole estate and also the payment of his claim, stated to his mother that if she did not agree to his wishes that the commissioner, who sold the land, would bring the sheriff to her house and divide everything among the heirs and set her, with her things, out of doors. It appears that after this appellant, Vicy Daniels, repeated in substance his threat, and by this means she and her brother, together with Taylor, obtained a transfer of appellee's bid to the appellant, Vicy Daniels, and caused the appellee to execute a writing addressed to the commissioner, directing him to convey the land to appellant, and also obtained a receipt from appellee showing that she had been paid the full amount of the bonds for purchase money, with their interest, when in fact not a cent had been paid. About a month after this appellant, Vicy Daniels, by and through C. P. Taylor, deposited in the bank at Pikeville, to her credit, the full amount of these bonds, with their interest. She then drew a check, payable to appellee, for \$1,003, and also

checks payable to Perry and Nelson Daniels for the amount of their claims, taking receipts from the appellee and Perry, showing that these amounts were in full of their interests in all the estate of William Daniels, deceased. When appellee and Perry went to Pikeville they learned for the first time the extent and effect of these papers, and also that the commissioner had not made any threats to take the sheriff to her house and divide her estate, and never had any intention of doing so. Then it was that appellee and her son, Perry, became convinced that they had been defrauded and overreached in the matter, and they went to appellant and returned to her the checks, declining to cash them. Afterwards C. P. Taylor sent these checks to his attorney in Pikeville, who deposited them in the bank to the credit of appellee and her son, and there they have remained.

It appears, without contradiction, that this land was worth from \$8,000 to \$10,000. It also appears that immediately after appellant obtained an assignment of appellee's bid she gave to C. P. Taylor a mortgage on it and also an optional contract by which he could become the owner at his election. Nelson Daniels cashed his check at the bank of Pikeville, which was paid out of the funds deposited there to the credit of appellant, Vicy Daniels. Appellee, Mary Daniels, conceiving that she had been taken advantage of and overreached by her daughter, the appellant, and those representing and aiding her, disregarded the writing which she had executed to her daughter and took the necessary steps and did cause the commissioner of the court to make a deed of conveyance to her for the land purchased by her at the commissioner's sale. She, with the aid of the claim of her son, Perry, settled all the balance due on her sale bonds except the amount of Nelson's claim, which had been paid by the appellant, Vicy Daniels.

This proceeding was instituted by appellant, Vicy Daniels, to set aside the deed made by the Commissioner to appellee and have the deed made to herself under the agreement and contract related. The appellee answered appellant's pleading, and alleged that this agreement and the writings referred to were obtained by misrepresentations and fraud. This was the sole issue tried in the lower court. On the trial the lower court adjudged that appellee was entitled to the deed to this real estate, and that appellant was not entitled to recover on her alleged contract and writings, for the reason that they were obtained by misrepresentation and fraud. The proof shows that the appellee could neither read nor write, and at the time she executed the writings referred to was evidently under the impression and belief that she would immediately be deprived of all her property and possessions unless the sale bonds were settled at once. Appellee proves that her daughter, the appellant, and her agent, C. P. Taylor, took an active part in creating that impression upon her mind to obtain these writings. Appellant controverts this, but it is certain that appellant and her agent, C. P. Taylor, knew that appellee was laboring under this false impression at the time that they obtained from appellee the transfer of her bid and the writings referred to, and they permitted her to remain under this false impression, when they knew it was false, and made no effort to relieve her mind from the fear with which she was possessed, and under these circumstances took an assignment of property worth \$8,000 or \$10,000 for considerably less than \$1,800.

Under these facts we are of the opinion that the lower court was correct in its judgment except upon one single matter, and that is, it should have adjudged to appellant the amount paid by her to Nelson Daniels, which was properly a debt due by appellee, which she has not paid. Appellant should be allowed a lien upon the land for the amount of the check given by her to Nelson Daniels, with interest from the date of its payment by the bank to him.

For this reason the judgment is reversed and the cause remanded for further proceedings consistent herewith.

PHILLIPS v. CAMPBELL.

(Filed May 12, 1905—Not to be reported.)

Practice—Lost record—Where the record in an action was lost and a substituted petition, which was in the nature of a reformed petition, was filed, after issue was joined the record was found when the plaintiff moved to dismiss the so-called substituted petition, Held—The court properly overruled the motion as the petition showed on its face that it was a reformed petition.

Roscoe Vanover and T. H. Harmon for appellant.

J. F. Butler for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Paynter.

The appellee sued appellant on an account and two notes, claiming a balance to be due him of something over \$500. The petition was not paragraphed. The answer was filed, in which the statute of limitations was pleaded to all except one item in the account. The record was lost, and the court directed the master commissioner to supply it. The plaintiff filed what was designated a substituted petition, but in fact it was in the nature of a reformed petition, by the averments of which he abandoned all claim on the account and sought to recover alone on the two notes, which amounted to something over \$500. The appellant joined issue and pleaded that he had paid the notes. The case was referred to the master commissioner to state the accounts between the parties. After the case was partially prepared the old record was found. Plaintiff moved to dismiss the so-called substituted petition, but the court overruled the motion. We think the court properly did so. The petition shows upon its face that it was not a substituted petition, but a reformed one, as we have heretofore stated.

The case was prepared and tried upon the issues made thereunder. We are of the opinion that the court properly sustained the report of the master commissioner.

The judgment is affirmed.

LOUISVILLE GAS CO. v. PAGE.

(Filed May 12, 1905—Not to be reported.)

1. Damages—Personal injuries—Defective construction of gas box—The evidence in this case showing that the injury to appellee resulted from a de

fective construction of appellant's gas box, and there being evidence that the injury was permanent, while it is difficult to determine the proper compensation which should have been awarded, the judgment will not be disturbed on the ground of its being excessive, it being the province of the jury to determine its extent.

2. Same—The mere fact that the court would not have fixed the damages as high as the jury did is no reason for setting the verdict aside and granting a new trial. To justify such a course it must be apparent that the action of the jury was influenced by passion or prejudice, and this fact does not appear here.

Fairleigh, Straus & Fairleigh for appellant.

Robt. L. Page for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Paynter.

The appellant, as found by the jury (and the finding is not questioned here), negligently constructed a gas box at the intersection of Twenty-fifth and Bank streets, in the city of Louisville, and while appellee, a woman of sixty years of age, was walking up Bank street, with care, stumbled and fell by reason of the negligent construction of the gas box, thereby, in a severe injury to her elbow, causing much suffering and pain, and she had not recovered from the effect of the injury at the time of the trial of the case, which occurred about one year after the accident.

The only ground upon which a reversal is sought is, that the verdict for \$2,000 is so excessive as to show it was superinduced by passion or prejudice of the jury. It was the province of the jury not only to determine whether the injury was the result of appellant's negligence, but its extent and the amount of compensation appellee was entitled to receive. In a case like this, where there has been a severe injury and much physical pain and suffering, and there being some evidence from which the jury might conclude that the injury may be permanent, it is difficult, if not impossible, for a jury or a court to determine with exactness the proper compensation. The mere fact that the court would not have fixed the compensation as high as a jury had done is no reason for setting the verdict aside and granting a new trial. To justify the court in doing so the verdict must be so excessive as to induce the belief that it was caused by the passion or prejudice of the jury. For the determination of this question no fixed rule can be formulated. Neither do former rulings of the court afford a ready means of determining the question, for it is a rare case where the injury received and physical suffering is exactly the same as in adjudged cases. We do not feel justified in granting a new trial upon the facts of the case.

The judgment is affirmed.

HALL v. DINEEN.

(Filed May 16, 1905.)

Supersedeas—Damages in appellate court—Error in awarding—When correctible—Upon the affirmance of a judgment by this court which has been superseded, it is error of the clerk of this court to enter a judgment giving the appellee 10 per cent. damages upon the amount superseded, unless there

was a personal judgment in the lower court against the appellant which might be enforced by execution, and which was also superseded, and the motion to correct the error may be made at a subsequent term of this court.

W. H. Mackoy for appellant.

Byrne & Reed for appellee.

Appeal from Kenton Circuit Court.

Chief Justice Hobson delivered the following response to motion :

The judgment appealed from herein, which was affirmed, directs the master commissioner to pay to Ellen Dineen the sum of \$620.72, the balance found due her out of the funds in his hands. Appellant superseded the judgment, and the clerk of this court, in entering the order of affirmance, so entered it as to give appellee 10 per cent. damages upon the amount superseded. Appellant has entered a motion to set aside this part of the order. Section 764 of the Civil Code provides: "Upon the affirmance of, or the dismissal of an appeal from, a judgment for the payment of money, the collection of which, in whole or in part, has been superseded, as provided in chapter 2 of this title, 10 per cent. damages on the amount superseded shall be awarded against the appellant."

In discussing the meaning of this section this court, in *Worsham v. Lancaster*, 104 Ky., 814, said: "It has been repeatedly held that damages could not be awarded upon the supersedeas of a judgment directing a sale of property to satisfy a lien unless there was a personal judgment for the amount of the lien, which was also superseded. (*Talbott v. Morton*, 5 Litt., 326; *Sumrall v. Reid*, 2 Dana, 65; *Woods v. Roman*, 5 B. Mon., 45; *Rowan v. Pope*, 14 B. Mon., 102; *Stamps v. Beatty*, Hardin, 345.) The Superior Court, in an opinion January 9, 1885, in *Coffin v. Kelling*, and *Robinson v. Bashaw*, and also in *Cornwall v. Fletcher* (October 12, 1887), held that damages on the affirmance of a judgment superseded should not be given where the contest was over a fund in court, but that the judgment must be one that might be enforced by execution. There are a large number of cases in which no opinion were delivered which follow this doctrine."

Several cases are referred to in the opinion in which the rule was followed, and it has been applied by the court consistently in cases coming before it since that opinion was delivered. The fact that the motion to correct the order was not made within thirty days after the judgment was entered is not material. So much of the order as gave damages on the affirmance was a clerical error, correctible by the record, and, like any other clerical error, may be corrected at a subsequent term.

The motion is, therefore, sustained.

NAHM & FRIEDMAN v. REGISTER NEWSPAPER CO , &c.

(Filed May 16, 1905.)

1. Landlord and tenant—Repairing leased premises—Consent of tenant—Damages to tenant—Liability of landlord—Where the owner of a one-story building, which was leased for and occupied for printing a newspaper, employed an independent contractor, without the consent of the tenant, to put

a second story thereon, the tenant is entitled to recover from the landlord the damage done to type, stationery, etc., by reason of its exposure to the rain, dirt and grit in the construction of the second story; and on the trial of the case the fact as to whether the tenant consented to the erection of the second story was a question for the jury, as was also the extent of the damage done to the tenant's property thereby.

2. Independent contractor—Cross petition of landlord—Demurrer—In an action by a tenant to recover from his landlord damages done to his property by an independent contractor, in putting a second story on the building occupied by the tenant without the tenant's consent, a demurrer to a cross petition of the landlord against the contractor was properly sustained, as such action can not be properly litigated in the claim of the tenant against the landlord.

Reed & Berry for appellants.

Hendrick & Miller for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellants, Nahm & Friedman, made the following lease to appellee:

"This lease made and entered into this 1st day of July, 1901, by and between Joseph L. Friedman and Max B. Nahm, of the first part, and the Register Newspaper Co., of Paducah, Ky., of the second part:

"Witnesseth, That for and in consideration of the payment by the second parties to the first parties of the sum of \$475 per year, payable in equal monthly installments, at the end of each month from date hereof, during a period of five years from date hereof, the first parties hereby rent and lease unto the second party the one-story store building on the south side of Broadway, between Fifth and Sixth streets, being No. 510, in the city of Paducah, Ky., for a term of five years from date hereof, and covenant to keep the second party in the quiet possession of the premises during said term.

"It is agreed that the said premises shall be occupied by the second party as a printing and publishing office, and the same may be sublet, or the term assigned by the said second party.

"The second party shall comply with all the city laws and ordinances now in force, or hereafter to be enacted, and shall not render the first parties liable thereunder.

"The second party agrees to return the said premises at the expiration thereof, and upon its vacation of same, in like condition as when received, ordinary wear and tear thereof and damage by fire, or other unavoidable casualty, excepted.

"In the event of a violation of any of the conditions herein contained then this lease shall, at the option of the first parties, become void and forfeited, and the statutory requirement as to demand and notice are hereby expressly waived.

"In testimony whereof the second party, by its president, James E. Wilhelm, together with James E. Wilhelm, who hereby assumes the obligation

of surety for the performance of the conditions hereof by the said second party, have hereunto set their hands the day first above written.

(Signed) "JOS. L. FRIEDMAN,
"MAX B. NAHM,
"REGISTER NEWSPAPER CO.,
"By JAMES E. WILHELM, President.
"JAMES E. WILHELM."

Appellee took possession of the property, which was at the time a one-story building, and was conducting in it its printing business. In the latter part of September appellants made a contract with F. W. Katterjohn to add another story to the building. Katterjohn proceeded to do this while plaintiff was in possession of the lower story with its presses, typesetting machinery, stationery, type, etc. He removed the roof so that the house was exposed, and the rain, grit, dirt and trash came down upon the plaintiff's apartments. The house continued in this condition for some months, during which there was a good deal of rain, by reason of which, as appellee alleges, much of its property was ruined, and it brought this suit for damages, alleging that it had been damaged in the sum of \$2,000. Appellants denied the allegations of the petition. They also pleaded that the plaintiff consented to their adding the other story to the building, and that the work was done by Katterjohn as an independent contractor over whom they had no control, and for whose negligence they were not responsible. The affirmative allegations of the answer were controverted, and on the trial of the case before the jury a large amount of proof was introduced. The court instructed the jury in substance that if, while the plaintiff was occupying the building under its contract, defendants, by contract, caused their contractor to enter upon the house and build a second story on it without the plaintiff's consent, and thereby injured and damaged the plaintiff's property, they should find for the plaintiff; but that if the plaintiff consented to the building of the second story, then they should find for the defendant. The court also instructed the jury in effect that, although the defendants made an independent contract with Katterjohn, still if the performance of the contract in the ordinary mode of doing the work would necessarily or naturally produce the injury to plaintiff's property in the lower story of the building, then the defendants would be liable to the plaintiff for the damages so sustained by it, and that if they found for plaintiff they should find such sum in damages as they believed from the evidence its property in the building was damaged by reason of the entry upon and the building of the second story to the house. The jury found a verdict in favor of the plaintiff for \$1,500, and defendants appeal.

The landlord is under a positive duty to his tenant that he shall have quiet enjoyment of the premises. He can not himself tear off the roof above the tenant's head without being responsible for the consequent injury to the tenant's goods, and what he can not do directly himself he can not relieve himself of responsibility for by contracting for its being done by another. A master can not relieve himself of a nonassignable duty which he owes to a servant by contracting with another for its performance. A railroad can not relieve itself from responsibility for the exercise of its franchises by contract with another. The principle runs through the entire law and has

often been applied between landlord and tenant. Thus in *Pittfield, &c., Manfg. Co. v. Pittfield Shoe Co.*, 60 L. R. A., 116, it was held by the Supreme Court of New Hampshire that a landlord is not relieved from liability from injury to tenants of a lower floor by the freezing and bursting of an automatic fire extinguisher in the upper portion of the building, by the fact that he has employed an independent contractor to keep the building heated, and in that case the court quote with approval from 1 Thompson on Negligence, section 668, as follows: "There are certain absolute duties resting upon natural persons and corporations, either by operation of law or by reason of having been voluntarily assumed. The law does not permit a person or corporation to cast off such a duty upon an independent contractor so as to exonerate himself or itself from the consequences of its nonperformance."

The same rule was followed by the Wisconsin Supreme Court in *Wertheimer v. Sanders*, 87 L. R. A., 146. In that case, which was similar to the one before us, the court, after collecting a great number of authorities, said: "If an injury might be anticipated as a direct or probable consequence of the performance of work contracted for, unless reasonable care be used, the negligence of the contractor or his employes will be chargeable to the person for whom the work is done, and the latter will be held liable accordingly." (*Marshall v. Cohen*, 9 Am. Rep., 170; *Gill v. Middleton*, 105 Mass., 477; *Hawver v. Whalen*, 14 L. R. A., 828; *Gilckauf v. Maurer*, 75 Ill., 289.)

The evidence on the trial was conflicting as to the amount of stationery that was ruined by the water and dirt, and as to the extent to which the presses and other machinery was injured thereby, and as to whether or not the type could have been cleaned. The proof for the appellee tended to show that from \$400 to \$600 worth of stationery was destroyed; that \$600 worth of type was ruined so that it had to be sold for type metal, and that much damage was done to the presses and machinery. If the jury believed this evidence they were fully warranted in finding the verdict for \$1,500. While the proof for the defendants showed that there was not so much damage, it was after all a question for the jury, and they evidently believed the witnesses for the plaintiff. The proof leaves no doubt that the plaintiff suffered substantial damages. The water ran down into its rooms from the rain until more than once it was over an inch deep on the floor. The plaintiff's men had to stand on bricks and planks to do their work, and were then kept wet. The water brought in grit and dirt upon the presses and machinery as well as the stationery.

This condition of things lasted for several months. The jury could not have been misled by the instruction as to the measure of damages under the evidence. They were only allowed to find the damage or injury to plaintiff's property in the building. No other matter of damage than the loss on the property in the building was allowed to be considered by them. On the question as to whether the plaintiff consented to the erection of the second story the evidence is conflicting, but we do not see, considering it all, that the verdict should be disturbed on this ground. Propositions of compromise are not admissible as evidence. But what occurred between the plaintiff and the defendants when it presented its claim for damages on account of the loss to its property, by reason of the roof being taken off and another story added to the building, was competent in this case for the reason that

there was not here any effort to compromise, and what occurred when the demand was made was potent evidence that the plaintiff had not consented to the erection of the second story; for this evidence tended to show that the defendants did not then claim that the plaintiff had consented to the erection of the second story, and would have settled in the way the plaintiff proposed but for their concluding that they were not liable on account of having made an independent contract with Katterjohn to do the work. For the same reason the notice given to appellants on October 11 was competent, for, from this notice and the response that was made to it, the jury were warranted in concluding that it was not then understood that the plaintiff had consented to the work. The court properly told the jury that the notice was not evidence of the facts stated, and was admitted simply to show complaint.

The defendants made their answer a cross petition against Katterjohn. He was served with process upon the cross petition and filed his demurrer to it, which was sustained. This was proper. The plaintiff had brought no action against Katterjohn; it had sued simply the defendants on their contract of lease. If Katterjohn is answerable to the defendants the matter may be litigated in an independent action between him and them, but their cause of action against him under their contract with him can not properly be litigated in this suit by the plaintiff against them under the lease. A cross petition must relate to the cause of action sued upon. It can not be allowed to bring into the case an independent cause of action growing out of another matter. On the whole case we see no error to the prejudice of the appellants.

Judgment affirmed.

CLARKE, &c. v. BOOTH.

(Filed May 16, 1905—Not to be reported.)

1. Roads and passways—Erection and removal of gates—Where gates are erected upon public roads with the permission of the county court, the court can not abolish them by proceedings under section 4297, Kentucky Statutes.

2. Same—Where the circumstances indicate a presumption that one in opening a passway and erecting gates upon it did so with the reservation that he should be permitted to maintain the gates, and this was done without objection or interference for several years, the passway being a private one, the court was without power under section 4297, Kentucky Statutes, to remove them.

Kennedy & Dickson for appellants.

Holmes & Ross for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Nunn.

This proceeding was instituted under section 4297 of the Kentucky Statutes for the purpose of abolishing four gates across a public highway. This highway was a dirt road leading from the Carlisle and Sharpsburg turnpike to the East Union and Sharpsburg turnpike road, a distance of about two and one-half miles. Two of the gates were situated on the road where

It passed through the lands of appellant, Mrs. Susan Clarke; the other two were upon the lands of Mrs. Press Stone. It is not shown in the record under and by what authority or circumstances the gates were erected by Mrs. Stone. The proof does show the circumstances under which the gates were erected on the lands of Mrs. Clarke, but fails to show that they were erected by the authority or permission of the county court. The evidence shows that a public way was established in 1858 passing through the lands of the appellants. This road passed along near the bank of Somerset creek through the lands of appellant Clarke. In the year 1887 or 1888 the East Union and Sharpsburg turnpike was built across this old dirt road. Where this turnpike crossed the creek and road it was necessary to make a rock wall about eight feet high, which extended out to high round. The erection of this rock wall across the old road prevented the use of it by the public, and those who were accustomed to travel thereon turned up through the farm of Clarke to a point where they could get upon the turnpike. The old road was confined to a lane where it passed through the farm of Clarke before the turnpike was built. The evidence shows that very soon after this the husband of appellant, Mrs. Clarke, erected a gate in his fence along the turnpike about one hundred yards from where the turnpike crossed the old road, and he also erected another gate near the center of his land in the lane across the old road, and he permitted the public to travel through these gates across his farm. Clarke died the next year, and the appellant, Mrs. Clarke, took this gate out of the center of her farm and caused it to be erected on the line on the opposite side of her farm from the first gate, and those going through these gates across her farm were not confined to any lane or particular passway from that time to the institution of this proceeding. There is no proof in the record that this road or passway was open or the gate erected by the order or permission of the county court. From all the proof in the record it is reasonable to infer that Mr. Clarke opened this passway for the convenience of himself and the public, and that he dedicated same for that purpose, and when he did so he dedicated it with the burden of the gates resting thereon.

The circumstances create a strong presumption that when he opened this passway or road and gave it to the public, it was with the reservation on his part that he should be permitted to erect and maintain the gate referred to. This was done without objection or interference until the year 1902.

This court in the case of Allen, &c. v. Hopson, &c., 26 Ky. Law Rep., 1148, decided that the power and authority of the county court, under section 4297 of the Statutes, to remove or abolish gates depends upon the fact as to whether the gates were erected by permission of the county court under the provisions of section 4289 and section 4297. If not so erected, the court can not abolish them by proceedings under section 4297. The facts, as they appear here and the law as construed in that case, are conclusive of the case at bar.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

HORINE v. NEW YORK LIFE INSURANCE CO.

(Filed May 16, 1905—Not to be reported.)

1. Insurance—Payment of premium—Evidence as to payment of premium—Where one applied for insurance on the 26th day of November, and died suddenly on the 29th, three days later, and suit was brought to recover the insurance, alleging that the applicant had paid the premium when the application was made, and there was no receipt relied on and the oral contract relied on was denied by the company, a peremptory instruction to find for the company was proper.

2. Same—Inadmissibility of evidence—Appellant upon the trial of this action offered to prove by a witness that her deceased husband had told her that he had applied for insurance and that he had paid for it by giving the agent credit upon an account he had against the agent, and that the agent had told him he was fully insured, was properly excluded, for to have admitted it would have been to allow appellant to make evidence for herself. The evidence was only a narration of a previous transaction and was in no sense *res gestæ*.

3. Same—So also was properly excluded evidence offered by deceased's son to the effect that deceased told him soon after leaving the agent that he had taken the insurance and had agreed to credit the agent upon his account or the premium, and directed the son to make the credit on the book kept by him, and that he forgot to make such credit. The conversation did not occur at the time of the transaction with the agent and the latter was not present, and was clearly incompetent.

Byrd & Jouett for appellant.

Pendleton & Bush for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Hobson.

On Thursday, November 26, 1903, which was Thanksgiving Day, W. H. Horine applied for insurance on his life in the New York Life Insurance Co. in the sum of \$1,000, payable to his wife, Annie Horine, at his death. The application and medical examination were sent on to the company, but on November 29, and before the company had acted upon the application, he died suddenly of heart failure. His wife, Annie Horine, brought this suit against the company to recover the \$1,000, alleging that he had paid the premium at the time he made the application, and that it was then agreed in consideration of his so doing that the insurance should be in effect from that time. No binding receipt was relied on, but only an oral contract, which was denied by the defendant. At the conclusion of the evidence offered by the plaintiff the court peremptorily instructed the jury to find for the defendant, and she appeals.

She offered to prove by herself and Hattie Walker that her husband told Hattie Walker when he came home on November 26 that he had that day taken out \$1,000 insurance on his life in the New York Life Insurance Co., through its agent, John E. Garner, and that he had paid Mr. Garner for the insurance by giving him credit on his account for the premium, which was \$11 and some odd cents, and when he took the insurance Mr. Garner told him that he was fully insured; that he also then said to Hattie Walker that the old lady would not have such a hard time getting off if he should die,

as she would have \$1,000 to take to her next husband. The defendant objected to this evidence and the court properly declined to admit it as it was simply hearsay. To admit it would be to allow one to make evidence for himself, for it was simply a statement by the insured at his own home when Garner was not present. It was merely a narration of a previous transaction, and was in no sense *res gestæ*.

The plaintiff also introduced a son of W. H. Horine, and offered to prove by him that his father told him on November 26, at his shop, that he had just taken out \$1,000 life insurance in the New York Life Insurance Co., through its agent, John E. Garner; that Mr. Garner had told him that he might pay the premium by crediting Garner's account on the book; that he agreed to do this, and that he then told the witness to make a credit of \$11 and some odd cents on Garner's account; that the witness at that time was busily engaged in shoeing a horse, and when he finished shoeing the horse it escaped his mind to put the credit on the book; that his father died the following Sunday, and that he had forgotten to make the credit. The court properly sustained the defendant's objection to this evidence also and excluded it. The conversation did not occur at the time of the transaction with Garner. Garner was not present; the transaction with him had closed; it was simply a narrative by W. H. Horine of a previous transaction. It was not connected in any way with that transaction so as to be in any sense part of the *res gestæ*; nor can the evidence be admitted under the rule admitting written entries in their books made by deceased persons in the ordinary course of business, for this rule does not extend to entries which, though made in the course of business, include incompetent matter which are not necessary to the performance of a duty by the person who made the entry. The life insurance company had no account with W. H. Horine. His account was with John Garner. Any entry made on his books in the usual course of business in the account with Garner might be evidence as to how he and Garner stood, but his narrative of his reasons for making the entry are no more competent against third persons than his statement under other circumstances not in the presence of the persons to be affected. This conclusion makes it unnecessary to consider any other questions raised in the case as no competent evidence was offered sustaining the plaintiff's claim.

Judgment affirmed.

FLOOR'S EX'OR, &c. v. FLOOR.

(Filed May 16, 1905—Not to be reported.)

Wills—Estates—Actions to settle—Appellee's wife in 1892 made a will devising a certain estate to him in fee, and subsequently she executed two others by which he was left a life estate in the property. Upon her death the three wills were offered for probate and the county court admitted the first one to record, but upon appeal to the circuit court the jury found the last one to be her will. Appellee qualified as executor of the first will, and Green, one of the appellants, as executor of the last one. Appellee appealed from the judgment of the circuit court, and while that appeal was pending appellant instituted this action, setting up his executorship and

that he was entitled to the possession of the property, alleged a wasting of the estate by appellee and asking that appellee be compelled to settle his accounts and turn all of the estate over to appellant, and also asked that a receiver be appointed. The prayer of the petition was properly refused as it had not then been settled who was the executor. The appointment of a receiver was properly refused because it was not alleged that appellee or his surety was insolvent, and there was no proof to support these allegations.

J. S. Kelly for appellant.

Greene & VanWinkle, N. W. Halstead, Eli H. Brown, Jr., and John D. Wickliffe for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Nunn.

Fannie B. Floor, deceased, was the wife of the appellee, J. H. Floor. In the year 1892 she made and executed a will by which she devised the fee in her home farm to the appellee. She devised another farm which she owned, and a house and lot in Bloomfield, to her nephews and nieces. In the year 1899 she made another will, and in the year 1900 she made still another. By these last wills she devised to the appellee, her husband, a life estate in the home tract. In other respects these two wills were in substance the same as the first. After her death the three wills were offered to the county court for probate, and the court admitted the first one. Upon appeal to the circuit court the jury found in favor of the last will. By the first will the appellee was made the executor, and when it was admitted to probate by the county court he qualified as executor thereof, and executed the required bond. By the last will, the one ordered to be probated by the circuit court, Ellis Green, the appellant herein, was named as the executor. On the next day after the circuit court ordered this last will to be probated the appellant obtained a copy of that order and filed it in the county court, and thereupon the county court ordered the last will recorded as the will of Mrs. Floor, and Ellis Green qualified as the executor thereof and executed the necessary bond.

J. H. Floor, the appellee herein, appealed from the judgment of the circuit court, directing the last will to be probated by the county court and executed appeal bond and caused a supersedeas to be issued, and while that appeal was pending in this court this action was instituted by the appellant, setting forth the fact that he was the executor of the will of Fannie B. Floor and as such was entitled to the possession of all the property devised by the testatrix, and that the appellee herein had failed to return an inventory of all the estate which had come into his hands; that he had wasted a considerable portion thereof, and had wrongfully cut valuable timber on the tract of land other than the home place and had sold some of it; the balance he had used on the home farm which had been devised to him for life, and asked that the court compel the appellee to settle his accounts and turn over to him (the appellant) all the estate, rents and profits which had come into his hands as such executor, and that the estate of the testatrix be fully and finally settled in that action. He also asked for an order appointing a receiver to take charge of the property, both real and personal, with directions to rent out the land and to hold the proceeds and

rents, subject to the order of the court pending a settlement and final judgment therein.

The appellee responded to the petition and motion of appellant, to which the appellant demurred. The court made in substance the following order: This cause being submitted on appellant's demurrer to the response of appellee, J. H. Floor, the court overrules appellant's demurrer and adjudges the response sufficient and overrules the motion to require appellee, J. H. Floor, to appear and settle his accounts as executor of Fannie B. Floor, deceased, and overrules the motion to require him to turn the property and estate of the testatrix over to appellant as executor, and also overrules the motion for the appointment of a receiver to take charge of the estate. From this order appellant appeals. The only part of this order that was final or subject to an appeal is that part refusing to appoint a receiver to take charge of the property.

It is evident that the lower court considered appellant's action premature, as it had not then been finally settled who was the executor. It is true the judgment of the circuit court, on appeal from the county court, fixed the last paper, of date 1900, as the will, and that named appellant as the executor, but the appellee herein had appealed from that judgment and had executed the appeal bond as required by the Code, which had the effect to stay all further proceedings therein. We are of the opinion that the lower court did not err in refusing to appoint a receiver, as it was not made to appear to the court that there was any probable danger of loss to those interested in the property. It is true it was alleged in the petition that the appellee had wasted a portion of the estate and had failed to make a true inventory thereof, but it was not alleged that appellee or his surety were insolvent. And in addition to this these allegations were denied by the appellee, and there was no proof introduced to support them.

It was also alleged in the petition that he had cut about \$1,500 worth of valuable timber on the Downs farm and sold and used it upon the home farm, but it was not alleged that he was then cutting or threatening to cut any more timber, or that there was any probable danger of his so doing, or of wasting any part of the estate.

Wherefore, the judgment of the lower court is affirmed.

CITY OF LOUISVILLE v. BURKE, &c.

(Filed May 17, 1905—Not to be reported.)

1. Taxes—Lien for—Limitation—Purchaser for value—Where appellant took no step in the prosecution of its action for taxes after filing it for more than fifteen years, and in the meantime appellee in good faith became a lender for value and without notice of the pendency of the suit or claim of appellant for taxes, a lis pendens did not exist in favor of the city at the time the interests of appellee intervened.

2. Same—Practice—The rule is that a party claiming the benefit arising from a lis pendens must, in order to entitle himself to it against the bona fide purchaser, show that the suit had been prosecuted with reasonable diligence.

Henry L. Stone for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Nunn.

This action was filed by the appellant May 26, 1886, against R. T. Burke and his wife to recover taxes due the city upon Mrs. Burke's realty for the year 1885, aggregating \$392, with interest from May 1, 1885, and for taxes for the year 1886, amounting to \$380. Summons was issued the day the suit was filed and was served upon Burke and wife September 7, 1886. On March 4, 1887, a printed amended petition was filed in the clerk's office, but no summons was issued thereon. This amendment also stated that the taxes for 1886 had been paid. On July 2, 1888, Burke and wife filed a general demurrer to the petition, upon which no action was ever taken. On September 23, 1893, Burke and wife filed an answer traversing the allegations of the petition, and also pleading that the taxes for 1886 had been paid since the suit was filed. In October, 1897, Burke and wife filed an amended answer, alleging that the cause of action set up and sued on in the petition, accrued to the city more than five years before the action was in good faith instituted or prosecuted against them and pleaded, and relied on the statute of five years' limitation in bar of the action. No further step was taken in the case until September 29, 1902, when the city set the case upon the trial docket and has since prosecuted the case actively.

By an answer filed in the action on December 23, 1902, by the appellee, the Fidelity Trust and Safety Vault Co., and from the proof in the case, it appears that Burke and wife applied to the company some time in May, 1895, for a loan, to be secured by mortgage upon the real estate of Burke and wife; that the company caused the usual examination and inquiry to be made and was informed and believed that the property was free from taxes up to 1895, and acting upon this belief and information the company loaned to Burke and wife the sum of \$10,000 on May 24 of that year. The loan was secured by the execution of a mortgage by Burke and wife upon the property described in this tax suit.

On August 8, 1900, the appellant, the city of Louisville, filed another suit against Burke and wife for taxes for the years 1896, 1897, 1898, 1899 and 1900. Burke and wife having failed to pay their interest to the trust company, it elected to treat the entire debt due, as it had a right to do under its contract, and in February, 1897, filed a suit against Burke and wife for the purpose of enforcing this mortgage lien. The appellant, the city of Louisville, was not made a party to this suit, but the trust company verbally recognized the city's prior lien for taxes for 1895 and subsequent years.

The trust company obtained its judgment, and caused the land to be sold June 30, 1902. Preparatory to that sale, and for the purpose of protecting its debt at the sale, the trust company, through its attorney, applied at the city attorney's office for a statement of the city's claim for taxes against the property. The book-keeper in charge made up a statement of costs and taxes for the years 1896 to 1900, inclusive, amounting to \$2,500.23, which was paid to the city August 12, 1902. Up to this time neither the trust company.

nor the then city attorney, nor any one connected with this office, had any actual notice of the existence or pendency of this case, which had been filed in 1886 for the taxes for 1885. After the sale of this land, under the judgment of the trust company, the fact that the taxes for 1885 had not been paid was made known to all the parties for the first time. The city is now claiming its lien for the taxes for 1885, with interest, amounting to the sum of some \$200.

The trust company, by its answer, sets forth the foregoing facts; denies the city's claim; charges it with gross laches in the prosecution of this suit, and denies that the city has a *lis pendens* that can be enforced against it under the circumstances. The taxes sued for were due the 20th of August, 1885, and under the statute the city had a lien for same for five years from that date and unless an action had been instituted thereon by the city prior to the 20th of August, 1890, the lien would have been lost. Its duration, as fixed by the statutes, would have been reached. (*Louisville v. Johnson*, 95 Ky., 260.) Therefore, the life of the lien after the 20th day of August, 1890, depended upon the life of the action theretofore instituted to enforce it, for if for any reason the action should abate or be dismissed, or otherwise cease to live, the lien dependent upon it for existence would die with it; and it is upon this theory that it has become a settled rule of law that after the statutory period has expired the lien as to third persons is lost wherever the plaintiff is guilty of gross negligence in the prosecution of the action in which the lien is set up and asserted. In the case of *Gosson v. Donaldson*, 18 B. M., 237, the court said: "The suit had been pending upwards of three years when Middleton purchased the land in contest, and it was about two years afterward that Donaldson made his purchase at the decretal sale. The suit might have been prosecuted with more vigilance and dispatch. It is not necessary, however, in order to retain the character of a *lis pendens*, that a suit should be prosecuted with even ordinary diligence, but as a *lis pendens* is created by the institution of the suit, it can only be lost by unusual and unreasonable negligence in its prosecution." In the case of *Ehrman, &c. v. Kendrick*, 1 Met., 148, the court said: "The question is now presented whether, under these circumstances, the mechanic's lien is available against the persons claiming under the second mortgage. It appears that the suit brought for the enforcement of the lien was ready for hearing in April, 1853, and that no step was taken in that suit from that time until after the present action was commenced in 1857. It does not appear that the mortgagees in the last mortgage had any actual notice of the existence of the lien when their mortgage was executed, nor even when the present action was commenced. They, therefore, contend that as they are purchasers for a valuable consideration without notice and the lien can not be made available against them, inasmuch as the suit which was brought for its enforcement has not been prosecuted with reasonable diligence.

The lien is created by statute, and continues one year from the completion of the work. Unless a suit for its enforcement be brought before the expiration of the year the lien will be entirely lost. Its existence, after the year had expired, depends exclusively upon the pendency of the suit brought for its enforcement. * * * It is evident, therefore, that the lien is alone continued in force after the year has expired by the *lis pendens*, and the

inquiry naturally arises, how long can it be thus sustained and kept in existence so as to affect prejudicially the rights of third persons.

The general rule is that a party who claims the benefit arising from a *lis pendens* must, in order to entitle himself to it against the bona fide purchaser, show that the suit had been prosecuted with reasonable diligence. (Watson v. Wilson, 2 Dana, 406; Clarkson, &c. v. Morgan, &c., 6 B. M., 447.) This principle has been adopted to guard in some degree against the mischiefs that might arise to the rights of third persons, from permitting a lien on property, latent in its character, to be continued beyond the period of time actually necessary for its enforcement. The court in that case decided that the plaintiff lost his lien by reason of the want of diligence in the prosecution of his claim to judgment, and that the second mortgagee obtained a good title to the property unaffected by the lien of the plaintiff. (Petree v. Bell, 2 Bush, 61; Hawes v. Orr, 10 Bush, 439; Wallace v. Marquette, 88 Ky., 133; Kelly v. Culver, 25 Ky. Law Rep., 445.)

In the case at bar the appellant took no step in the prosecution of his case from March 4, 1867, until September 29, 1902, a period of more than fifteen years. In the meantime, between 1895 and June 30, 1902, the trust company became a lender and purchaser for value, in good faith, and without actual notice of the pendency of this suit, or the claim of the city for taxes for the year 1885, and no reason has been offered for the delay in the prosecution of this action. Under these circumstances and the authorities referred to we are of the opinion that a *lis pendens* did not exist in favor of the appellant city at the time the rights and interests of the appellee trust company intervened, and its equities and rights are superior to those of appellant, and the real estate referred to is not liable for the taxes for 1885.

For these reasons the judgment of the lower court is affirmed.

HARDIN, &c. v. HARDIN.

(Filed May 17, 1905—Not to be reported.)

Slaves—Customary marriages—Legitimacy of offspring—Under the act of the Kentucky Legislature of February 14, 1866, providing that the issue of customary marriages of negroes while they were slaves, a son of parents who were shown to have been married according to the custom among slaves in Kentucky, and who recognized each other as husband and wife, is held to be an heir of his deceased father, although the parents failed to appear before the clerk of the county court and make the declaration required by the statute as evidence of the existence of their marriage.

Geo. S. & John A. Fulton and Halstead & Yewell for appellants.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Hobson.

Robert Edelen died some years ago a resident of Bardstown, owning a house and lot worth about \$700. He and his wife were the slaves of Ben Hardin. They had four children, born slaves, who were given by Hardin to his children, and took the surnames of their masters. One of the sons, named George, was sold as a slave and sent south some time in the fifties. After Robert Edelen's death the other three children and their descendants

took charge of the house and lot. Appellee, Charles Hardin, brought this suit, alleging that he was the son of the decedent's son, George, and entitled to one-fourth of the property as the only child and heir at law of his father. The court adjudged him the relief sought, and the other children and grandchildren of the decedent appeal. The only question in the case is whether appellee is the lawful son of George Hardin.

The proof shows that appellee is the son of a negro woman named Mary, who was the slave of Greenup Evans. It also shows that the decedent's son, George, and Mary lived together as husband and wife before he was sold and sent South. No record of the marriage is produced and no one testifies who was present at the marriage, but one witness testifies that the wedding was announced, and that after this he saw them and they acted as husband and wife. George also claimed the boy as his child. In view of the great length of time we think the proof on this subject is as strong as could reasonably be expected, showing a customary marriage between George and Mary and the birth of the child to them. By the act of February 14, 1866, it is provided that the issue of customary marriage of negroes shall be held legitimate. (Myers' Supplement, 784.) It is true the act also provides for their appearing before the clerk of the county court and making a declaration which shall be evidence of the existence of the marriage. But in *Whitesides v. Allen*, 74 Ky., 23, it was held that the children of customary marriages of negroes born prior to the passage of the act are legitimate though their parents failed to make the declaration as provided by the act. The same rule was followed in *Brown v. MaGee*, 75 Ky., 428, where one of the parents had died before the passage of the act. (*Scott v. Larimore*, 17 Ky. Law Rep., 613; *Botts v. Botts*, 108 Ky., 414.) As appellee was born before the passage of the act referred to and was the child of a customary marriage between negroes, he must be regarded as legitimate, and is, therefore, entitled to his share of the property. The fact that he was not recognized by the other members of the family can not affect his rights. His rights come through the law, and the fact that the other members of the family did not regard him as a kinsman, while it is a circumstance to be weighed with the other proof in the case, is not sufficient to overcome the proof establishing the customary marriage and showing that appellee is the issue of the marriage.

Judgment affirmed.

SHUTTLEWORTH v. MYER, &c.

(Filed May 17, 1905.)

1. Contracts—Where it is clearly stated in a contract that the considerations for transfer of designated property are services and assistance to be thereafter rendered, a purchaser from one under such contract must have known that he took only their rights, and he should have inquired what they were and what the contract was in this regard.

2. Same—Limitation of actions—The appellant under the contract relied on in this action only bought one-half of appellees' rights whatever these rights might turn out to be, and there can not be an implied warranty from this contract that appellees owned one-half of the property referred to, and his cause of action not having been instituted within ten years after the

cause of action accrued, his action to recover upon the contract was barred by limitation.

3. Same—While there is some conflict of authority as to whether there is an implied warranty of title in the sale of a chattel not in the possession of the vendor, there certainly is no implied warranty in the sale merely of the rights of a person under a contract where the contract shows on its face that the considerations of the contract are services to be performed in the future.

Simrall & Doolan for appellant.

O'Neal & O'Neal for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Hobson.

On January 28, 1890, the following written contract was made between E. H. Patterson and Joseph H. Allen of the one part and Archer Harmon and Samuel P. Myer, of the other part:

“Louisville, Ky., January 28, 1890.

“This contract witnesseth: That whereas, we, E. H. Patterson and J. H. Allen, are owners of not less than two-thirds interest in all the property rights and benefits derivable therefrom, based on and accruing from all contracts in the name of said Patterson, as trustee for the purchase of land in Owsley, Clay, Lee and Perry and other counties in Southeastern Ky., now made or hereafter to be made, aggregating about 100,000 acres, located on the waters of the Red Bird Fork of the Kentucky river; and, whereas, said Patterson and Allen desire the services and assistance of S. T. Myer and Archer Harmon in effecting sales of said lands and property rights to others, or in otherwise realizing and making profits thereon:

“Now, in consideration of \$1 in hand paid to us, and of the services and assistance of said Myer and Harmon, to be by them rendered in effecting the above purposes, which service and assistance they hereby agree to render, we, said Patterson and Allen, hereby transfer and assign to said Myer and Harmon, their heirs and assigns, one-half of all the rights and interest of us, said Patterson and Allen, now or hereafter owned by us, in and under all of said contracts made, or to be made, in the name of said Patterson, trustee, and of all benefits and profits realized thereon, or accruing thereon, by a transfer of said contracts or sale of said lands or property rights, or in any other manner.

“Witness our signatures and the signatures of said Myer and Harmon, this day above written.

(Signed) “E. H. PATTERSON, Trustee,
“JOSEPH H. ALLEN,
“ARCHER HARMON,
“For himself and
“S. P. MYER.

“Witness: J. B. KELLY.”

On the same day, in consideration of \$6,000 in hand paid by James A. Shuttleworth, Myer and Harmon executed the following contract to James A. Shuttleworth and James G. Givens:

“Louisville, Ky., January 28, 1905.

“For value received, we, S. P. Myer and Archer Harmon, hereby assign

and transfer to James G. Glvens and James A. Shuttleworth one-half of all our rights, interests and benefits now or hereafter accruing under and by virtue of a contract on this date between us and E. H. Patterson and J. H. Allen for certain interests under contracts for the purchase of lands in Southeastern Kentucky, now or hereafter made in the name of said Patterson, as trustee, of which contracts between us and said Patterson and Allen a copy is given above and made a part hereof for greater certainty.

(Signed) "S. P. MYER,

"ARCHER HARMON.

"Witness: WM. AYERS."

Some time after this Patterson, as trustee, sold out the holdings referred to in the above contracts to a New York corporation, known as the Kentucky Coal, Iron and Development Co., for \$458,199.95, and Harmon having brought suit against Patterson, as trustee, and the Kentucky Coal, Iron and Development Co. for one-sixth of the fund arising from the sale, Shuttleworth appeared in that suit and set up his contract and claimed one-sixth of the property. He was denied any relief for the reason that on the same day that the contract first above quoted was made, and at the same time there was another writing signed, in which it was stipulated what Harmon and Myer were to do. In this writing it was provided that Patterson might, in six months, notify them that he declined their proposition, and that in that event the contract should be null and void. Patterson did so notify them and canceled the contract, and it was held that Shuttleworth took nothing by his assignment. (Shuttleworth v. Ky. Coal, Iron and Development Co., 22 Ky. Law Rep., 1841.) In response to the petition for rehearing in that case this court pointed out that the contract made by Patterson and Allen with Myer and Harmon showed on its face that it was in consideration of services and assistance to be rendered by them, thus giving notice that they had not paid the consideration and putting a purchaser on notice to inquire what the contract really was on their behalf. (22 Ky. Law Rep., 1806.)

Shuttleworth having been defeated in that case, brought this suit against the representatives of Myer on the 21st day of April, 1903, to recover the \$6,000 which he had paid on the ground that there was an implied warranty of title in the sale to him by Myer and Harmon, and that they having no title he should recover upon the implied warranty the amount of the consideration, with interest. The defendants pleaded limitation and the court having sustained the plea and dismissed the action, the plaintiff appeals.

An action for relief for fraud or mistake can not be brought more than ten years after the perpetration of the fraud or the making of the mistake, and so the plaintiff is confessedly barred by limitation unless he can bring his case within the fifteen years' statute applying to suits on a written contract. This he insists he had done by reason of the fact that the contract between him and Myer and Harmon was in writing, signed by the parties, and that as the subject-matter of the contract was certain land options, which, under the statute, must be regarded as personal property, there was an implied warranty of title on the part of Myer and Harmon in the sale to him shown by the written contract. The only question necessary to be decided in the case is whether a warranty of title may be implied from the written contract.

It will be observed that the contract made by Myer and Harmon with Shuttleworth only assigns to Givens and him one-half of their rights under the contract which they had made on the same day with Patterson and Allen, and a copy of that contract is expressly made a part of the contract with Givens and Shuttleworth. It will also be observed that in the contract made by Patterson and Allen with Myer and Harmon it is clearly stated that the consideration for the transfer is services and assistance to be thereafter rendered by Myer and Harmon. What these services and assistance were to be are not shown by either of these writings, but clearly Myer and Harmon could have demanded nothing by virtue of their contract if they failed to render the services agreed on. A purchaser from them must have known that he took only their rights, and he should have inquired what they were to do, and what was the contract in this regard. It was reasonable from the paper that there was some agreement between the parties on the subject. In a matter of this magnitude it should have been presumed that the agreement was in writing; and, however this may be, the purchaser was notified that services and assistance were to be rendered in the future by Myer and Harmon, and, therefore, he knew, or must be charged with knowing, that they were selling a right which they were thereafter to perfect. There is some conflict in the authorities as to whether there is an implied warranty of title in the sale of a chattel not in the possession of the vendor, but certainly there can be no implied warranty in the sale merely of the rights of a person under a contract when the contract shows on its face that he is to perform services in the future as the consideration of the contract. The written contract between Myer and Harmon, of the one part, and Givens and Shuttleworth, of the other part, only transferred to the latter one-half of their rights, interests and benefits then or thereafter accruing under the contract between them and Patterson and Allen. There can not, in the nature of the case from this contract, be an implied warranty that they owned half of the property referred to. They simply sold one-half of their rights, whatever these rights might turn out to be. The rule is that the implication or presumption of a warranty of title in the sale of a chattel is a disputable, not a conclusive, presumption, and only arises where there is nothing in the circumstances to show the contrary. It is never indulged where it appears that the vendor only sold his interest in or right to the chattel. (Freeman's note to Scott v. Hix, 62 Am. Dec., 463-466.) When the consideration for the contract failed an action might have been maintained by Shuttleworth on the implied assumpsit to recover the amount paid by him, with interest, if begun within five years after the cause of action accrued; but this action not having been instituted within ten years after the cause of action accrued was barred by limitation. Judgment affirmed.

THE COVINGTON SAW MILL AND MANUFACTURING CO. v.
DREXILIUS, &c.

(Filed May 17, 1905.)

1. Public streets and alleys—Building sewer across—Failure to keep in repair—Injury to child—Liability of constructor—Where a child eleven or

twelve years old broke her leg in jumping from a pile of lumber and breaking into a sewer, which had been constructed in a public alleyway of a city without the consent of the city, by the owner of a lumber plant adjoining the alley, for his own convenience in drawing the surface water from his lot, which sewer was constructed of plank which had been allowed to become rotten, it was the duty of the owner of the plant to keep the sewer in safe condition, and such owner, and not the city, is liable in an action for damages for such injury.

2. Construction by former owner—Liability of successor—Implied contract—The fact that the sewer was constructed by a former owner of the plant for the use and convenience of the plant, and which was maintained by him during his ownership, will not excuse his vendee from liability, who continued to use the sewer and failed to thereafter keep it in repair, as he was liable for its repair, and the fact that it was kept in repair by the former owner, an agreement that he should keep it in repair was implied.

3. Children—Playing on street—Necessary use—The fact that the child was playing in the alleyway when injured is no defense to her action for damages for the injury. In crowded cities the use of the public streets and alleys for purposes of recreation and pleasure by children and others may be regarded a public necessity, so long as such use does not impinge upon the rights of others to use them, and such users are entitled to have them in a reasonably safe condition.

4. Instruction—Gross negligence—Punitive damages—An instruction to the jury that they could find punitive damages against appellant if they should believe from the evidence that the injury complained of was the result of gross negligence, was error, and should not be given when there was no evidence whatever of gross negligence, and while this court might be of the opinion that the verdict rendered was no more than would compensate the plaintiff for the pain endured and the impairment of her capacity for laboring and earning money as the result of the injury, we do not feel warranted in saying that some part of the verdict was not given by way of punishment.

J. B. Frenkel and S. D. Rouse for appellant.

Robert C. Simmons for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was operating a lumber plant on a lot adjoining one of the public alleyways of the city of Covington. To divert a flow of surface water from the lot for its own convenience it constructed and maintained a blind ditch or sewer, made of oak planks, across this alleyway and along the side of its lot, which was covered with dirt, hiding the location of the sewer. The ditch or sewer was not kept in repair, so that the planks became rotten. Appellee, a child of eleven or twelve years of age, while playing on the lumber piles and in the alley, jumped from one of these lumber piles to the ground in the alleyway, when the covering to this ditch gave way under her weight, her foot was caught in the hole thus made, and her leg broken. In her suit against appellant she was awarded a verdict of \$2,500 in damages.

This appeal presents the following matters which are alleged as errors at the trial, and for which a reversal is sought. It is first complained that appellant was not liable for the condition of the street; that when the ditch

was dug and the box sewer put in it was made reasonably safe for its purpose, and to keep it in repair was not the duty of appellant. The alleyway was a public highway, which had been dedicated to the public use and accepted by the city many years before the accident sued for, and was so used at the time of the accident. The act of appellant in digging and maintaining the ditch across the alleyway, without the direction or permission, and for that matter without the knowledge of the municipality, being for appellant's personal convenience, could not impose the duty on the municipality to keep it in repair. It was appellant's duty to maintain the ditch or sewer in such reasonably safe condition as would not interfere with the public's superior right to use the alleyway for any purpose for which it might have been properly used. Its failure to keep the ditch in such repair constituted it a nuisance.

In *Woodring v. Forks Township*, 4 Casey (Penn. St.), 365, it was said: "A man who owns the soil on which the public have a highway has a right to enjoy his property in every way that may promote his interest or convenience, so that he takes care not to injure the public easement. * * * He may cut a passage across the road for the purpose of draining his land, or leading water to his mill, because the land is his own and he may use it for all legitimate purposes. But as he has no right to injure the public easement, he is bound, in order to preserve that right, not only to construct bridges over the ditches, where they cross the highways, but also to keep them in repair. The duty of keeping such bridges in repair is as imperative as the original obligation to construct them."

It further appeared in that case that the ditch had not been cut by the appellant charged with the liability for not keeping it in repair, but was cut by a preceding owner. The court held, however, that when appellant continued to use the water course across the highway for the use of his mill, thereby rendering a continuance of the bridge necessary, he was liable for the repairs of the bridge. From those facts, and the further fact that the bridge had been kept in repair by the former owner of the mill, an agreement to keep it in repair was implied. (*Phoenixville v. The Phoenix Iron Co.*, 9 Wright, 135 Penn., St.)

In *Dygert v. Schenck*, 23 Wendell, 449, a case was presented to the Supreme Court of New York, where the owner of premises adjacent to a highway dug a raceway across the public road to conduct water to his mill, and built a bridge across it. Plaintiff's mare fell through the bridge in consequence of the plank flooring being loose, and received injury. The bridge, when built, was a substantial structure, and continued so for a number of years. In the end, however, the bridge was suffered to get out of repair. The court wrote: "In suffering this, the defendant came short of his obligation to the public. Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travelers, is a nuisance. * * * Special damage arising from it, therefore, furnishes ground for a private action, without regard to the question of negligence in him who digs it. * * * The moment a plank became liable to slide from the bridge, or any other serious difference arose against its safety, as compared with the original unbroken ground, the ditch took the character of a nuisance."

In *Peasly v. Chandler*, 6 Mass., 451, it was likewise held: "If a highway be located over water course, either natural or artificial, the public can not shut up these courses, but may make the road over them by the aid of bridges. But when a way has been located over private land, if the owner should afterward open a water course across the way, it will be his duty, at his own expense, to make and keep in repair a way over the water course, for the convenience of the public; and if he should neglect to do it, he may be indicted for the nuisance."

Judge Dillon, in his "Municipal Corporations," section 1032, lays it down, upon authorities cited, that no person, not even the adjoining owner, whether the fee in the street be in himself or in the public, has the right to do any act which renders the use of the street hazardous, or less secure than it was left by the municipal authorities, and that if the adjoining owner undermines the street by placing unauthorized obstructions therein, which make the use of the street unsafe or less secure, he is guilty of a nuisance, and is liable to any person who, using due care, sustains any special injury therefrom. He declares: "The ultimate liability in such cases is upon the author or continuer of the nuisance." (*Stephani v. Brown*, 40 Ill., 428; *Matheney v. Wolffe*, 2 Duv., 137.)

The next proposition asserted by appellant is that appellee was injured while she was playing in the street, and can not recover for injuries received while so engaged. The great weight of authority as well as the common sense of the matter is that children may use the public streets of a city for pleasure as well as grown persons may. If an adult were walking along a street idly, or merely in the pursuit of pleasure, or were driving along a street for a similar purpose, and was injured by a negligent defect in a street, it could scarcely be maintained that he could not recover for his injuries. So long as such use does not impinge upon the rights of others to use them, such users are equally within the protection of the law, and hence equally entitled to have them in as reasonably safe condition as those who are using them as travelers or in pursuit of business. Indeed we know of no rule of law that gives precedence to those engaged upon business over those in pursuit of pleasure in the rightful use of the public highway. In crowded cities the use of the public streets and alleys for purposes of recreation and pleasure by children and others may be regarded as public necessities. We fail to perceive why, if a horse, being used on a public street for the purpose of pleasure, may be recovered for if injured because of the defective condition of the street, that a child playing upon the street may not recover for injuries to itself from the same cause. (*McGuire v. Spence*, 91 N. Y., 302; *Chicago v. Keefe*, 114 Ill., 223; *Indianapolis v. Emmelman*, 108 Ind., 535.)

In *Gibson v. Hunting*, 38 W. Va., 177, the court expressed the idea in this language: "Poor parents are unable to provide a place of healthful exercise and play for their children for it requires all their earnings to clothe, feed and shelter them. The law prohibits them, under the penalty of being trespassers, from entering on the lands of others, and now to forbid them to use the road to its utmost boundary for the purpose of play, when not interfering in any manner with the traveling public, would savor too much of the dark ages of barbarism, when children were subject to inhuman and

diabolical punishments, and their lives were at the mercy of those having charge over them. The roads are the only commons children now have, and to confine them in the narrow limits of their tenement houses would be cruel, unjust and oppressive, blight their young lives, and render their bodies weak, sickly, scrofulous and vile."

In *Redd v. City of Madison*, 83 Wis., 171, a seven-year-old child was injured while rolling a hoop on the sidewalk. The court regarded that this was not *per se* negligence, and used this language: "It is natural for a child to play, early and late, at home and abroad, going and coming and everywhere. Because it plays on its travels on the sidewalk it should not be declared an outlaw, or excluded from the usual remedies of the law."

A similar recovery was allowed for the death of a nine-year-old boy while at play on a street, in the case of *Louisville v. Snow's Adm'r*, 107 Ky., 536. The instructions to the jury are complained of, but they submitted the case under principles set forth above, except that the court told the jury that they could find punitive damages against appellant if the jury should believe from the evidence that the injury was the result of the gross negligence of the defendant. There was no evidence whatever of gross negligence, and that instruction should not have been given. Appellee contends that the amount of the verdict is no more than reasonable compensation, and that a new trial should not be awarded because the error is harmless. This court has always been reluctant to interfere with the province of the jury in saying what is reasonable compensation for injuries of this kind. Where mental and physical suffering are elements of damages there is no certain standard by which they may be measured. The common experience, observation and judgment of a jury of average intelligence are peculiarly adapted to determine such matters. While we might be of opinion that the verdict was no more than would compensate one for the pain endured and the impairment of his capacity for laboring and earning money, as the result of such an injury, manifestly to do so would be to usurp in a measure the province of the jury in this respect. They may have thought otherwise, and the appellant is entitled to their verdict and not our judgment instead upon this subject. If the jury should have found that a less sum was fair compensation it would not have been within our province to have increased it. We do not feel warranted in this case to say that some part of the verdict returned was not punitive damages. The court submitted that item to the jury. Their verdict was not unanimous. It may have been that some of the jury, or, for that matter, all who did agree to the verdict, may have given some part of it by way of punishment. At any rate, appellant was entitled to have his real case tried by the jury under unobjectionable instructions as to the measure of damages. There are a few instances where the verdict was so unmistakably compensatory only that the court has not reversed for erroneous instruction allowing punitive damages. But where it ceases to be a certainty, and is a doubt whether their verdict was regarded by the jury as merely compensation, we have not allowed our conjecture to supply the jury's function. The court endeavors to keep clear of trenching in any sense upon the jury's proper province. The trial court evidently inadvertently failed to define negligence to the jury in the instructions, although it did define ordinary care, the absence of which is

negligence. Maybe the jury was not misled by this fact, but upon a retrial this omission should be cured. We will add that the instruction defining ordinary care would have been less open to objection if it had omitted the last clause, "for his own safety."

Therefore, the judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

LANGHORNE, JOHNSON & CO. v. WILEY.

(Filed May 18, 1905.)

Appeals—Failure to file transcript—Dismissal—Under section 738 of the Civil Code, providing that "the appellant shall file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal," where an appeal was granted on November 22, 1904, and the appeal bond was given on December 12, and the supersedeas was issued on December 13, the appellee, by filing a copy of the judgment and bond in this court on May 16 following, was entitled on his motion to have the appeal dismissed.

Walter S. Harkins, D. J. Wheeler and C. M. Cooper for appellants.

C. B. Wheeler for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Chief Justice Hobson.

The judgment appealed from was rendered and the appeal was granted on November 22, 1904. The appeal bond was given on December 12; the supersedeas issued on December 13. On May 16 appellee filed a copy of the judgment and bond and entered a motion to dismiss the appeal, the record not having been filed in this court by the appellant. In response to the motion appellant shows that time was given to file a bill of exceptions; that after the bill of exceptions was filed the clerk did not complete the transcript, and for this reason it was not filed for the April term, although appellant used every effort to get it made out. Section 738 of the Code is as follows: "The appellant shall file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal, unless the court extend the time, as, for cause shown, the court may do."

Section 740 is as follows: "No appeal shall be docketed by the clerk until the appellant complies with the provisions of section 739, and if he fail to file the transcript within the time allowed by section 738, or by the court pursuant thereto, his appeal shall be dismissed."

The facts stated in the response would be sufficient to justify the court in extending the time for filing the transcript, as provided in section 738, if a motion to this effect had been made in this court by appellant before the time expired. But after the time has expired the court is without power in the premises, and, under the mandate of the statute, the appeal must be dismissed.

Appeal dismissed.

REMELIN, &c. v. REMELIN.

(Filed May 18, 1905—Not to be reported.)

Supersedeas—Attempt to change statutes—Contempt—By the supersedeas all proceedings by the parties to enforce the judgment appealed from are stayed. Any attempt to change the status of things existing just before the judgment was rendered will be a contempt of the supersedeas, and will be so treated by this court.

R. H. Gray and Greene & VanWinkle for appellants.

Thos. L. Michie for appellee.

Appeal from Campbell Circuit Court.

Chief Justice Hobson delivered the following opinion on motion for rule:

By the supersedeas all proceedings by the parties to enforce the judgment appealed from are stayed. The status existing just before the judgment was entered must be preserved until the appeal is determined. The securities must not be removed from the bank during the pendency of the supersedeas. Any attempt to remove them or to change the status of things existing just before the judgment was rendered will be a contempt of the supersedeas, and will be so treated by this court. But we do not see that anything of this sort has been done yet. The order of April 4, 1905, did not materially change the sense of the judgment. It simply set out what was necessarily by implication contained in the judgment. The petition filed by Eleanor C. Remelin is not before us, and we do not see from the facts stated that she has done, or attempted to do, anything in violation of the supersedeas. If hereafter anything is done, or attempted to be done, in violation of the supersedeas the motion may be renewed, but as the case is now presented we see no sufficient reason for awarding the rule.

If the purpose of Eleanor C. Remelin's suit is merely to establish her rights and not to remove the securities from the custody of the bank before this appeal is determined, we do not see that its prosecution will be a violation of the supersedeas. But nothing should be done, or attempted to be done, in that action which will in anywise interfere with the supersedeas or render it in any respect inoperative.

Motion overruled.

ERWIN, &c. v. BENTON, &c.

(Filed May 18, 1905.)

1. Local option—Contest—Order of contest board—Final order—Appeal—Where the contest board in a local option election considered the evidence and made an order adjudging that "the election be set aside, cancelled and held for naught; that no election was held, and that neither party is entitled to have any fact certified concerning said election," said judgment was a final order, from which an appeal lies to the circuit court.

2. Swearing judge off the bench—Affidavit—Sufficiency—An affidavit filed by the appellees on an appeal from the contest board to the circuit court in a local option election contest, stating that "the appellees in nowise question the integrity of the presiding judge, and without imputing to him any personal hostility to appellees, but that he can not, and will not, afford

‘them a fair and impartial trial of the matters of law and facts involved in the appeal because he has a pronounced bias to the sale and traffic in intoxicating liquors,’ is not sufficient to disqualify the said judge from sitting on the trial of the case.

3. Holding election.—Special officers—Under section 2555, Kentucky Statutes, special officers are required to be appointed to hold local option elections, who shall be appointed by the election commissioners of the county in which the election is held.

4. Voters—Qualification—Doubts of officers—Rejected voter—Where the election officers have a doubt of the qualification of a voter, they may require him to make the affidavit required by section 1477a, Kentucky Statutes, and until the voter either qualifies or offers to do so by making the required affidavit he is not a rejected voter, and neither the voter nor any other person can justly complain that he was not allowed to vote.

5. Legal age—How determined—One who was born on June 9, 1883, was entitled to vote at an election held on June 8, 1904. In law a man is twenty-one years old on the day preceding his twenty-first birthday.

6. Proposition submitted—Effect as to druggist—A proposition “whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned within the corporate limits of the town of Calhoun, McLean county, Kentucky, and that the provision of this law and prohibition shall apply to druggists,” submitted to be voted on under the local option law in this State, is an entirety, intended, if adopted, to prohibit the sale of intoxicating liquors by druggists within said town.

7. Emblem—Improper use—Effect—While there is no authority for the use of a device or emblem upon the ballot in a local option election, the fact that such emblems were used by both sides in such an election, and that the one used by those favoring prohibition was an open book, with the words “Holy Bible” printed across it, ought not to be allowed to de the voters’ will where it was fairly expressed and otherwise held in conformity to law.

W. S. Pryor, David H. Kincheloe and Sweeney, Ellis & Sweeney for appellants.

Joe H. Miller and Little & Taylor for appellees.

Appeal from McLean Circuit Court.

Opinion of the court by Judge O’Rear.

This appeal presents a contest of the local option election held in the town of Calhoun on June 8, 1904. The election was regularly called, and was held at the time and places indicated in the call. The result showed an apparent majority of two in favor of prohibition. Certain electors instituted a contest, under the statute, which came on to be heard by the contest board, composed of the county judge and two nearest qualified justices of the peace. The contest board, considering the evidence, decided that there was no election. Consequently the result as certified by the board of canvassers was set aside. On appeal to the circuit court it was decided that the election was valid, and that the proposition submitted, viz., whether spirituous, vinous and malt liquors should be sold in the town of Calhoun, that carried by a majority of two. It is from the last-named judgment that this appeal is prosecuted. The first question presented is whether the order entered by the contest board was such a final order as admitted of an appeal from it to the circuit court. The order reads as follows: “The undersigned

board of contest, sitting in the above-styled proceeding, is unable to find from the evidence that a majority of the legal votes cast at the election in the town of Calhoun on the 8th day of June, 1904, were cast either in favor of or against the proposition, 'whether spirituous, vinous or malt liquors shall be sold, bartered or loaned in said town.' Therefore, it is ordered and adjudged that the return made by the board of canvassers in the matter of said election be, and it is, set aside, cancelled and held for naught, and it is further ordered and adjudged that there was no election, and that neither party is entitled to have any fact certified concerning said election. And it is further ordered and adjudged by the board that the foregoing order and finding be spread upon the order book of the McLean County Court."

In this contest the parties may be deemed those electors who favored and those who opposed the proposition submitted. By the certificate the result was that prohibition was established in the town. By the action of the county board this status was changed. The proposition, instead of being defeated, was left as it was before, which was that such liquors might be lawfully sold. The judgment was final, and in view of the conclusion at which the board had arrived was the only one possible. Being final in fact, as well as in depriving one set of litigants of that which they before had, it was a final order or judgment so that an appeal would lie from it under the statute (section 2567, Kentucky Statutes) to the circuit court.

On the appeal to the circuit court an objection was made to the regular judge, by affidavit. He declined to vacate the bench. The sufficiency of that affidavit is raised by his ruling. The wording of the affidavit is as follows:

"The appellees, who were the contestants before the board of contest, from whose judgment this appeal was prosecuted, in nowise questioning the integrity of the Hon. T. F. Birkhead, the regular judge of this court, and without imputing, or intending to impute, to him any personal hostility to appellees, say he can not and will not afford them a fair and impartial trial of the matters of law and facts involved on this appeal. The said Birkhead, regular judge of this court, is opposed to the sale and traffic in such liquors to the extent that he has a pronounced bias against it. They believe, and on such belief, state that the bias of the regular judge of this court against the licensed traffic in spirituous, vinous and malt liquors is so pronounced that he can not and will not afford them a fair and impartial trial. The principal, if not the only, question involved on this appeal, related to the validity of an alleged election held in the town of Calhoun, on the 8th day of June, 1904, on the proposition as to whether or not spirituous, vinous or malt liquors shall be sold in said town. They believe and state that the regular judge of this court entertains a bias against the grounds of contest relied on by appellees, and that same is so pronounced that he can not and will not afford them a fair and impartial trial of the matters of fact and law involved in this proceeding on this appeal. The affiants, who are appellees on this appeal, say they believe the statements in the foregoing affidavit are true.

(Signed) "... .."

No fact is stated showing or indicating the bias complained of. Bias of mind is, until demonstrated by act, purely a mental state. Incapable of

being proved or disproved with any degree of certainty, the allegation of bias, unaccompanied by facts indicating it, may be easily made. If the mere allegation in the objecting affidavit were sufficient, then it were possible always to remove a trial judge upon the mere charge of a litigant, without his hazarding anything if his statements should be true. The opinion in *Powers v. Commonwealth*, 114 Ky., 237, is relied on. But the state of the record presented here falls far and fatally short of the rule announced in that case, and gathered from *Insurance Co. v. Landrum*, 88 Ky., 434; *Vance v. Field*, 89 Ky., 178, and *Masse v. Commonwealth*, 93 Ky., 588. It was distinctly held that difference in political belief alone on the part of the judge and a litigant would not disqualify the judge from trying a cause in this court.

In the case at bar it is expressly stated that the judge was not personally hostile to or biased against the litigants. It is admitted that his official integrity was unquestioned. It is not charged that by any act or word had he indicated any bias against appellants or their case. The objection rests solely upon the assertion that the judge is biased against the liquor traffic. If the liquor traffic is an evil, as many believe it is; if violation of the Sabbath by doing secular work is an evil, as many regard it; if combinations of capital to crush competition in the utilities of life is an evil, as is supposed by a majority of people probably, a judge who regarded these things unfavorably would be disqualified to try a case wherein any of them was involved if appellants' position is right. And, to carry the same argument forward, a judge biased against crime would be unfitted to try criminals. The law is administered not by the personal predilection of the judge, but by the application of known and accepted rules or principles to the facts of the controversy. Very rarely it must happen that the judge's personal views can properly enter, or do they enter, into the adjudication of the matter before him, for he delivers not his judgment, but the laws. If it be conceded that he is enlightened in the law, upright in character, and disinterested personally in the result of a litigation, his individual views can be of but little, if any, weight in the matter. It is inconceivable that a man qualified to act as a judge of a circuit court can have formed no opinion regarding many, if not most, of the moral and economic questions which have engaged public attention for many years. It would be an astounding proposition if it were true that judges with personal opinions on such questions were disqualified to act in cases where the law, as written, is to be applied, where those matters became involved. To admit the premise, it seems to us is to abdicate the right of popular government. There is no reported case in this State that holds, nor has it ever been held under any statute, that a mere charge of bias or hostility against the judge will disqualify him from sitting on the trial of a case. Facts which, if true, would probably operate to prevent his giving a fair trial must be alleged. The affidavit in this case is wholly lacking in this particular.

There are a number of objections urged against the validity of the election, as well as against the validity of certain voters who participated in it, upon the decision of which this case does and similar cases may depend. We will notice them in order.

The officers of election who held this election were appointed by the elec-

tion commissioners of McLean county. There is no question made that they did not possess all the statutory qualifications. Their conduct of the election appears to have been as nearly in conformity to the statute as is customary. Indeed no complaint is made of them. But it is urged that the county election commissioners had not the right to appoint them or others to hold this election; that the officers appointed for those precincts for the preceding November election continued in office as precinct election officers for "one year, and until their successors were chosen and qualified." (Section 1596a, subsection 3, Kentucky Statutes.) Until the extraordinary session of the legislature in 1900 election officers were removable by the appointing power at any time. Such at least was the practice in the practical construction of the statutes. Abuses of the system having led to widespread dissatisfaction, the law governing elections was so amended as to prevent, it was believed, arbitrary substitutions designed for purposes of giving undue advantage to one party over the other. Section 1596a, subsection 3, adopted to carry that idea into effect, reads: "Said county board shall, annually, not later than September 20, appoint for each election precinct in the county two judges, one clerk, and one sheriff of election, to act as such in their precincts, and shall hold their office for one year and until their successors are appointed and qualified."

Elections under the local option law are provided for in a different statute (chapter 81, Kentucky Statutes, title "Intoxicating Liquors"). Section 2555, providing for the calling of the election, reads in part: "All elections provided for in this act shall be held by such officers as would be qualified to hold elections for county officers, and they shall be selected in the same way; and all elections provided for herein shall be held in accordance with the provisions of the general election laws of the State, except that they shall not be held on the same day with any regular political election, nor within thirty days next preceding or following any such regular political election."

This statute was enacted in 1894. At that time election officers were not required to have quite the same qualifications as are now required, nor were they appointed in the same way. Section 2555 does not require that the same officers appointed to hold other elections in those precincts shall also hold the local option election therein. Nor does section 1596a, subsection 3, Kentucky Statutes, provide that officers of election in those precincts shall hold all elections held therein during their term of office, though the latter proposition would seem to follow the wording of the statute, except where other provision has been made, as for holding school elections, and local option elections, the only elections save primaries that can be held at other times than at the regular elections. We are of the opinion, however, that the language of section 2555 requires special officers to be appointed to hold local option elections. The section does not say such elections shall be held by those officers appointed to hold other elections in such precincts during their term of office, as it might have done, but, on the contrary, provides that they be held "by such officers" as would be qualified to hold regular elections, that is, be held by officers who shall possess the same qualifications of election officers holding regular elections for county officers. It.

also provides that they shall be selected in the same way, indicating clearly that instead of the same persons being used, others, but to be selected by the same authority, were to be chosen. Officers of regular elections are now chosen from lists nominated by their respective political parties. The reasons are forceful and practical. They can not apply at all to the selection from the same lists of officers to hold option elections, though the ones selected for the general elections are not necessarily disqualified from the latter service. In *Puckett v. Snider*, 22 Ky. Law Rep., 1720, it was held under section 2555, *supra*, that it was proper for the appointing officer to appoint special officers to hold local option elections. Whether the reason given for the distinction is the real one actuating the legislature in so providing is immaterial. It may or it may not have been their reason. But as the provision seems to clearly indicate the course, it matters not what the reason was.

A number of votes were contested because it was alleged that the voters were not residents of the precinct where they voted. Others were refused the right to vote because it was thought they were not legal voters. These were all dependent upon the fact of residence. Some people, without families and of wandering disposition, or whose callings do not admit of their stopping long at one place, can not always establish the fact of their residence being at a certain place as satisfactorily as those whose habitations are fixed. Yet in law every person has a domicile. In some instances it may be different from his actual abode. Until he has changed it, which is a combination of act and intention, it continues to be his domicile in law. (McCrary on Elections, section 71.) Where one has had an actual domicile, and departs from it temporarily, intending to return, it will remain his legal domicile for all purposes.

Section 1478, Kentucky Statutes, gives the rules for determining the residence of a voter. We think the trial court ruled correctly as to all the voters voting, whose right to vote depended upon the fact of their residence.

Three voters were refused the right to vote, at least they were challenged and failed to vote. They did not sign, nor offer to sign, the affidavit allowed by section 1477a, Kentucky Statutes. The blanks were present and the voters were so notified. They chose to leave without voting, being in doubt themselves, it seems, whether they were legal voters. Until the voter either qualifies by showing his right to vote, or offers to do so by making the affidavit required by law, he is not a rejected voter. The officers of election, if honestly in doubt concerning his right to vote, may properly demand that he comply with the law so as to protect the ballot by the safeguards provided by the statute from illegal voting. The conditions provided are reasonable, and until complied with neither the voter nor any other can justly complain that he was not allowed to vote. (Cooley's Const. Lim., 776.)

One voter was said to have been intimidated and another hindered or bribed not to vote. The evidence does not satisfy us on the latter point at all. In the former it is so conflicting that we are unwilling to disturb the judgment of the court and that of the contest board on this point. One voter was born June 9, 1883. The election was held, as stated, on June 8, 1904. Consequently the day following the election was his "birthday."

The question is, when did he become twenty-one years old? The law does not take notice of a part of a day. Its division of time into days is to allot say twenty-four hours to the day, each day ending at midnight. So a day, in law, may be very much less than twenty-four hours. It may, of course, be less in fact than one hour, or even one minute. Where time is an element of a fact, its beginning is deemed to have been coincident with the first moment of the first day of the event. The year, in law, is 365 calendar days. One born on the first day of the year is consequently deemed to be one year old on the 365th day after his birth, the last day of that year. As a matter of fact he may not be. For he may not have been born on the first moment of the first day of the year, which would have been necessary to make him one year old on the last moment of the last day of that year. So unless the law should take notice of parts of days, it would more frequently happen that one would have to be twenty-one years and one day, or twenty-one years and some part of an additional day old, before he could do any act permitted to be done by an adult and prescribed to a minor, for it is hardly possible that that many people could prove the precise moment of their birth by any kind of evidence. This has given rise to some nice discussion as to when in law one does become twenty-one years old. As at that age he is a man, can make a will, enter into contracts, and vote, and bind himself and his property as an adult, the question has frequently arisen, though it seems to have been before this court but once, and there it was assumed, without discussion or citation of authority, that one is twenty-one years old on the day preceding the twenty-first anniversary of his birth. (*Hamlin v. Stevenson*, 4 Dana, 597.)

The conventional fixing of twenty-one years by the common law when man's estate of full responsibility is begun has been adopted generally where the common law has gone. It was adopted in deference to considerations of expediency similar to those upon which rest the maxim that the law takes no notice of a fraction of a day. Inasmuch as a man is a man when he is twenty-one, he is then entitled to all the privileges, as he is charged with the responsibilities, of full age, at twenty-one he may lawfully do what he could after he is twenty-one. Time is continuous, and of course is not in fact severable. There is no instant between the finding of one period and the beginning of the succeeding one. When twenty-one years have passed, the twenty-second year had begun. So if it were said that twenty-one years must actually pass before one is of full age, it would follow that he would be more than twenty-one in fact before he attained to the privileges which the common law gives to one who is just twenty-one years old. The law notes no fraction of any day. In law a man is twenty-one years old on the day preceding his twenty-first birthday, and may then do whatever is allowed to an adult to do. Hence, one born on June 9, 1888, at 11:59 p. m. is deemed in law to have been born on the first moment of that day. By like rule, on the first moment of June 8, 1904, he has encompassed twenty-one complete years, although as a matter of fact we see that he lacks forty-seven hours and fifty-eight minutes of having done so. This illustrates one extreme of the possibilities of the rule. But it is supported by the great majority of the adjudged cases, indeed the courts seem quite unanimous on the point. (1 Bl. Com., page 463; Bingham's *Infancy*, page 2;

Ross v. Morrow, 85 Texas, 172, 16 L. R. A., 542; Wells v. Wells, 6 Ind., 447; Bardwell v. Purrington, 107 Mass., 419, 425; State v. Clark, 3 Harrington, 557.)

Prof. Minor says the doctrine is absurd. (1 Minor's Inst., 514.) Redfield also seems to regard it as "a blunder." (Redfield on the Law of Wills, 19.) But it has been too long established now to depart from it, particularly as no good could come from the change.

Another contention of appellants is that the proposition submitted was self-contradictory and misleading. The proposition, as printed upon the ballots, reads: "Proposition: Whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned within the corporate limits of the town of Calhoun, McLean county, Kentucky, and that the provisions of this law and prohibition shall apply to druggists."

The argument is, that if an elector desired to vote no on the proposition whether intoxicating liquors of any kind should be sold in the territory mentioned, but desired to vote that druggists might sell, his voting "no" would not reflect his will, nor would his voting "yes." This argument proceeds upon the supposition that the propositions are severable. Whereas they are not. We have in this statute the initiative and referendum. The electors, by their petition, a given number joining in it (section 2554, Kentucky Statutes), initiate the proposition upon which the election can be held. They alone determine its extent. Unless they see proper to include druggists in the prohibition, and unless they are so included in the proposition voted on, the law will not apply to them. (Section 2558, Kentucky Statutes.) Their proposition as an entirety is referred to the electors for ratification or rejection. And it must be adopted or rejected as a whole. The proposition, in view of the petition in this case, was properly worded.

It was whether the sale, loaning or giving of spirituous, vinous and malt liquors should be prohibited in that town, including sales by druggists.

The remaining question is, was the emblem adopted for the ballot on behalf of the local option advocates in violation of the statute? It seems to have been assumed by the county court clerk who prepared the form of the ballot, and by all parties concerned, that a device was authorized to be used on the ballots. Section 1453, Kentucky Statutes, concerning elections, defines the duties of county court clerks in preparing ballots. It authorizes the selection by political parties of devices. It reads (in part): "If the certificate of nomination of any State convention shall request that the figure or device selected by such convention be used to designate the candidates of such party on the ballots for all elections throughout the State, such figure or device shall be used until changed by request of a subsequent State convention of the same party. Such device may be any appropriate symbol; but the coat of arms or seal of the State, or of the United States, the national flag, or any other emblem common to the people at large, shall not be used as such device."

It is elsewhere provided in the statute regarding nominating candidates by petition to be voted for at a general election: "Such petition shall state the name and residence of each of such candidates; that he is legally qualified to hold such office; that the subscribers desire, and are legally qualified to vote for, such candidate; shall designate a brief name or title of the party

or principle which said candidates represent, together with any simple figure or device by which they shall be designated on the ballot."

Section 1460, Kentucky Statutes, respecting the form of the ballot, allots the devices chosen for parties to their respective groups of candidates, and allows the clerk to adopt a device for those candidates who have chosen none. These sections pertain altogether to the nomination of candidates for office, and the placing of their names on the official ballots.

Section 1459, Kentucky Statutes, regulates the submission of constitutional amendments and other public questions. It reads (except as to constitutional amendments): "Whenever a * * * public measure is proposed to be voted upon by the people, the substance of such * * * public measure shall be clearly indicated upon the ballot, and two spaces shall be left on the right of the same, one for votes favoring the * * * public measure, to be designated by the word 'yes,' and one for votes opposing the * * * measure to be designated by the word 'no.' The elector shall designate his vote by a cross mark, thus (x) placed opposite the word 'yes' or 'no.'"

There is no authority whatever for the use of a device or emblem upon the ballot submitting a public measure. Notwithstanding these ballots were provided with devices for each side of the proposition: The one for those favoring prohibition was an open book, with the words printed across it "Holy Bible." The device for those opposing prohibition was a female figure holding aloft a balance. No device at all should have been used on the ballots. Still if those used were otherwise unobjectionable, and as all the ballots had the same devices, so that none were thereby distinguishable from the others, that fact would not justify setting aside the election. Defects not calculated to affect the results of an election, and which have not done so, ought not to be allowed to defeat the voter's will, where it is fairly expressed, and the election has otherwise been held in conformity to the law. (Anderson v. Winfree, 85 Ky., 597, 9 Ky. Law Rep., 181; Clark v. Leathers, 9 Ky. Law Rep., 558; Bailey v. Hurst, 113 Ky., 699, 24 Ky. Law Rep., 504; Pettit v. Yewell, 113 Ky., 777, 24 Ky. Law Rep., 565; Graham v. Graham, 24 Ky. Law Rep., 548.)

Though it be conceded that the words "device," "emblem," "symbol" and "figure" in the statute mean the same thing, which is that the device or figure used may be such symbol as will represent a particular idea; and though it be further conceded that the use of a figure of a book, with words indicating that it represents the Holy Bible, and that it is such a type or symbol that it is common to all the people, and, therefore, within the mischief sought to be prevented by the statute quoted from (section 1458, Kentucky Statutes), and that the prohibitory language is mandatory, still we are not able to agree with learned counsel's argument that all the ballots were thereby vitiated, and the election failed. It would never be granted that putting a device on the ballots annulled the election, where the statute said nothing about devices at all, and where it was shown that the one used did influence the election. If it would be more than an irregularity, for which the electors would not be made to suffer, it must be because the law specifically makes it so. Counsel anticipate the force of that by assuming the position that this device was one expressly and mandatorily prohibited. It was not prohibited, though, as we have seen, used on ballots

for an election submitting a public measure alone. If the legislature has so prohibited its use with respect to candidates for office, as to render the election void if the prohibition is ignored, the courts would so hold by the sheer force of the legislative mandate, and not otherwise. But legislative mandates are always direct, and are never implied by analogy. The court would be entirely without justification in holding that because the legislature has declared that a particular device should not be used for one purpose, and if it was the election would be null, that, therefore, if the device was used for an entirely different purpose, about which the legislature had said nothing, one way or the other, the election would likewise be void. No rule of statutory construction authorizes that course. From the cases cited above it is seen that the positive tendency of the adjudged cases is not to defeat the elector's will by strict attention to immaterial defections by election officers. In the case at bar the elector did not arrange his ballot; nor could he control its arrangement; he had to vote that one, or not vote at all. It is not shown that its form in anywise influenced any voter's action. The law will not deprive the electors of their rights, and defeat their expressed will, for such an informality. The other objections to the election are fully covered by the principles announced above.

Perceiving no error in the trial the judgment is affirmed.

Chief Justice Hobson not sitting.

CRIGLER, &c. v. COMMONWEALTH (No. 173).

(Filed May 18, 1905.)

1. Intoxicating liquors—Local option—Special acts—Effect—Judicial notice—The local prohibition law commonly called the "Five Counties' Act," approved April 4, 1884, forbids the sale of liquor by retail in Laurel county; it results, therefore, that in Laurel county the act of March 10, 1894, as amended, which constitutes chapter 81, Kentucky Statutes, must be construed as part of the act of 1884, regulating and controlling the former in the matter of procedure, the quantity of liquor to be sold, and the punishment. In other words, the act of 1894 is operative in Laurel county without the necessity of a vote by the people. Of the existence of the act of 1884 and the operation of the act of 1894 this court will take judicial notice.

2. Distillers—Retailing—C. O. D. shipments—Interstate commerce—Device to evade statute—Under subsection 4 of section 2757b, Kentucky Statutes, which is a part of the general local option act of 1894, as amended in 1902, providing that "all the shipments of spirituous, vinous or malt liquors to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town, district or precinct where said act is in force, shall be unlawful, and shall be deemed sales of such liquors at the place where the money is paid, or the goods delivered." Where intoxicating liquors are made and sold by a distiller in this State in quantities less than five gallons and sent to Cincinnati, O., to be shipped to the purchaser C. O. D., in a town where the local option law is in force, such shipment being for the purpose of imparting to it the quality of interstate commerce, is a mere device to evade the laws of this State, and is no protection to the seller, and for every such sale the parties so engaged are liable to the penalties prescribed by the local option law in this State.

Furber & Jackson, W. L. Brown and G. G. Brook for appellants.

N. B. Hays, Loraine Mix and Chas. Morris for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

The appellants were indicted by the grand jury of Laurel county, charged with the offense of retailing liquor contrary to law. A trial resulted in their conviction, and a fine being inflicted; and from the judgment enforcing this verdict they have appealed.

Laurel is one of the five counties in which the retailing of spirituous liquors is prohibited by an act of the general assembly of the Commonwealth of Kentucky, commonly called the "Five Counties' Act." In *Locke v. Commonwealth*, 25 Ky. Law Rep., 76, we reviewed all the cases theretofore decided bearing upon the subject, and held that, wherever a local law was in force, either through vote of the people or by legislative will, the sale of liquor by retail remained prohibited, not according to the terms of the local act, but as if a vote had been held in such locality against the sale of liquor under the act of March 10, 1894. It results, therefore, that in Laurel county the act of March 10, 1894, as amended, which constitutes chapter 81, Kentucky Statutes, must be construed as part of the act of 1884, regulating and controlling the former in the matter of procedure, the quantity of liquor sold to constitute an offense, and the punishment. In other words, the act of 1894 is operative in Laurel county without the necessity of a vote by the people. Of the existence of the act of 1884, and the operation of the act of 1894, this court will take judicial notice.

The local prohibition law, commonly called the "Five Counties' Act," approved April 4, 1884 (Acts 1883 4, volume 1, page 1116), forbids the sale of liquor by retail in Laurel county. The act of 1894, as amended by the act of 1902 (section 2557, Kentucky Statutes), provides as follows: * * * "Any person who shall sell, barter or loan, directly or indirectly, any such liquors in said county, city, town, district or precinct, shall, upon conviction, be fined not less than \$60 nor more than \$100, or be confined in the county jail not less than ten nor more than forty days, or both so fined and imprisoned, in the discretion of the court or jury, for each offense." * * *

Subsection 4 of section 2757b, Kentucky Statutes, which is also a part of the general local option act of 1894, as amended in 1902, is as follows: "All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, commonly called 'C. O. D. shipments,' into any county, city, town, district or precinct where said act is in force, shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The real question involved in this case is whether or not the sales made by the appellants constituted interstate commerce; if so, then their acts were not subject to the control of the laws of Kentucky, and this case must be reversed; if, however, the sales were such as may lawfully come within the purview of the local option statutes of the State, then they are guilty, and the judgment of the trial court must be affirmed.

Appellants, Robert L. and Jacob S. Crigler, are partners, conducting a distillery business under the firm name of Crigler & Crigler.. They own and

operate a distillery in Scott county, Kentucky, and have places of business in Covington, Ky., and Cincinnati, O. Prior to the enactment of the amendment in 1902, commonly called the C. O. D. statute, and which is quoted above, they had no business place in Cincinnati, but had been for several years theretofore making what is known as C. O. D. shipments from Covington to various points throughout the State of Kentucky, among which was Laurel county, where, under the operation of the act of 1884, the retailing of spirituous liquor was prohibited. Their mode of business was to send an agent to the county to take orders and forward them to appellants at Covington, who filled them and shipped direct to the customer by the Adams Express Co., collect on delivery. The express company delivered the packages to the customers, collected the selling price, and paid it over to the appellants. By conducting the business in this manner they successfully avoided the penalty of the law prohibiting the retailing of liquor in Laurel county, under the principle enunciated in the opinion of this court in *James v. Commonwealth*, 102 Ky., 108, holding that where such "C. O. D. shipments" were made, the sale took place where the order for the whisky was received, and not at the place where it was delivered by the carrier and paid for by the customer. To prevent the nullification of the local option law thus made possible the "C. O. D. statute" was enacted.

After 1902 the appellants, evidently not desiring to surrender their business of retailing liquor in prohibition counties on the one hand, nor to subject themselves to the punishment denounced by the statute as amended on the other, opened up a branch house in Cincinnati, and notified their customers in local option districts in Kentucky that thereafter all orders must be sent to the Cincinnati business place, from which all shipments would be made. In the case at bar, the specific facts constituting the offense of which appellants were found guilty, are as follows: One Britt Davis forwarded to appellant's place of business, in Cincinnati, O., an order for four quarts of whisky, which was accepted by appellants, who shipped it to him in Laurel county through the Adams Express Co., "collect on delivery." It was delivered to the consignee in Laurel county, the price was there paid to the express company, and forwarded to appellants. The whisky was contained in four quart bottles, which were enclosed in a box, arranged and sealed for shipment. The appellants contend that this transaction was interstate commerce, and not controlled or affected by the statutes of Kentucky. For the Commonwealth it is insisted, first, that the sale was not interstate commerce because the retailing of liquor is not interstate commerce; and, second, if this be not true, the sale was not interstate commerce, because the whisky was manufactured in Kentucky by citizens thereof, and sent across the State line into Ohio, merely for the purpose of evading the local option statutes of Kentucky.

Upon the trial of the case the State introduced Britt Davis, who testified to sending the order to appellants through D. C. Adams; that, in return, the whisky was shipped to him at East Bernstadt, Laurel county, and there delivered to and paid for by him. In response to question 2, "What amount did you get," he answered: "A gallon and one-half pint bottle and a little box. They called it a bible, I think." The witness showed that the "bible," in addition to the liquor, contained a corkscrew and a dram glass.

Upon these were printed: "Woodland Whisky. Adopted by the United States government for hospital purposes. Crigler & Crigler, Distillers, Covington, Ky." In response to question 85, the witness stated that he was told by Mr. Barkley, an agent of appellant, that if he sent to Covington for the whisky he could get it for \$3.35 by sending the money, but if he sent to Cincinnati, he would have to give \$3.85, "and they (appellants) had to send it to Cincinnati to ship it."

"Q. 86. Did he make any other statement to you?"

"A. He said he could not ship from Covington C. O. D., as it was against the law; that he had to take it to Cincinnati, O., to ship."

D. C. Adams testified that he was an agent of appellants to take orders in Laurel county, and had written authority to represent them. A paper to that effect was introduced in evidence, and is as follows:

"This is to certify that Mr. D. C. Adams, East Bernstadt, Kentucky, has been appointed our authorized representative to take orders for Woodland Whisky.

"Territory Assigned Laurel County.

"We have paid all government licenses, which gives our representatives the right to take orders in any part of the United States, whether that place is local option, prohibition, or otherwise. This paper empowers our representative to take orders only, which the laws of the revenue department permit him to do for us. We bill, ship and collect.

"By a special ruling of the United States Supreme Court express companies may now deliver whisky C. O. D., in any State, and the said ruling holds that any local option or prohibition law to the contrary is in violation of the interstate commerce law, and is, therefore, not binding.

"CRIGLER & CRIGLER,

"Distillers of Woodland Whisky, and Sole Proprietors of U. S. Bond Warehouses and Distillery No. 54, Seventh Rev-

(Seal) enue District of Kentucky.

"CRIGLER & CRIGLER,

"Woodland

"Distillery,

"Covington, Ky.

"Covington, Ky., this day of April 13, 1903."

J. W. Morin testified that he had taken orders for appellant, and had received two letters from them, which show that Mr. Barkley, spoken of by one of the witnesses as the agent of appellants, represented them, and also their manner of doing business and from what points.

These letters were introduced in evidence, and are as follows:

"Covington, Ky., April 10, 1903.

"J. W. Morin, Esq.,

"London, Ky. :

"Dear Sir—As per the order of our Mr. Barkley, we are shipping to your city to-day several consignments of whisky. He advises you have accepted the agency, and you will be allowed commission on these orders as per enclosed terms to representatives. Commission will be paid you on all business from your territory whether the order comes from you or direct from the customers.

"There will be no trouble in regard to the express agent at London and Pittsburg delivering C. O. D. shipments, as we have taken up the matter with the proper authorities, and will instruct the agent to deliver C. O. D. shipments.

"The orders must be mailed up to our Cincinnati office, as per enclosed envelopes. We will do everything in our power to assist you, and in the box for yourself we have included two quarts for sample purposes. We will keep you supplied with samples in the proportion of one quart for every ten gallons sold.

"CRIGLER & CRIGLER."

"Covington, Ky., May 14, 1903.

"Mr. J. W. Morin,

"London, Ky:

"Dear Sir—We are in receipt of your letter of the 12th, enclosing ten orders; same have had our prompt attention and gone forward by first express, all charges prepaid. We note your remarks in reference to a sample sent you on the 9th of the month. We hold the express company's receipt for same, and they should have delivered it on the 12th. If you do not receive it in a day or two, advise us and we shall ship you a duplicate and make a claim against the express company for the one lost. In the future always enclose your order blanks to our Cincinnati branch, as per enclosed envelope, that will insure prompt shipment as soon as your orders arrive.

"Looking over the books, we find there are five shipments on which we have not had returns. Perhaps they have been paid in the express company and we will receive them in a few days. As soon as we have returns, we will be glad to pay you commission.

"Thanking you for the orders, we are,

"Very respectfully.

"CRIGLER & CRIGLER."

At the close of the Commonwealth's testimony the appellants introduced no evidence in their own behalf, apparently willing to submit the case upon that of the Commonwealth. There can be no manner of doubt that they were guilty of the offense with which they stood charged, unless the shipment they made of the whisky from their warehouse in Cincinnati to the consignee in Laurel county, Kentucky, is protected from the operation of the prohibition laws of this State by the interstate commerce clause of the Constitution of the United States. Our State, has adopted the standard fixed by the act of congress, whereby selling less than five gallons of spirituous liquors at one time constitutes retailing. The quantity sold in the case at bar was one gallon, and the question before us is whether, under the facts of this case, the shipment in question was interstate commerce.

It may be conceded at the very outset that the shipment is not taken out of the category of interstate commerce by the act of congress of 1890, commonly called the Wilson Bill. Under this act, as construed by the Supreme Court of the United States in *re Rohrer*, 140 U. S., 545, and *Rhodes v. Iowa*, 170 U. S., 412, the prohibition law of the State did not attach until the whisky was delivered to the consignee. If, therefore, we are to reach the conclusion that the shipment here involved was not interstate commerce, it must be upon the ground either that selling liquors by retail is not

interstate commerce, or that the particular liquor in question having been made in Kentucky and shipped by citizens of this State out of the State for the purpose of being reshipped into the State, in order to evade the prohibition laws, is such a trick or device as forbids it being considered interstate commerce for that reason. No one who reads this record will long hesitate in reaching the conclusion that the act in question was a retailing of liquor and that the form of the procedure was adopted merely for the purpose of giving the color of the interstate commerce to the transaction so as to evade the penalty denounced by the prohibitory State statute for its violation.

The case of *Austin v. Tennessee*, 179 U. S., 348, involved the question as to whether or not a single package of cigarettes shipped into the State of Tennessee from North Carolina, contrary to a statute of the former State, was interstate commerce, and, therefore, protected by the Constitution of the Federal government. In the opinion, at page 359, is said: "The real question in this case is whether the size of the package in which the importation is actually made is to govern; or the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of State laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods, have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words 'original package' in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or to be used to evade the police regulations of the State with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a bona fide package of a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several States, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of

Defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister State we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandize to a single ribbon, provided only the dealer sees fit to purchase his stock outside the State and import it in minute quantities."

This reasoning applies with special force to the transaction at bar. Here the intention to evade the prohibition laws of the State was not pretended to be concealed. Appellants sent their agent into a prohibition county soliciting orders, and when obtained shipped whisky which had been manufactured in Kentucky and sent across the line into the State of Ohio for the purpose of imparting to it the quality of interstate commerce, and of then reshipping it into the State to customers, in violation of law. Such a transaction is a mere device to evade the laws of the State; it has not one attribute of legitimate interstate commerce; it is simply an attempt to retail liquor contrary to the laws of the State, under the protection of the Constitution of the United States. If this method of doing business is to receive the protection of the Constitution as interstate commerce, it need no argument to demonstrate that there can be no effective prohibition of the retailing of liquor in any State unless all the other States have likewise prohibited it, for it is evident that it would lie in the power of any dealer on one side of the mathematical line dividing the States to send his messengers across the line, and deliver the prohibited liquor by the quart, pint, or even drink. If the appellants can ship whisky to Laurel county by the quart or gallon from their warehouse in Cincinnati, why might they not, by a convenient use of the telephone, send it across from Cincinnati to Covington by the glass, and call that the original package? But we feel our inability to state the unsoundness of appellant's contention as forcibly as has the Supreme Court in the opinion above quoted. Borrowing the language of Mr. Justice Brown, it is evident that "the doctrine (of original package) has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company, and the connivance of his consignee."

We conclude, therefore, upon the authority of *Austin v. Tennessee*, this shipment was not legitimate interstate commerce, but a mere trick or device to evade the prohibition laws of the State; and this particular whisky was never interstate commerce for the additional reason that it was manufactured by citizens of this State, in this State, sent to Ohio, and then shipped back into the State for the express purpose of evading the prohibition laws of this Commonwealth. The record discloses that appellants notified their customers, after the enactment of the C. O. D. statute, that they must send their orders to the Cincinnati office, and that a small additional sum must be paid in excess of the usual price to cover the cost to appellants of shipping the whisky to Cincinnati for the purpose of reshipment back to the customer. This transaction was so transparent a device as to require no argument to demonstrate that it had no element of interstate commerce,

and was, therefore, subject to the prohibition of laws of the State. This being true, there is no question of the guilt of appellants.

The whole subject of the rights of congress under, the commercial clause of the Constitution, and the police power of the State, under its reserved rights, is thus summarized by John Randolph Tucker, in his work on the Constitution of the United States (volume 2, section 260): "The delicate boundary line between the congressional and State power may be drawn by the judiciary upon the principle that the State may not *mala fide*, under color of its reserved power, impinge on the commercial power of congress; and congress may not, under color of its granted power, impinge on the reserved power of the State. *Bona fides* is required on both sides. This *bona fides* is equivalent to the word 'frankly' in the quotation above from the chief justice. Each must use its distinct power in such a way as not to trench on the power of the other. Where the judiciary find that a State uses its reserved power as a pretext to regulate commerce, or that congress, under the commerce power, invades the reserved clause jurisdiction of the State, it shall so adjust it in both cases as to maintain the supreme law of the land over congress and the States, hence the early laws of congress regulating commerce respected the quarantine laws of the State, and aided their maintenance, and did not obstruct them, and this because a law to regulate commerce was neither necessary nor proper, but the contrary, when it introduced into the State disease and death, physical or moral, contrary to the State quarantine."

It is believed that this states the true rule of the subject-matter under discussion. To quote the language of Mr. Justice Gray, in his dissenting opinion in *Lelsy v. Hardin*, 185 U. S., 160: "Because to hold otherwise would add nothing to the dignity and supremacy of the powers of congress, while it would cripple, not to say destroy, the whole control of every State over the sale of intoxicating liquors within its borders."

Judgment affirmed.

R. L. & J. S. CRIGLER v. COMMONWEALTH (No. 167).

(Filed May 18, 1905—Not to be reported.)

Furber & Jackson, W. L. Brown and G. G. Brock for appellants.

N. B. Hays and Lorine Mix for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

This case is one of seven of the same style, and involving the same questions, which were heard together. The facts are substantially similar to that of *Crigler & Crigler v. Commonwealth*, No. 178, this day decided, and it is affirmed upon the authority of that case.

R. L. & J. S. CRIGLER v. COMMONWEALTH (No. 170).

(Filed May 18, 1905—Not to be reported.)

Furber & Jackson, W. L. Brown and G. G. Brock for appellants.

N. B. Hays and Lorine Mix for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

This case is one of seven of the same style, and involving the same questions, which were heard together. The facts are substantially similar to that of Crigler & Crigler v. Commonwealth, No. 173, this day decided, and it is affirmed upon the authority of that case.

R. L. & J. S. CRIGLER v. COMMONWEALTH (No. 174).

(Filed May 18, 1905—Not to be reported.)

Furber & Jackson, W. L. Brown and G. G. Brock for appellants.

N. B. Hays and Lorine Mix for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

This case is one of seven of the same style, and involving the same questions, which were heard together. The facts are substantially similar to that of Crigler & Crigler v. Commonwealth, No. 173, this day decided, and it is affirmed upon the authority of that case.

R. L. & J. S. CRIGLER v. COMMONWEALTH (No. 176).

(Filed May 18, 1905—Not to be reported.)

Furber & Jackson, W. L. Brown and G. G. Brock for appellants.

N. B. Hays and Loraine Mix for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

This case is one of seven of the same style, and involving the same questions, which were heard together. The facts are substantially similar to that of Crigler & Crigler v. Commonwealth, No. 173, this day decided, and it is affirmed upon the authority of that case.

R. L. & J. S. CRIGLER v. COMMONWEALTH (No. 180).

(Filed May 18, 1905—Not to be reported.)

Furber & Jackson, W. L. Brown and G. G. Brock for appellants.

N. B. Hays and Loraine Mix for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

This case is one of seven of the same style, and involving the same questions, which were heard together. The facts are substantially similar to that of Crigler & Crigler v. Commonwealth, No. 173, this day decided, and it is affirmed upon the authority of that case.

R. L. & J. S. CRIGLER v. COMMONWEALTH (No. 183).

(Filed May 18, 1905—Not to be reported.)

Furber & Jackson, W. L. Brown and G. G. Brock for appellants.**N. B. Hays and Loraine Mix for appellee.****Appeal from Laurel Circuit Court.****Opinion of the court by Judge Barker.**

This case is one of seven of the same style, and involving the same questions, which were heard together. The facts are substantially similar to that of *Crigler & Crigler v. Commonwealth*, No. 173, this day decided, and it is affirmed upon the authority of that case.

BEAN, &c. v. VENABLE, &c.

(Filed May 18, 1905—Not to be reported.)

Sale of land—Deed adjudged a mortgage—Rights of parties—In an action by B. against V. to recover a house and lot which B. had conveyed to V. for \$141, and which V. had agreed to reconvey to B. at the same price, on which B. agreed to pay 8 per cent. interest, a part of which was paid, but which V. subsequently sold and conveyed to G. for \$150, Held—That the transaction between B. and V. was a mortgage, and that V. should be charged with what he received from B., including the \$150 he got for the property from G., and credited by the purchase price, with 8 per cent. interest, and the balance was payable to B.

Pendleton & Bush and J. M. Benton for appellants.**J. F. Winn for appellees.****Appeal from Clark Circuit Court.****Opinion of the court by Chief Justice Hobson.**

In the year 1893 Asa Bean bought a mare from Dr. O. R. Venable for \$125 and procured Charles Swift to pay Venable the money by executing to Swift a mortgage on a house and lot which was the residence of himself and wife. In April, 1894, Swift wanted his money and thereupon Bean and wife conveyed the house and lot to Dr. Venable in consideration of \$141, \$115 of which was paid by Venable to Swift, and the remainder to Bean's wife. Bean and wife remained in possession of the property as tenants of Venable at \$2 a month, Bean to pay also the taxes, insurance, and keep up the repairs.

Not long after this Bean's wife died and Venable proposed to Bean to deed the property back to him at \$141, if Bean would pay him \$100, and give a note for the remainder. Bean agreed to do this, but did not pay the \$100. However, he from time to time made payments to Venable, which Venable credited on the rent account, aggregating about \$150, much of this being paid in the year 1899. Things ran along in this way until April, 1901, when Venable sold and conveyed the land to Miss Ethel Garner for \$150. Before the sale to Miss Garner Venable testifies that he saw Bean and asked him if he wished to carry out his contract to purchase the place, and that Bean said that he did not; but Bean denies this. About a month later Miss Gar-

ner sold and conveyed the place to T. G. Barrow in consideration of \$200, and in the following September Bean filed this suit against Venable, Barrow and Miss Garner to recover the property, charging that the deed made to Venable in 1894 was only a mortgage to secure \$150. The circuit court found the facts to be as above stated, and while there is much conflict in the evidence we see no reason to disturb his finding on the facts. He dismissed the petition against Miss Garner and Barrow, but gave Bean a judgment against Dr. Venable for \$90.81. Bean appeals and Venable prosecutes a cross appeal.

Miss Garner and Barrow were bona fide purchasers without notice. The title of record was in Venable, and they having purchased from Venable, without notice of any equity on the part of Bean to the property, his petition was properly dismissed as against them. As between Bean and Dr. Venable the judgment of the circuit court seems to follow the equity of the case, and to be substantially correct. The proof shows that in making the transaction with Dr. Venable it was the intention of the parties to vest the title in him.

The proof also shows that the proposition which Venable made to Bean of selling the property back to him included as part of the consideration that Bean was to pay Venable interest at 8 per cent. Venable can not be allowed to keep both the property and the money which Bean paid him on the contract, and from all the evidence we are satisfied that the money which Bean paid was not paid as rent, but was paid on the contract and for the purpose of having the title to the property reconveyed to him. As the 8 per cent. was a part of the consideration which Bean was to pay for the property, he can not complain that the account between him and Venable is settled on this basis. The court charged Venable with what he had received, including the \$150 which he got for the property, and credited him by the purchase price of \$141, with interest at 8 per cent., thus finding the balance against him as above stated. It is apparent from the evidence of Proctor that Venable was to have 8 per cent., and the settlement of the account made by the chancellor seems to do substantial justice between the parties. If we treat the verbal contract between Dr. Venable and Bean as void, then Venable would have to return the consideration received with interest, and Bean would be charged with the use of the house, less taxes, insurance and repairs. In cases of this sort, as between vendor and vendee, the rents are usually fixed according to the interest on the purchase money, and if we figure the account on this basis we reach practically the same result as that reached by the chancellor. Dr. Venable had no substantial grounds of complaint as he thus gets what he was willing to take, his purchase money, with interest at 8 per cent.

The judgment appealed from is, therefore, affirmed on the original and cross appeal.

DOWLING'S ADM'X v. WALKER, &c.

(Filed May 18, 1905.)

1. Forcible detainer—Appeal—Supersedeas bond—Action on—Recovery—Where in a forcible detainer proceeding the defendant appealed from a judgment of the circuit court awarding a writ of restitution against him,

by executing a supersedeas bond under section 748 of the Civil Code, instead of a traverse bond under section 463 of the Code, the covenant of such supersedeas bond does not cover an attorney's fee as part of the costs recoverable thereon.

2. Insufficient surety—New bond—Time covered—Where a supersedeas bond has been executed by the appellant with insufficient surety, and on motion of appellee a new bond is required to be executed by appellant with sufficient surety pending the appeal, the new bond is not limited in its operation to the time elapsing between the date of its execution and the day upon which the property was returned to the owner, but relates back and covers the period between the execution of the first bond, the surety of which was adjudged insufficient, and the date of the return of the property to the owner.

3. Damages for detention—Rent—Waste—Theft—Where in a written lease between a landlord and tenant for the rent of a distillery, both of whom were experienced distillers, fixing the annual rental at \$1,000, in an action on the supersedeas bond for the damages in detaining the property, by the lessor against the lessee, the measure of damages for the rent is at the rate of \$1,000 per year for the time it was so detained, and as appellant was entitled to recover whatever damages accrued to the property during the period covered by the supersedeas bond, due to the negligence of the party detaining it such party is liable for the blowing down of the smoke stack if it resulted from his failure to properly secure it, and for other damages of a similar kind which accrued because of his failure to take such care of it as a prudent owner would of his own property as well as for all property taken by theft, which he could, by diligence, have prevented by repairing the house or employing a watchman to protect it.

L. W. McKee, Willis & Todd and Wm. Carroll for appellant.

Humphrey, Hines & Humphrey and F. R. Feland for appellees.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Barker.

This is an action on a supersedeas bond executed by J. R. Walker, as principal, and the American Bonding and Trust Co., of Baltimore City, as surety, to John Dowling, in a forcible detainer proceeding between Dowling and Walker, to recover possession of a distillery plant and fifteen acres of land situated in Anderson county, Kentucky.

The facts out of which this litigation grows are substantially as follows: Walker owned the distillery plant and land, and executed a mortgage upon it to Dowling to secure borrowed money. This mortgage was foreclosed by a judgment of the Anderson Circuit Court, but a sale was not had, an arrangement having been effected between the parties by which Walker was to pay the interest on the debt.

In 1900 Walker sold the property to Dowling for the existing debt, and executed and delivered to him a deed therefor, at the same time leasing it from the latter for a term of one year, at a stipulated rental of \$1,000 per annum, with the privilege of renewal for another year at the same rental. Based upon a breach of some of the conditions of the lease not necessary to be here set forth, in February, 1901, Dowling instituted a forcible detainer proceeding against Walker to recover possession of the property. A trial in the Anderson County Court resulted in a verdict of guilty, upon which was

entered a judgment of restitution in favor of Dowling. This inquisition was traversed by Walker, who executed bond and appealed to the Anderson Circuit Court. A trial in that tribunal likewise resulted in a verdict of guilty, and a judgment of restitution in accordance therewith. From this judgment Walker appealed to this court, and on the 27th day of April, 1901, executed a supersedeas bond under section 748 of the Civil Code, with J. R. McBrayer as surety. Dowling deeming McBrayer to be insolvent, entered a motion, in vacation of this court, before Judge J. P. Hobson, that Walker be required to execute a supersedeas bond with sufficient surety, under section 750 of the Civil Code. This proceeding resulted in an order requiring Walker to execute another supersedeas bond with sufficient surety, which was complied with on the 16th day of July, 1901, by the execution of the bond sued on herein.

Afterwards the judgment of the circuit court was affirmed by this court and a writ of restitution issued, under which Dowling was placed in possession of his property on the 21st day of May, 1902; whereupon he instituted this action upon the supersedeas bond executed on the 16th day of July, 1901, to recover damages for the wrongful detention of his property during the period elapsing between April 27, 1901, and May 21, 1902, being one year and twenty-four days.

In his petition he alleges that during the period mentioned Walker collected, as storage on whisky in the bonded warehouse on the property and appropriated to his own use, \$1,985 50, which he is entitled to recover, or, if this be not so, then he is entitled to a reasonable rental of the property for the time mentioned, which he alleges to be \$1,985.50; also that during the time the property was wrongfully detained from him great waste was committed by Walker, aggregating \$2,065, consisting in the latter's permitting the smokestack of the distillery to be blown down by neglecting to properly secure it; the beer and water pumps to be blown down or taken away, and a large quantity of the tools and implements and machinery to be stolen or destroyed. He further claims the sum of \$250 as a reasonable attorney's fee expended by him in the recovery of the property in the forcible detainer proceeding, and the additional sum of \$52 court cost paid by him.

Walker and his surety filed separate answers, and without examining the pleadings with particularity it is sufficient to say that all of the material allegations of the petition were placed in issue. Without objection the case was transferred to the equity side of the docket, and referred to the commissioner to report on the damages accruing to Dowling during the time his property was detained from him. It was ascertained by the commissioner that the property had been wrongfully detained from Dowling by Walker from the 27th day of April, 1901, to the 21st day of May, 1902, a period of one year and twenty-four days; that during this time Walker had collected \$1,985.50 as storage on whisky deposited in the bonded warehouse; that of this sum four fifths was necessarily expended in caring for the whisky, leaving a net profit of one-fifth, or \$397, which was allowed Dowling; that a reasonable rental of the property was \$250 per year, and, therefore, the sum of \$266.56 was allowed as rent for the whole period. The commissioner further ascertained that Dowling had expended \$52 in court costs, which was allowed, making a total of \$715.56. Two hundred and fifty dollars was

deemed a reasonable attorney's fee. This item, however, was neither rejected nor allowed, but submitted to the court.

Both parties filed exceptions to this report, which, upon final judgment, were thus disposed of. The attorney's fee was rejected in toto, as was also the item of \$266.56 rent; the item of court costs, \$52, was allowed, and also \$391.84 as net storage on whisky, the rent of the fifteen acres of land for pasturage, and for such damage as accrued to the landlord by the waste of the tenant during the period in controversy, and a judgment awarded for the aggregate sum of \$484.50, to reverse which this appeal is prosecuted.

Pending the litigation Dowling died, and the action was revived in the name of his wife as administratrix of his estate. The bond which constitutes the basis of appellant's cause of action is a supersedeas bond issued under the authority of section 748 of the Civil Code, and not a traverse bond under section 463, as is urged by appellant. The covenant of a supersedeas bond does not cover an attorney's fee as a part of the costs. (Welch v. Welch, 106 Ky., 406; Buckner v. Bogard, 8 Ky. Law Rep., 701.)

The bond sued on is not limited in its operation to the time elapsing between the date of its execution and the day upon which the property was returned to appellant, but relates back and covers the period between the execution of the first bond, the surety of which was adjudged insufficient, and the date of the return of the property to appellant. (Hargis v. Mayes, 20 Ky. Law Rep., 1965; Wilson v. King, 23 L. R. A., 802.)

In the case of Turner v. Johnson, 106 Ky., 460, which was an action upon a supersedeas bond, and in principle identical with the case at bar, the measure of damage on the bond is thus set forth:

* * * "The bond sued on obligates the appellee to pay appellants the reasonable and fair rent of the property during the time he was kept out of it by reason of the bond, and any damages he sustained from waste or injury to his property during this time."

Tested by this principle, what was a reasonable rent for the property during the year and twenty-four days appellant was kept out of possession? Dowling testified that it was worth \$1,000 per year; Walker says \$250.

But the parties, both of whom were experienced distillers, fixed it in the written lease at \$1,000 per year. They of all men knew best what the property was worth. Under the terms of the lease, if Walker elected to hold the property for the second year, he was to pay a \$1,000 for its use. He did hold it for that term, not by election, but by keeping his landlord out of possession by the bond sued on. To hold him to this rental is to make him pay exactly what he agreed to pay for the same time; and we think the stipulation in the lease a fair criterion of the rental value of the property. This view concedes Walker the right to the storage commission, and, so far as this question is concerned, leaves the parties just as if Walker had elected to hold over, with the addition that he must pay for the twenty-four days at the rate of \$1,000 per year.

Appellant was clearly entitled to recover whatever damages accrued to the property during the period covered by the supersedeas bond due to the negligence of Walker. In Turner v. Johnson, supra, on this subject, it was said: "It was the duty of appellee to use the property and take care of it just as a prudent owner would use his own property. It was waste to fail to keep

it in reasonable repair. The rule of care required in this case is different from that required of an occupant seeking a rescission where he is not in fault as to the holding. Appellee was in the wrong, and if, while he held the property by means of the machinery of the law, he let it go to waste for lack of the attention that a prudent owner would give his own property, he is responsible for the damages thereby resulting to appellants. It was his duty to see that the tenants took proper care of the property, and that no waste was done by them or by the railroad company while it was held by him."

Measured by this rule, we are unable to see why Walker is not liable for the blowing down of the smokestack, if that resulted from his failure to properly secure it, and for any other damage of a similar kind which accrued because of his failure to take such care of it as a prudent owner would of his own property; and clearly he must account for all the property taken by theft; certainly he could, by diligence, have prevented loss of the property in this way. The fact that the distillery was open, and could not be locked up because the doors were down, or the weather-boarding off, is no excuse; it was his duty to have repaired the house so as to have kept the machinery and other implements safe, or, at all events, to have employed a watchman to protect it. For the purposes of this case it is not necessary to extend the principle of Walker's liability for waste beyond the rule announced in *Turner v. Johnson*, but it has often been held that one who wrongfully withholds the property of another becomes its insurer. The case of *Carroll v. Early*, 4 Bibb, 270, was an action to recover the value of a slave who had died in the possession of one who wrongfully held him, but without fault on the part of the defendant. Chief Justice Boyle thus stated the rule: "For, admitting that he acquired the possession of the slave rightfully, yet his detention of the slave after the action commenced was certainly wrong; and he who wrongfully detains the property of another does it at his own peril, and will be responsible to the proprietor although the property be destroyed by accident or taken from him by violence. Thus it is held that all bailees are responsible for losses by casualty or violence after their refusal to return the things bailed on lawful demand. (*Jones' Law of Bailment*, 94; *Dear v. Brannon*, 4 Bush, 71; *Munford v. Taylor*, 2 Met., 599; *Kelly v. White*, 17 B. Mon., 98.)"

No question is made by either party as to the propriety of the allowance of \$52 as court costs.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

COMMONWEALTH v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed May 19, 1905—Not to be reported.)

1. Railroads—Sufficient accommodation for the transportation of passengers—Construction of statutes—Section 796, Kentucky Statutes, was intended to force the separation of white and colored passengers while traveling upon railroads in this State, but the legislature did not have in mind, at the time this section was enacted, the purpose of fixing a penalty for failure or neglect on the part of the railroads to furnish sufficient accommodation or the transportation of passengers.

2. Same—Section 788 of the statutes provided that sufficient accommodation should be furnished, but the legislature failed to fix a penalty for a failure to comply with this provision, therefore, a demurrer to an indictment against appellee, under section 795 of the statutes, for failure to provide sufficient accommodation for white and colored passengers, was properly sustained as that section merely provides for the separation of the races and had no reference to the fixing of a penalty for the failure to furnish a sufficient number of cars to transport all passengers applying for transportation.

N. B. Hays, R. L. Durham and C. H. Morris for appellant.

W. C. McChord, B. D. Warfield and E. W. Hines for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from the action of the lower court in sustaining a demurrer to an indictment against the appellee for the violation of section 795 of the Kentucky Statutes. The indictment in substance alleged that appellee violated the statutes by willfully failing to furnish sufficient coaches or cars for the transportation of passengers on the 28d of October, 1903; that from the month of May prior and up to the date named the appellee ran a regular passenger train from Greensburg to Lebanon, Ky., a distance of sixty-six miles, and that the cars in this train consisted of a postal and baggage car with a compartment, used as a smoking car, for about twelve passengers and also one coach with a partition for white and colored passengers, the white compartment seating forty four and the colored compartment seating twenty persons; that the cars had been taxed to their full capacity from May up to October 28, 1903; that appellee had advertised that it would run a reduced-rate excursion on the last-named date, and that it and its agents in charge knew of the incapacity of the regular train to transport the passengers who would purchase tickets for that excursion, and that notwithstanding this it willfully failed to furnish any additional coach or coaches for that occasion, and that the compartments for white passengers were filled to overflowing and many of the white passengers were compelled to take seats in the colored compartment.

It appears from the indictment that the appellee did furnish separate coaches or compartments for white and colored people in compliance with the statutes. The gravamen of the offense charged is that appellee did not furnish a sufficient number of coaches or compartments for that occasion. That part of section 795 applicable to the question involved provides that railroads operating passenger trains in this State "are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act." By section 797 a penalty is provided for a violation of this section.

As stated, this prosecution was instituted to enforce this penalty for the violation of that section. It appears from the language quoted from section 795 that the general assembly intended to force the separation of white and colored people while traveling upon railroads in this State, and that it did not have in mind, at the time of the enactment of this section, the purpose

of fixing a penalty for the failure or neglect on the part of the railroad to furnish a sufficient number of cars or compartments to transport all the white and colored persons who might apply for transportation. In support of our construction of the preceding statute we refer to section 783, which provides that every railroad company shall furnish sufficient accommodation for the transportation of all passengers who apply therefor. For a failure to comply with the provisions of this statute the general assembly failed to fix any penalty. If the construction of section 795 be correct, as contended for by appellant, then section 783, in so far as it applies to furnishing accommodation for the transportation of passengers, is superfluous.

We are of the opinion that the lower court did right in sustaining the demurrer to the indictment, and the judgment is, therefore, affirmed.

COFER v. COMMONWEALTH, FOR USE, &c.

(Filed May 19, 1905—Not to be reported.)

Intoxicating liquors—City ordinance—Sale without license—Wholesale dealers—Under an ordinance of a city of the fifth class, that "any person who shall within the city limits without license so to do sell or otherwise dispose of any spirituous, vinous or malt liquors, shall be fined not less than \$20 nor more than \$100," and a further ordinance providing that "license to sell spirituous, vinous or malt liquors in the city shall be \$500 per annum, to be taken out either annually or semiannually and paid for in advance," a wholesale dealer in such liquors who sold and delivered to a saloonkeeper in said city a quantity of beer in a wholesale lot, which was not drunk on the premises of the seller, is subject to the fine prescribed in said ordinance, whether the ordinance be regarded as an occupation tax, one for revenue purely, or whether as a police regulation incidentally affording revenue.

O'Meara & James for appellant.

J. F. Reid for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant is a wholesale dealer in malt liquor, with his place of business located at Elizabethtown, Ky. Elizabethtown is a city of the fifth class, wherein the local option law is not in effect. The city council passed an ordinance, which is as follows: "License to sell spirituous, vinous or malt liquors in the city shall be \$500 per annum, to be taken out either annually or semiannually and paid for in advance."

The city also has another ordinance, as follows: "Any person who shall within the city limits without license so to do sell or otherwise dispose of any spirituous, vinous or malt liquors, shall for each offense be fined not less than \$20 nor more than \$100." Appellant, without a license from the city, in his business as a wholesale dealer, sold and delivered to one Nichols, who is a saloonkeeper in Elizabethtown, a quantity of beer in a wholesale lot, which was not drunk on appellant's premises. The sale was in good faith a wholesale transaction. For this sale appellant was arrested under a warrant charging a violation of the ordinance above quoted, and was fined

in the police court of Elizabethtown. On appeal to the Hardin Circuit Court, showing the facts set out above, he was found guilty under the ordinances, and fined \$100. Appellant contends, first, that the ordinance first quoted, when properly construed, does not apply to wholesale transactions; and, second, if the ordinance be construed, as applying to wholesale transactions, it is invalid. The first ordinance quoted does not purport to deal alone with traffic in liquor by retail. Its language is as broad and ample as is necessary to include both wholesale and retail transactions, without tautology. We will further notice the scope of this ordinance in connection with the extent of power conferred upon the municipality by the State, for it must be obvious that the city could not exact a license tax at all except it is granted power to do so by the legislature. Even then its right to exact a tax is limited or not according to the terms of the legislative grant of power. The statute governing cities of the fifth class confers upon their city councils the right to enact ordinances upon numerous subjects, and concerning the matter now in hand particularly, as follows (section 3637, subsection 4): "To impose and collect license fees and taxes on stock used for breeding purposes, and on all franchises, trades, occupations and professions, but the license for the sale of spirituous, vinous or malt liquors shall not be less than two hundred and fifty nor more than one thousand dollars; and no license shall be issued or granted in any city where the sale of such liquors is now forbidden by law, until such law be changed."

The legislature seems to have regarded that the power to impose and collect license fees or taxes for selling spirituous, vinous or malt liquors was included in the power to impose and collect such taxes upon occupations, as that seems to be the only term used in the section exactly covering that business. The clause "but the license for the sale of spirituous, vinous or malt liquors shall not be less than two hundred and fifty nor more than one thousand dollars" is in the nature of a limitation upon a power theretofore granted, which is not found elsewhere than in the language first quoted. This at least seems to be the legislative construction of the meaning of the first sentence of the section. It will be observed that the limitation applies alone as to the amount of the license tax, both as to its minimum and maximum. It can not be found in the language of the section that the legislature intended to limit the power to impose licenses for selling liquors to retail transactions any more than it could be said that it was meant to limit it to wholesale transactions. Clearly one is as much an occupation as the other. Nothing short of an arbitrary construction could limit the term to either branch of the business.

It is argued, however, that the concluding clause of the section indicates a legislative purpose to confine the power to retail transactions. This theory is reasoned out upon a consideration of the State of the law at the time of the enactment of the act governing cities of the fifth class (July 3, 1893) applicable to prohibition under the local option statute. That statute, which is now in part section 2558 of Kentucky Statutes, provided that the local option prohibition "shall not apply to any manufacturer or wholesale dealer, who, in good faith and in the usual course of trade sells by the wholesale in quantities of not less than five gallons, delivered at one time, and not to be drunk on the premises."

The argument is, that under section 3637, subsection 4, quoted above, fifth class cities were given the power to license the sale of liquors therein except where such sale was then forbidden by law; that the only sale that could be and was then forbidden by law was a sale by retail, therefore, it is argued retailing alone was contemplated. We think the State of the law as indicated in section 2558 would argue as much for one construction of the section being considered as the other. The language, whether construed from the terms employed, or in connection with the other section alluded to, seems to naturally imply that the city was given the right to tax and exact licenses from all occupations, including that of dealing in liquors. But to the extent that the laws of the State prohibit any one from selling liquors in that city, then the power to license such sale was not granted. This would leave untouched the power to license the sales of liquors not forbidden by law within the city, which would mean that the city might license wholesaling of liquors within the city, inasmuch as such sales were not forbidden by law. The legislature intended by the section 3637, subsection 4, to let the city license any occupation which was not prohibited by law.

It is further argued that at that time the State itself did not exact a tax from wholesale dealers in malt liquors, which proves nothing in this argument, because the State did not at that time exact any tax upon trades or professions. Yet it granted, as it was competent for it to grant, the power to its municipalities to exact such license. (Section 181, Constitution.)

Illinois granted to its cities the power "to license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquors, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license."

Under that grant the council of Chicago passed an ordinance exacting a license from wholesale liquor dealers. The question came before the Supreme Court of Illinois in *Dennehy v. Chicago*, 120 Ill., 627, as to whether the general terms of the grant to the cities included the power to exact licenses from wholesale dealers. It was argued in that case by the appellant that the State itself did not exact a license tax from wholesale dealers, that indicated that it had not, by the general terms used, authorized the city to exact it. The court held that under the general power to license, regulate, etc., the municipality could regulate such sales in quantities larger than those for which provision was made by the general law of the State.

In *Miller v. Ammon*, 145 U. S., 421, the construction of the same ordinance under the legislative grant of power was before the Supreme Court of the United States. While deferring to the decision of the State's Supreme Court in a large measure, as it was purely a local police regulation, the Federal Supreme Court went further to construe on its own account the language employed, and said: "There is no limitation or qualification as to the manner of sale, whether at wholesale or retail, or as to the character of the house at which the business is to be carried on, whether a dram shop, a grocery or a drug store."

Whether the ordinance of the city be regarded as an occupation tax, one for revenue purely, or whether as a police regulation, incidentally affording

revenue, is not material in this case, as under either aspect of it it appears clearly that the legislature has granted to the city the right to impose the tax. The amount of the tax is left to the discretion of the city council.

McQuillin on Municipal Ordinances, section 181, says: "Where under undoubted charter power the tax is imposed for revenue, or for police regulation and revenue, the amount thereof is usually a matter for determination by the legislative branch of the municipal government. Ordinarily the court will decline to interfere on the ground that the amount is oppressive or unreasonably large."

There is nothing in the record to indicate that the amount is so oppressive or unreasonably large as to be confiscatory, or to remove it from the domain of proper municipal legislative discretion.

Perceiving no error in the record the judgment is affirmed, with damages.

SMITH'S ADM'R v. ILLINOIS CENTRAL R. R. CO.

(Filed May 19, 1905.)

Appeals—Rule of court—Delay in filing brief—Motion to dismiss appeal—Payment of cost—Rule 8 of this court authorizes a dismissal of an appeal without prejudice, upon the motion of the appellee, where the appellant has not filed his brief twenty days prior to the day the case is set for hearing; the purpose of the rule is to give appellee an opportunity to file his brief after appellant's brief is filed. Where appellant has failed to file his brief, and appellee on the calling of the docket entered a motion to dismiss the appeal, a motion then made by appellant for an extension of time to file his brief comes too late, although the facts stated in the affidavit for the extension were sufficient if the application had been made seasonably. Still as both parties are before the court the ends of justice will be met by requiring appellant to pay the costs in this court up to the time the motion to dismiss the appeal was made.

Hendrick & Miller for appellant.

Wheeler, Hughes & Berry for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Hobson.

At the head of the present docket are printed in large type these words:

"IMPORTANT—The special attention of attorneys is called to rule 8 which will be enforced on the calling of the docket."

Rule 8 is as follows: "That in all cases or appeals hereafter filed, or now filed and not submitted, it shall be the duty of the appellant to file his brief twenty days prior to the day the case is set for hearing, and the appellee to file his brief ten days prior to that time, and a failure to do so by the appellant shall cause a dismissal of the appeal without prejudice, and upon the part of appellee he will, if in default, be required to pay the costs up to the date of filing his brief. No oral argument will be ordered or heard on the part of the party in default unless his brief is filed as herein provided. When the briefs are in, or the brief of the party not in default, an oral argument will be ordered if desired, and a time fixed for the hearing." Appellant failed to file his brief twenty days prior to the day the case was set for

hearing, and appellee, on the calling of the docket, entered a motion to dismiss the appeal. On the same day appellant entered a motion for time to file brief; but the time for filing the brief having expired, a motion to extend the time on the calling of the docket at the same time that the motion to dismiss was made comes too late. The facts stated in the affidavit accompanying the motion to extend the time for filing the brief would be sufficient to warrant an extension of the time if the application had been made seasonably, but the purpose of the rule is to give appellee an opportunity to file his brief after the appellant's brief is filed, so that the case may be ready for submission on the calling of the docket, and that each of the parties may have an opportunity to know before the calling of the docket the points relied on by his adversary.

Still, as both parties are before the court, and the ends of justice will be met by requiring appellant to pay the cost in this court up to this time, the motion to dismiss the appeal is overruled, but the appellant will pay the cost of the appeal up to this time. As the appellant is here asking for time, no more rigorous rule should be applied to him than would be to appellee if in like fault.

ASHER, &c. v. UHL, &c.

(Filed May 18, 1905.)

1. Amended pleadings—Motion for new trial—An amended pleading tendered during the progress of a trial, or offered at the conclusion of the evidence to conform to it, is essentially different from a motion for a new trial, as the former presupposes the pending of a trial and the latter that the trial has ended.

2. Trial in appellate court—Remanding—Conflicting amendment—Where a case has progressed on definite issues to final judgment, an appeal taken, those issues adjudicated by the appellate court, and the case remanded with mandate to enter a conformable judgment, an offer by either party to file an amended pleading containing charges or denials different from or in conflict with the issues on which the cause was originally tried, it would be a necessary requirement of the party so offering that he show to the court by accompanying affidavits why the matter contained in the tendered amendment had been delayed until that time.

3. Same—Discretion of court—Where a pleading is tendered by defendants, accompanied by affidavits purporting to be a motion for a new trial, no judgment having previously been entered, such affidavits may be considered by the court in determining whether such pleading should be filed as an amended answer.

4. Same—While great latitude is and should be allowed in the interpretation of the provisions of the Code, section 134, on amendments to pleadings, this section does not go to the length of authorizing, after trial, judgment, appeal and remanding, an amendment which tenders an issue directly opposed to the issues upon which the case had been tried.

5. Same—In an action by plaintiffs claiming title by patents to a large survey of land, which was adversely claimed by defendants under conflicting patents and surveys, which lands the defendants by their answer alleged were vacant and unappropriated lands, and the issues tried, appealed and remanded, with the directions for a conformable judgment, an amended answer tendered by defendants setting up a new defense of adverse pos-

session of the lands in controversy, which facts were known to the defendants before the former trial and judgment, such amendment was properly rejected by the lower court.

Hazelrigg & Chenault, N. B. Hays and A. K. Cook for appellants.

Wm. Ayers for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Special Judge Saufley.

This is the second appeal of this cause. On the first appeal the present appellees held the position of appellants. The opinion was rendered on the 20th day of September, 1901.

Only a brief reference to it and the record on which it is based will be necessary to an understanding of the questions involved in this appeal. On the 5th day of September, 1894, the present appellee, Edward Uhl, filed in the Franklin Circuit Court a petition in equity against the register of the land office, the present appellants, A. J. Asher and others, exhibiting his title to a large tract of land lying in Clay county by virtue of a patent to John H. Cheever, issued in 1872. He complained that A. J. Asher and others, who were acting for him only, had caused to be made surveys of several distinct parcels of land lying within the boundary of the Cheever patent, claiming that such parcels were vacant land, and that they were taking the preliminary steps to have the certificates of survey carried into grant. He prayed an injunction against the register, and that he be adjudged the owner of the lands embraced in said certificates of survey. The defendant, A. J. Asher, and some of those who were associated with him in the attempt to appropriate these lands, filed their joint answer on the 28th day of January, 1895. Characteristically this answer was but a traverse.

Defendants accepted the issue tendered by plaintiff that the lands attempted to be appropriated by them were not vacant, and gave emphasis to this denial by affirmatively alleging that they were vacant and unappropriated. A motion made by plaintiff Uhl to strike the affirmative words from the answer, presumably on the ground that the issue was complete without them, was overruled by the court; and this ruling imposed on plaintiff the necessity of a reply in traverse. The significant bearing of this fact on a question involved in the present appeal will be noted in the sequel of this opinion. Additionally the defendants denied that the Cheever patent covered any of the lands embraced in any of the certificates of survey; denied the correctness of the alleged boundary of said patent, and denied plaintiff's averment of its beginning corner. In a word, the traverse was complete. There was no fact pleaded in bar by way of confession and avoidance. On the issues made voluminous evidence was taken. After elaborate, and what must have been expensive, preparation the circuit court, by its judgment of April 2, 1899, dismissed the petition, except as to an inconsiderable part of the land, the title to which plaintiff had otherwise acquired, and plaintiff appealed. On the 20th of September, 1901, this court rendered an opinion reversing the judgment of the circuit court, holding that the lands Asher was endeavoring to appropriate are parts of the land embraced within the Cheever patent. The cause was remanded for a conformable judgment. It is proper to observe that on the trial of the chief issues, that is, whether the

boundary of the Cheever patent embraced the several tracts surveyed by Asher, the ascertainment of the locus of the beginning corner of said patent became a capital point of inquiry. This point definitely ascertained, the further solution of the question became unvexed. This court, in its opinion on the former appeal, declared in accordance with Uhl's contention that the initial corner is "at the intersection of the Clay, Harlan and Bell county lines at the marked hickory tree in Foundation Gap in Kentucky Ridge."

On the return of the cause to the Franklin Circuit Court the defendants tendered and offered to file, on the 26th of April, 1902, a pleading styled by them "Amended and Supplemental Answer and Counterclaim," and with this pleading tendered and offered to file the separate affidavits of A. J. Asher and other persons. On the same day the plaintiff tendered and moved the court to enter of record a draft of a judgment prepared in conformity to the appellate court's opinion. Objections being made to both motions, the court took time. Subsequently the plaintiff, Uhl, in support of his objections to defendant's motion, and to controvert the facts alleged in the affidavits, filed the separate affidavits of himself and other persons.

At final hearing, on the 5th day of September, 1902, the circuit court overruled defendant's motion to file the amended pleading and the supporting affidavits, and granted plaintiff's motion to enter the judgment tendered. From these judgments appeal was granted, and on that appeal the cause is now here.

The pleading offered by defendant is unique. Styled "Amended and Supplemental Answer and Counterclaim," it contains much which is not properly matter of averment in a pleading, being distinctively evidential. It also contains a prayer that the judgment entered pursuant to the mandate of the Court of Appeals be set aside, for a new trial of the issues involved, and for a judgment for the lands in controversy.

This pleading was verified on the 4th day of January, 1902, and tendered for filing on the 26th of April following. Yet the judgment it seeks to vacate was not entered until the 5th day of September following. It is not possible to understand how a new trial could have been granted when a previous trial had not been had. There is a like impossibility to comprehend how a judgment might be vacated which had not been formally entered or even orally pronounced. It is not a supplemental pleading because there is no averment of a fact alleged to have occurred after the filing of a former answer. (Civil Code, section 135.) Nevertheless, it seems to have been regarded and treated by the parties and by the trial court as both an amended answer and a motion or petition for a new trial. Regarded solely as a motion for a new trial, it would seem that the filing of it was a matter of right if so be that a previous trial had been held. Regarded solely as an amended answer, the offer to file invoked the judicial discretion of the court. It is most obvious that an amendment tendered during the progress of a trial, or offered at the conclusion of the evidence to conform to it, is essentially different from a motion for a new trial after verdict or judgment. The former presupposes the pendency of a trial; the latter that the trial is ended. There must have been a former trial and judgment before there can be a vacation of judgment and a new trial. The blending of incongruous procedures begets a confusion of practice, and should not be established as

a precedent. A misconception of terms often leads to a misconception of rights.

It may, however, be said that when a case has progressed on definite issues to final judgment, an appeal taken from that judgment, those issues adjudicated by the appellate court, and the case remanded, with mandate to enter a conformable judgment, an offer by either party to file an amended pleading containing charges or denials different from or in conflict with the issues on which the cause was originally tried, it would be a necessary requirement of the party so offering that he show to the court by accompanying affidavits why the matter contained in the tendered amendment had been delayed until that time. In this view of the case, while the affidavits offered by the opposing parties may not be regarded as evidence on a motion for a new trial, no judgment having previously been entered, we think they may be considered as they bear on the offer of defendants to file an amended answer.

This amendment in substance charges two things:

1st. That a patent issued by the Commonwealth of Virginia in the year 1788 to one Benjamin Say for 90,000 acres of land situate in the then county of Lincoln, and now the counties of Bell, Clay and Knox, and that this patent embraces within its exterior lines all the lands in controversy, and that the Cheever patent of 1872, which embraces the land in controversy, is in itself covered and embraced by the senior entry, survey and patent of Say, the contention based on these facts being that the Cheever patent is void on the ground that the land embraced in its boundary was not vacant at the time the entry and certificate of survey were carried into greater grant. Additionally it is alleged by A. J. Asher, and sworn to by him, that on or about the 15th day of November, 1901, he discovered for the first time the existence of the Say patent, and could not, by reasonable diligence, have discovered it sooner; that he had no knowledge or information as to the location of the lands embraced in the Say patent prior to the reversal of the circuit court's judgment of 1899; and with greater particularity he alleges "that said Cheever patent, as located by the opinion of the Court of Appeals, embraces the lands in controversy, and that it is also covered and embraced by the senior entry, survey and patent of said Benj. Say for said 90,000 acres; that he has learned these facts since the decision and judgment of this court, by the location of the Cheever patent by the opinion of the Court of Appeals and the facts herein set out, and he could not, with reasonable diligence or with ordinary expense or time, or otherwise, except by the opinion of the said Court of Appeals, determine the location of the Cheever patent."

By this statement in greater detail Asher reveals the sources and approximately the time of his first information on two points: First, that the Cheever patent embraces the lands in controversy; second, that the Say patent embraces the Cheever patent so far as the lands in controversy are concerned. Besides, he says he learned these two facts from the opinion of this court, and the facts herein set out. There are no facts set out which might lead to any part of this information except his statement that in 1894 (prior to the institution of this suit) he employed Calvin Hurst, a surveyor, to make a survey and determine whether the Cheever patent could be

located. The information thus obtained is in no sense newly discovered, and as a separate fact is wholly unavailing on the offer to file an amendment. The only remaining source of information is the opinion of this court. Inasmuch as the opinion is absolutely silent on the subject of the Say patent, neither the grant itself nor the name of the grantee appearing on it, nor any reference direct or remote to it, it is most difficult to perceive how defendant Asher procured his first information that the Say patent covered the Cheever patent from this court's opinion of September, 1901. His further statement that he had no information of the existence of the Say patent prior to the circuit court's judgment of 1899 must be credited, if at all, against much weight of evidence. Beyond all reasonable doubt the opposing proof shows that he is incorrect.

It is probably true that defendant could not have foreseen that this court would adjudge that the beginning corner of the Cheever patent is at the intersection of the Clay, Harlan and Bell county lines, at a marked hickory in Foundation Gap in Kentucky Ridge, nor the sequence from this that the Cheever patent covers the land in controversy. But this was his own mistake of judgment or inference. Before the circuit court judgment of 1899 he was in possession of record evidence of every fact relating to that particular point of controversy. These facts induced the appellate court not to locate the beginning corner, but to adjudge as a matter of fact where it had been located by the survey precedent to the Cheever patent. It was not the judgment that located the beginning corner; that was fixed and established by the surveyor. The locus of it was only ascertained by the court, and ascertained by facts which Asher himself had in part exhibited to the court. He had full opportunity to ascertain the same thing himself. His failure to do so was a failure of judgment and not a want of opportunity. For this reason he can not be placed in a better attitude for re-opening this controversy than any other disappointed litigant who makes erroneous deductions from existing facts.

The provisions of the Code (section 134), on amendments, are liberal and so designed. Much is left to the discretion of the court "in furtherance of justice;" but it is a judicial discretion to be exercised within expressed limitations. In furtherance of justice the court may, on proper terms, permit an amendment, first, by adding or striking a name; second, by correcting a mistake in name or otherwise; third, by inserting other allegations material to the case; fourth, if the amendment do not materially change the claim or defense, by conforming the pleading to facts proven. These in substance are the limitations which the Code itself places on the court's right to permit an amendment. Great latitude of interpretation of the full meaning of this section has been upheld, but no case is cited which goes to the length of authorizing, after trial, judgment, appeal, and remanding an amendment which tenders an issue directly opposed to the issues on which the case had been tried.

In his petition plaintiff Uhl alleged that the lands the defendants were surveying for the purpose of appropriation were not vacant. Defendant denied this, and, as heretofore stated, went beyond the requirement of exact pleading by making an affirmative allegation that they were vacant. Defendants resisted the motion of plaintiff to strike this affirmation, and pro-

cured a ruling of the court which forced a reply. The issues were complete without the affirmation, which was but surplusage. But the persistence of defendants in bringing it to the notice of the court in duplicate form illustrates their conception of it both as an issue and a prime factor in determining the cause. If plaintiff had failed to make this averment his petition would have been demurrable. It seems from the record that defendants eagerly accepted the issue. The case was tried on it with the results herein stated. At this late stage the defendants, having failed after full hearing and ample preparation, now offer to withdraw their former denial and to substitute the plea that the lands which they themselves were undertaking to appropriate to their own use were not vacant, and, therefore, not proper objects of appropriation. The tendency of this defense being to defeat the claims of both parties, it does not impress one that it is in "furtherance of justice" to the defendants to allow them at this untimely juncture to interpose a plea "which not enriches them and makes the plaintiff poor indeed."

2d. The second new defense set forth in the amended answer is a plea of adverse possession of the lands in controversy. The defendant, A. J. Asher, makes this plea for himself only. He describes by metes and bounds and courses and distances a tract of land which may or may not be the lands, in whole or in part, in controversy herein. The defendant does not commit himself to any express statement as to the identity. By argument or deduction it may be inferred that the boundary he describes embraces the several parcels he endeavored to patent, and of this boundary he claims to have had the adverse possession the statutory period anterior to the bringing of the suit. It is needless to discuss whether the facts pleaded in this behalf show an adverse possession in law. Defendant himself admits that he knew every fact which would sustain this plea before he abandoned his rights as an adverse holder and endeavored to acquire title by entry, survey and patent; that he abandoned such rights under the advice of counsel, whether correctly or mistakenly given, can not legally affect the fact which remains that he knew when he filed his original answer all that he set up on this subject in the amended answer. For this reason alone, omitting others, it should not have been allowed.

The judgment of the circuit court is affirmed.

Judges Barker and Cantrill not sitting.

WEDDING v. WEDDING, &c.

(Filed May 23, 1905—Not to be reported.)

1. Gifts—Assignment of note—Evidence—Where appellant delivered a note to her daughter without any assignment of it, it is not reasonable to suppose that she made an absolute gift of it. Had that been her intention she would have endorsed it.

2. Collection of note—Gift—In this action to recover of appellee the value of a note which appellant claims she left with her for collection the claim of appellee that it was a gift to her is not sustained by the evidence, and the fact that there was no assignment of the note endorsed upon it is presumptive of the fact that it was not a gift, but placed with the appellee for collection as appellant contends.

Claude Mercer and N. McC. Mercer for appellant.

Morris Eskridge for appellees.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Nunn.

On the 8th of February, 1892, the appellant loaned to her sister, Mary S. Dean, \$300, and took a note for the amount and a lien on a tract of land to secure its payment. After this appellant moved to the State of Texas, and returned to Kentucky in the fall of 1901 on a visit. In the meantime her sister, Mary S. Dean, had died, leaving four adult children, who requested appellant not to enforce her mortgage lien on the land, but give them an opportunity to make a sale of it, they agreeing to make a sale by the spring of 1902, and out of the proceeds pay her debt. She acceded to this request, and before returning to Texas placed this note in the hands of her daughter, the appellee, Sue E. Wedding. She had previous to this tried to induce a niece to take it and collect and send her the money. The issue is over the proceeds of this note. The appellant claims that she left this note with her daughter only for the purpose of collection. The appellee claims that her mother made to her an absolute gift of the note.

The lower court decided this issue in favor of the appellee. After a careful consideration of the record we are of the opinion that the court erred. Appellant testified in a positive way that she did not make a gift of it to her daughter, but that she only left it with her for collection, under the promise by appellee that when she collected it she would send her the money. In this she is corroborated by several facts and circumstances: First, when the note was delivered to her it was without any assignment, and it is reasonable to presume that if she had made an absolute gift of it to her daughter she would have endorsed it; second, one Robert McGavock, the husband of one of the daughters of Mary Dean, and who by reason thereof was interested in the payment of the note, testified that in the fall of 1902 he had a conversation with the appellee, at her house, and she stated at the time that this note did not belong to her, but belonged to her mother, the appellant. Appellee, however, denied this statement. This occurred about twelve months after the appellant had left the note with her. On the other hand, appellee and her daughter testified that her mother, the appellant, made to the appellee an absolute gift of this note at the time she delivered it to her in the fall of 1901; that she suggested to her mother at the time that she had better endorse it or assign it, but that her mother stated that it was not necessary since it was all in the family; that she would have no trouble in collecting the money on it. Appellee also introduced her husband, who stated that he was present, and he related what occurred at the time of the alleged gift. His testimony with reference to this matter was incompetent, but even if admitted, instead of aiding appellee, it further corroborated appellant, for it was shown that he wrote a letter to one Newson, an agent of appellant, some twelve months after the alleged gift, in which he stated that this note belonged to appellant. His testimony also contradicts that of his wife and daughter as to what took place at the time of the alleged gift. He stated that when appellant made the gift he called his wife to one side and told her that she had better have her mother assign the note to her,

when his wife remarked that it was unnecessary as it was all in the family.

From all the proof we are convinced that the lower court erred in sustaining the alleged gift. Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

GRAVITT, &c. v. MOUNTZ, &c.

(Filed May 23, 1905—Not to be reported.)

1. Practice—Public record—Where a judgment enforcing a lien upon land was rendered, the foundation for the action being a judgment from a magistrate's court, an allegation in the answer of no knowledge or information sufficient to form a belief as to whether there was such a judgment did not make an issue, and in the absence of a denial of such a judgment the court was authorized to render judgment upon it. Such a judgment was a public record, and if it did not exist a denial of its existence should have been made in positive language.

2. Sale of land—Appraisement—Although there was an irregularity in an appraisement of land directed to be sold, yet where no exceptions to the report of the appraisers until long after its confirmation and after the purchaser had paid the purchase price, it was too late to have the case redocketed for the purpose of setting the sale aside for the error named.

C. F. Spencer and W. D. Jackson for appellants.

J. D. Atkinson and Hazelrigg & Hazelrigg for appellees.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by appellees in the Powell Circuit Court against the appellants as the heirs of George Gravitt, deceased, upon a judgment against him rendered in a magistrate's court June 16, 1892, for the sum of \$84. No administrator was ever appointed of the decedent's estate and he left no personal property with which to pay debts. The lower court sustained the claim of the appellee and directed the land of decedent to be sold to pay same, subject to the homestead rights of Kittle Gravitt, the widow of the deceased, the land being worth less than a \$1,000. This appeal is by the adult children of George Gravitt. The appellants complain that the court erred in adjudging that the \$84, with its interest, was due the appellees, for the reason that he did not file a copy of the judgment with his petition nor prove it by the record of the magistrate who rendered the judgment. The appellants would be correct in this if they had denied by their answer that any such judgment was ever rendered; but they only denied any knowledge or information sufficient to form a belief on that subject. This did not make an issue. This judgment was a public record and presumably within their knowledge, and they, at least, should have made an investigation of the record, and if the judgment did not exist they should have denied in positive terms the existence thereof. Appellants complain that there was no appraisement of this land, as required by the statutes before the commissioner made the sale, and for that reason the court should not have confirmed the sale. It appears that the commissioner appointed ap-

praisers and they made a report before he made the sale, but it also appears that their report failed to fix any value of the land, which made their report a nullity. But there were no exceptions filed to the report until long after the confirmation of it and after the purchaser had paid the purchase price and had obtained a deed for the land. The appellants undertook then, upon notice, to have the case redocketed and sought to have the sale set aside for the error named. They were too late. This valuation and appraisal of land is for the benefit of the defendant, giving him the right to redeem the land in case it does not bring two-thirds of its appraised value. This right he can waive. In the case at bar the appellants had sufficient time from the report of the sale to its confirmation to have filed exceptions to the report showing that they had been deprived of their right to redeem this land by failure of the appraisers to fix any value on it, and they must be deemed to have waived this statutory right which was enacted for their benefit.

Wherefore, the judgment of the lower court is affirmed.

PENN'S EX'OR v. PENN'S EX'OR.

(Filed May 23, 1905.)

1. Wills—Real estate—Taxes thereon—Life tenant—Duty to pay—P., who died in June, 1902, by his will devised to his wife all his personal estate absolutely, and certain real estate during her life. At his death there were unpaid taxes assessed against his real and personal estate amounting to \$326.50. His widow died September 16, 1902. Held—It was the duty of the personal representative of the widow to pay said taxes, as under our statutes the taxes were a lien on the lands, and it is the duty of one to whom land is devised for life to pay the taxes and keep it free from lien as against the remaindermen.

2. Same—Devise of real estate—Subsequent lease by testator—Notes for rent—Effect—P. owned two tracts of land and by his will, dated September 8, 1894, devised to his wife all his personal estate absolutely, and all his real estate during her life, and by a codicil, dated November 13, 1899, directed that the "home tract" be sold at his death and the proceeds divided among the children of his two sisters, and on July 30, 1901, after the date of the will and codicil, leased the other tract of land for the term of three years at \$800 per year, for which he held the three notes of the lessee at the time of his death in June, 1902. Held—That the will speaks as of the date of the death of the testator, and the three notes were payable to the testator and were his personal property, and passed with his other personal estate under the will to his widow.

Field McLeod, Wallace & Harris and W. O. Davis for appellant.

Jas. Bradley and Montgomery & Lee for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Nunn.

On the 8th of September, 1898, Jacob A. Penn was the owner of two valuable tracts of land in Scott county, Kentucky, and something near \$3,000 worth of personal estate. On that date he made and executed his will, and after making several special bequests the testator in the fifth clause of his

will used the following language: "I will to my wife, Sallie A. Penn, all the balance of my personal property of every description. I also will to my said wife, for her life, all real estate of which I die possessed; at the death of my said wife, should she survive me, it is my will that all of said real estate shall be sold and the proceeds thereof distributed in the following manner: To the children of my two sisters, Charlotte McLeod and Mary Ellen Russell, both of Montgomery county, Indiana, etc."

On the 18th day of November, 1899, the testator added the following codicil: "It appearing that the personal property bequeathed absolutely by me to my wife, together with the income from my other real estate, will be ample to meet my wife's needs, I desire and direct that the place on which I now reside, containing about 275 acres, be sold as soon as practicable after my death, and the proceeds at once divided among the children of my two sisters, Charlotte McLeod and Mary Ellen Russell, etc."

On the 30th of July, 1901, after the date of the will and the codicil, Jacob A. Penn leased the farm other than the home place to one Alex. Lawless for the term of three years for the price of \$800 per year, Lawless executing his three promissory notes to Jacob A. Penn, due March 1, 1903, March 1, 1904, and March 1, 1905, respectively. Jacob A. Penn died in the month of June, 1902, and his will was probated July 21, 1902, and the appellant, Field McLeod, qualified as his executor. McLeod took possession of these notes. The widow, Sallie A. Penn, departed this life testate on the 16th of September, 1902, and the appellee, Frank Kearney, was appointed and qualified as her executor.

It further appears from the agreed state of facts that at the time of the death of Jacob A. Penn there was taxes assessed against the real and personal estate, which were unpaid, amounting to \$326.50. The questions to be determined by this court are these: Who is entitled to the Lawless rent notes or their proceeds under the will of Jacob A. Penn? Whose duty is it to pay the \$326.50 taxes for 1902, and shall it be paid out of the personal estate only or proportioned so as to charge the real estate with part of the taxes, and if so, what part? Whose duty is it to pay the taxes for the year 1903 on the real estate or farm devised to Sallie A. Penn for life, she having died on September 16, 1902? We will consider these questions in the reverse order from that stated. Mrs. Penn was devised the farm, other than the home place, for life.

Under our statutes it was her duty to pay the taxes and keep the property free from lien so that it might pass to the remaindermen free of all charges. Under the statutes taxes become a lien on the land on the 16th day of September, hence the taxes which would become due for the year 1903 were a lien on this land the day before the death of Mrs. Penn, and under the plain and positive provisions of the statutes her estate was liable for these taxes. (Brodie v. Parsons, 28 Ky. Law Rep., 883, and the cases therein cited.)

As to the second question, that is, who should pay the taxes for 1902 for \$326.50, we are of the opinion, from an inspection of the will of the testator, that they should be paid out of his personal estate. By his will he directed that all of his funeral expenses and debts be paid as soon as practicable after his death out of his personal estate, and he then gave all the balance

of his personal estate of every description to his wife, Sallie A. Penn. While taxes are not, strictly speaking, debts (which has been decided by this court in the case of *Jones v. Gibson*, 82 Ky., 561), yet they are obligations or liabilities, and we are convinced that the testator used the word "debts," intending to include all obligations and liabilities against his estate of every character.

On the first question as to who was entitled to the Lawless rent notes, the executor of Jacob A. Penn claims that the widow was entitled to that proportion of the rent which had accrued up to the date of her death, to wit, September 16, 1903, and that the rents accruing after that time follow the reversion and go to the niece and nephews, the beneficiaries in remainder, and contend that the case is governed by section 3865 of the Kentucky Statutes, which is as follows: "When a person who has a freehold, or an uncertain interest in land, shall rent out the land, and die before the rent shall have become due, the rent of the land shall be apportioned between the personal representatives of the deceased and the person who shall succeed to the land as heir, personal representative, devisee, or person in reversion or remainder, unless, in the case of a devisee, the will shall otherwise direct."

Appellant's contention in this case would be correct if the will did not otherwise direct. The rule in construing wills is to the effect that they shall be construed as speaking at the date of the death of the testator. These Lawless notes were payable to the testator and were his personal property, and they passed with his other personal estate to his widow under the positive provisions of his will. If the testator prior to his death had sold these notes to a third party for their full value, and had deposited the cash received for them in the bank, under the provisions of the will the widow would certainly have taken this cash as a part of the personal estate, and it could not reasonably be contended that the purchaser of the notes could not have collected the whole of the notes. He could not have been stopped in the collection of them at the date of the death of the testator or his widow. Under the provisions of the will of Jacob A. Penn he passed these notes to his wife as effectively as he could have passed them to a third party by a sale thereof.

The judgment of the lower court being in conformity with the views herein expressed it is, therefore, affirmed.

CARMONY V. LOUISVILLE & NASHVILLE R. R. CO.

(Filed May 16, 1905—Not to be reported.)

Damages—Negligence—Evidence showing that appellant who was hurt by being struck by a piece of timber as it was being moved by a derrick stated upon the trial that he never paid any attention to the moving of the timber; that he expected to get out of the way before it reached him, it appearing that he had ample time to get out of the way from the time the lifting of the timber began until it reached him, he was guilty of such negligence as to authorize a peremptory instruction upon the trial in which he sought damages against appellee for the injury inflicted.

Colson & Hurd and Weller & Points for appellant.

Benjamin D. Warfield for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Paynter.

The appellant was a common laborer working for the appellee with a crew of men on a construction train. Connected with the train was a derrick, operated by steam, used to load and unload heavy material. An engineer operated the derrick by means of an engine. It is averred in the petition by the appellant that the engineer in charge of the derrick, by negligence, lifted a heavy timber from the ground with the derrick and swung it against the appellant, thereby seriously injuring him. The court gave a peremptory instruction to find for the appellee. It is stated that this was done upon the ground that the petition did not aver that the engineer was superior in authority to the appellant, and because there was no evidence to show that appellant received the injury by reason of a negligent act of the engineer.

It appears that ropes and grab hooks were necessary to handle heavy timber with the derrick. On the occasion in question Kale Steele stood on one side of the log and fastened a grab hook on his side and appellant stood on the other side of the log and pressed a grab hook to the log, and was to hold it here until the hook caught the log in such a way as to move it. When the hooks were thus fastened into the log it was the duty of those manipulating the grab hooks to stand aside so as to avoid being struck by the log. After the hooks were fastened into the log the engineer began to hoist it, when it swung around and struck appellant, causing the injuries of which he complains. It was necessary to start the engine before the grab hook would take hold. While appellant was on the witness stand he was asked if he did not know when the engineer was hoisting the log that it would swing in his direction and he answered: "I never paid any attention; I expected to get out of the way." When he was asked if he did not see the rope that was attached to the hooks tightening he replied: "I never paid any attention to its tightening." From the testimony of the appellant, stating the time which elapsed after the hooks caught the log until it swung around, he had an abundance of time to get out of the way of the log. The injury was the result of his negligence, and he is not entitled to recover. In view of the conclusion we have reached as to the facts, we deem it unnecessary to consider the question as to the sufficiency of the petition and as to whether the appellant and engineer were fellow servants.

The judgment is affirmed.

THOMPSON, &c. v. THOMPSON.

(Filed May 19, 1905—Not to be reported.)

1. Wills—Construction of—Where a testator conveyed a certain described boundary by will, it will not be held that he intended it to be reduced in quantity that an adjoining part of the land should contain a certain number of acres, and the statement in his will that the part directed to be sold contained such a number of acres, when it shows that he was in error as to the number of acres such part contained.

2. Same—Where a testator specifically devised a tract of land to a son, directing that the remainder of it shall be sold, his executors under a clause in the will, to the effect that "they are directed to dispose of my property as they think best," have not the power to sell that specifically devised.

D. G. Park and Shelbourne, Kane & Smith for appellants.

Robbins & Thomas and A. M. Tyler for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Paynter.

This action involves the construction of A. T. Thompson's will. The parts of it to be construed read as follows:

"Also to T. T. Thompson (Dick) one tract of land, line beginning at Charlie Wright's northwest corner, running with the Wright line to the Fields line; thence east far enough to make fifty acres.

"Also to John M. Thompson the home place, beginning at a corner in the road and running north, taking in the stables and horse lots, to F. M. Finch's line; thence east to Abb Thompson's line; thence south with Abb Thompson's line to a stake on the northeast corner; thence west to the beginning. Also ten acres off the strip between Dick Thompson's land and Theo. Twiggs' line off the part next to Twiggs, the remainder of the land in the strip between Dick Thompson and Theo. Twiggs, together with the land lying on the west side of the farm, about 125 acres, being about 135 acres in all, which I want sold or disposed of as they think best for all concerned, and this is to be divided between Jas. F. Thompson, Sallie Browder, W. J. Thompson, E. A. Thompson and T. T. Thompson, all equally, except that \$200 is to be taken from Jas. F. Thompson's part and \$600 is to be taken from T. T. Thompson's part. Also the horses, cattle, hogs, farming utensils, and crop to be disposed of according to the contract as known and understood between myself, Will, Ed. and John.

"I hereby appoint my sons, Wm. J. Thompson, E. A. Thompson, and John M. Thompson, as my executors, to dispose of my property as they think best, and I respectfully ask the court not to require any bond of them."

The testator left surviving him six children, five of whom are appellants and the other is the appellee. The testator seems to have made advancements to all of his children, except the appellee, John M. Thompson, with whom he had lived a number of years. The testator owned what is known as the home place, containing about 200 acres, and he owned a tract adjoining it upon which his son, T. T. Thompson, lived. At the time of the testator's death he occupied the residence on the home place. Near by the residence there were stables and horse lots. One was situated to the east of the house and the other to the west of it. There is a public road commencing near the residence on the south side of the home place and runs a southerly course therefrom. There is a lane or road from this public road running west therefrom, and is situated directly south of the home place, and is the line between it and the lands of C. M. Wright.

The principal difference between the parties is as to what land John M. Thompson took under his father's will. It is described by the following language: "Also to John M. Thompson the home place, beginning at a corner in the road and running north, taking in the stables and horse lots,

to F. M. Finch's line; thence east to Abb Thompson's line; thence south with Abb Thompson's line to a stake on the northeast corner; thence west to the beginning."

It is the contention of John M. Thompson that the beginning corner of the land willed to him is at a point in the road immediately west of the horse lot on the west of the residence, and thence running a northerly course so as to take in the stables and horse lots to F. M. Finch's line. To so run the line gives him about 101 acres of land. The contention for the appellants is that the beginning corner is at an iron stob at the point where the public road intersects the road or lane which we have mentioned. To commence at that point and run the line John M. Thompson would get something over forty acres of land. To so run the line it would not include the stables and residence and only one of the horse lots. The testator was entirely familiar with the land. The iron stob is the corner of the C. M. Wright land and the land devised to T. T. Thompson, and is the southern line of the home place. The testator well knew of its location and the corner of the C. M. Wright land, for in describing the land willed to T. T. Thompson he referred to the C. M. Wright corner as the beginning corner. Had he intended that that point should be the beginning corner of the land willed to John M. Thompson he would have so designated it as the corner. To hold that that point is the beginning corner of the land willed to appellee we would utterly disregard the language used by the testator, because he says that the line which is to be run from the beginning corner in the road must be run north so as to embrace the stables and horse lots on the home place. If the beginning corner had been fixed at the iron stob, corner of the Wright land, thence a north course so as to include the stables and horse lots, we would have to supply the line from that point to a point west in the road, and then run a northerly course so as to include the stables and horse lots. The testator directed that the west side of the home place, containing about 125 acres, should be sold. The statement that the west side of it should be sold is no indication that the testator intended the east side of it willed to his son, John M. Thompson, was to be reduced in quantity. The statement of the testator that the west side ordered sold contained 125 acres, simply indicates that the testator was in error as to the number of acres in the boundary directed to be sold. As the boundary willed to John M. Thompson is particularly described, we can not hold that the testator intended to reduce it, so that the west side ordered to be sold should contain 125 acres. If counsel for appellants is correct as to the location of the line, the testator directed about 150 acres of the home place sold. Learned counsel for appellants has shown research and ability in his effort to sustain his contention, and has furnished the court with many correct rules for the construction of wills, but we are constrained to differ with him as to their application to this case. With a map before us showing the location of the land, together with the rule that the intention of the testator must be gathered "from the four corners of the instrument," we have had no difficulty in reaching the above conclusion.

Counsel insists that because under the clause of the will naming the executors "they are directed to dispose of my property as they think best," that they are vested with power to sell the land specifically devised to ap-

pellee, John M. Thompson. As to whether such a clause would be valid, if it were susceptible of that meaning, it is unnecessary to consider, because it is our opinion that the testator did not intend to vest the executors with the power to sell property specifically devised. He simply intended to vest them with a discretion as to the time and as to the manner of selling the property which he had directed to be sold.

The judgment is affirmed.

BIG SANDY RAILWAY CO. v. DILS, &c.

(Filed May 23, 1905.)

1. Railroads—Condemnation proceeding—Appeal to circuit courts—Imperfect transcript—Amendment—In taking an appeal from the county court to the circuit court in proceedings to condemn land sections 839 and 840, Kentucky Statutes, are to be read together, and require the appellant to file the transcript of the orders of the county court, a statement of the parties to the appeal, and execute bond within thirty days after the judgment in the county court. Where a good appeal bond was filed and an imperfect transcript which contained an imperfect statement of the parties to the appeal, it was proper for the circuit court, under section 134 of the Civil Code, to allow the transcript to be amended so as to conform to the requirements of the statutes.

2. Same—Trial in circuit court—Erroneous instructions—On the trial of a proceeding by a railroad company to condemn a strip of land of 2 71-100 acres taken alongside the county road just outside the boundary of a town of the fifth class, the court instructed the jury that "in fixing the value of the land taken and the damages to the abutting property, the jury may consider its location and use to which the land was adapted, together with the change made necessary in, or discontinuance of, the county road over or in front of said property, if any. They will also find for the defendant such sum as they believe from the evidence they are entitled to for extra fencing, if anything." Held—That said instruction did not present to the jury the proper view of the case, as nothing was said about setting off the incidental damages against the incidental advantages.

3. Same—The court should have told the jury in the first instruction that in estimating the direct damages they should allow such a sum as they deem from the evidence is the fair and reasonable value of the strip of land taken, considering it in relation to the entire tract; also such other direct damages, if any, as directly result to the remainder of the tract by reason of the situation in which it is placed by the taking of the strip, and such additional fencing and other improvements, if any, as may be necessary to the reasonable enjoyment of the remaining land by reason of the taking of the strip; but that their finding of direct damages should not exceed in all the amount which they may believe from the evidence is the difference between the actual value of the entire tract immediately before and the actual value of the remainder immediately after the taking of the strip, excluding from both estimates any enhancement of the land by reason of the building or operation of the railroad.

4. By another instruction the court should have told the jury that they should also take into consideration all the advantages and disadvantages which may be reasonably anticipated to result from the prudent construction and operation of the proposed railway, and if the balance be against

the owners of the land then to the extent that such balance diminishes its market value they should also find for them incidental damages in addition to the direct damages referred to in the first instruction; but that if the incidental damages or enhancement of the land in value from the prudent construction and operation of the railroad equal or exceed the incidental disadvantages or depreciation in value, they should find for the defendant only the direct damages as set out in the first instruction.

York & York, J. W. York and W. H. Wadsworth for appellant.

N. J. Auxier for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Hobson.

On March 23, 1903, the Big Sandy Railway Co. filed in the Pike county court its petition to condemn as part of its right of way a strip of land belonging to John A. Dils' heirs 100 feet wide and 1,181 feet long, containing 2 71-100 acres. Commissioners were appointed who valued the strip taken at \$1,000, and fixed the damages to the remainder of the tract at \$400. The defendants filed exceptions to the commissioner's report, and the case being heard by a jury a verdict was rendered fixing the value of the strip taken and the damages to the residue of the tract at \$3,500. The defendants were not satisfied with the verdict of the jury and took an appeal to the Pike Circuit Court. In the circuit court the case was tried anew and a verdict and judgment were obtained fixing the damages at \$8,800, and from this judgment the railroad company appeals.

When the case reached the circuit court the railroad company entered a motion to dismiss it. The court overruled the motion, and the correctness of this ruling is the first question arising on the appeal. The judgment in the circuit court was rendered on April 23, 1903. On May 14 the defendants filed with the clerk of the circuit court an attested copy of the judgment and executed before him an appeal bond. He thereupon issued a supersedeas and a summons. Some days after this the county clerk made a copy of the other orders entered in the county court and pinned them to the copy of the judgment which had been filed in the circuit court; but no statement of the parties to the appeal was filed until the motion to dismiss the appeal was entered by the railroad company at a subsequent term of the circuit court. A statement of the parties to the appeal was then tendered and the court allowed it to be filed. Section 839, Kentucky Statutes, provides: "Either party may appeal to the circuit court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried de novo."

Section 840 further provides: "The appeal from the county court shall be taken by filing with the clerk of the court to which the appeal lies a statement of the parties to the appeal, and a transcript of the orders of the county court, and thereupon the said clerk shall certify to the clerk of the county court that said appeal has been filed, and the clerk of the county court shall immediately transfer the original papers to the clerk of the court to which the appeal is pending."

It will be observed that by section 839 either party may appeal by executing the bond within thirty days, and that by section 840 the appeal shall be taken by filing with the clerk of the court to which the appeal lies a

statement of the parties to the appeal and a transcript of the orders of the county court. The two sections are to be read together. It is incumbent upon the appellant to file the transcript of the orders of the county court, a statement of the parties to the appeal and execute the bond within thirty days after the judgment in the county court. In the case before us the bond was executed in time and a partial transcript of the orders of the county court was filed, which showed the parties to the appeal sufficiently to enable the clerk to issue a summons and a supersedeas, which were issued in time. In other words, a good appeal bond was executed and an imperfect transcript was filed which contained an imperfect statement of the parties to the appeal. After the thirty days had expired the court, instead of dismissing the appeal, allowed the appellant to file a full statement of the parties to the appeal and a full transcript of the orders of the county court. Section 134 of the Civil Code is as follows: "The court may, at any time, in furtherance of justice, and on such terms as may be proper, cause or permit a pleading or proceeding to be amended, by adding or striking out the name of a party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, if the amendment do not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

The purpose of this section of the Code is to permit amendments in just such cases as this where by some irregularity the proceeding does not conform to the requirements of the law. In *Bush v. Lisle*, 86 Ky., 504, an imperfect transcript was filed in this court, and after the time had expired for filing the transcript it was insisted that the appeal should be dismissed, but the court held otherwise, and allowed the imperfect transcript to be perfected. In *Puff v. Huchter*, 78 Ky., 146, the plaintiff failed to file a petition in the magistrate's court, but after appeal to the circuit court he was allowed to file an amended petition setting up his cause of action. In the same way it has been held that a defective bastardy warrant, or a defective warrant for forcible entry or detainer or defective warrant for a misdemeanor, may be amended on appeal. (*Commonwealth v. Cantrill*, 20 Ky. Law Rep., 24; *Louisville v. Wemhoff*, 25 Ky. Law Rep., 995; *Forsythe v. Huey*, 25 Ky. Law Rep., 147.)

In *Calloway v. Bradburn*, 26 Ky. Law Rep., 977, it was held that where a defective appeal bond is executed in due time in a contested election case a good and sufficient bond may be given under this provision of the Code after the time for the execution of the bond has expired. In that case the court, among other things, said, referring to the provision of the Code above quoted: "As the Code regulates proceedings in all actions, so this section allows an amendment of all proceedings in the process of an action. It was intended by it to provide in general for the amendment of anything that was found to be defective in the progress of an action, the purpose being to perfect rather than to destroy. It is not limited to mistakes in pleadings, but it is intended to cover any kind of a mistake and to allow an amendment. At common law, and before the passage of the modern statutes, very many mistakes or clerical errors were cause for the dismissal of an action or the defeating of justice."

Under the rule laid down in the cases cited the circuit court properly

allowed the appeal to be perfected, the purpose of the provision of the Code being to prevent just such slips as this defeating the administration of justice.

On the trial in the circuit court the evidence for the property owners tended to show that the strip of land taken lay alongside of the county road just outside of the town boundary of Pikeville, the road being a continuation of College street; that the strip was valuable for town lots and could be cut up into something like twenty-four lots of fifty by one hundred feet, and that other lots near this property, and between it and town, had sold for \$400 and \$500. The witnesses for the property owners valued the strip taken at from \$8,000 to \$15,000; they fixed the damages to the remainder of the tract at from \$1,000 to \$5,000. On the other hand, the witnesses for the railroad company fixed the value of the strip taken at \$1,000 to \$2,000, and the damages to the remainder of the tract at from \$400 to \$500. The court instructed the jury as follows: "The jury will find for the defendants (the property owners) such sum as they may believe from the evidence the defendants have been damaged by reason of the plaintiff's taking the land described in the petition; and they will determine this by finding from the evidence the true market value of the land taken at the time it was taken. They will also find for the defendants such sum as they may believe from the evidence the defendants have sustained in damages to the abutting property (if anything) by reason of the plaintiff taking said property; and in fixing the value of the land taken and damages to the abutting property the jury may consider its location and use to which the land was adapted, together with the change made necessary in, or discontinuance of, the county road over or in front of said property, if any. They will also find for the defendants such sum as they believe from the evidence the defendants are entitled for extra fencing, if anything.

"2d. Nine of the jurors may find a verdict, in which event they must all sign the same."

In *Elizabethtown & Paducah R. R. Co. v. Helm's Heirs*, 71 Ky., 684, this court, after stating the difficulties growing out of the application of the general rules governing the subject, said: "To avoid such difficulties it is necessary to ascertain, first, the value to the owner of the land proposed to be taken; and, second, the amount, if any, which the disadvantages and inconveniences will overbalance the advantages to the land not taken, from the use to which the public proposes to devote that which is taken. The first question can be most readily and fairly determined by ascertaining the value of the entire tract of land, excluding the enhancement resulting from the contemplated improvement; then (still excluding this enhancement), what will be its value after the appropriation of the portion, or of such estate therein as may be proposed to be taken. The difference in value thus found is the true compensation to which the owner is entitled."

Then, after giving some reasons for its conclusions, the court disposed of the second question in these words: "Let a survey be taken of all the advantages and disadvantages which may be reasonably anticipated to result from the prudent construction and operation of the proposed railway, and if the balance be against the owner of the land, then to the extent that such balance diminishes its market value he should have a judgment on account of incidental damages; otherwise of course he is entitled to nothing."

The rule thus announced has been since maintained by the court. (*Asher v. L. & N. R. R. Co.*, 87 Ky., 391; *L. & N. R. R. Co. v. Asher*, 12 Ky. Law Rep., 815; *L., St. L. & T. R. R. Co. v. Barrett*, 91 Ky., 487; *W. Va. &c., R. R. Co. v. Gibson*, 94 Ky., 234.) In these cases it has been held that the cost of additional fencing, which will be rendered necessary by the taking of the land, is to be included as part of the direct damages, which can not be abated by any benefits arising from the building of the road. The owner is entitled to damages by reason of the depreciation in value of the land on account of the shape in which it may be left or the situation in which it may be placed. Nothing can be deducted from the direct damages which include the value of the strip taken, the depreciation in value of the residue of the tract, and the additional fencing rendered necessary. But damages for consequential inconvenience or injury resulting from the prudent construction and operation of the railroad may be set off against the advantages which may be reasonably anticipated to result from the prudent construction and operation of the railroad, and if the advantages equal or overbalance the disadvantages nothing should be allowed for the latter. The instructions of the circuit court did not present to the jury the proper view of the case and nothing was said about setting off the incidental damages against the incidental advantages. Both parties on the trial conducted the examination of their witnesses in the same way. Neither undertook to show by any witness what the value of the entire tract of land was or what the remainder would be worth after the taking of the strip sought to be condemned. The case was left to the jury largely upon the mere opinions of the witnesses without a statement of the facts on which the opinions were based, and this may account for the verdict. We know judicially that Pikeville is a town of the sixth class, and it is hard for us to understand why 271-100 acres of land a quarter of a mile beyond the town boundary is worth anything like \$8,000. The facts in the record do not show any substantial damage to the remainder of the tract except that a road will have to be opened on the tract along the railroad. On another trial the court will require the parties to have the witnesses as to value fix the value of the entire tract of land, excluding the enhancement resulting from the building of the railroad; also the value of the remainder of the tract after the taking of the strip by the railroad company, still excluding any enhancement from the building of the railroad; the difference in value thus found is the measure of the direct damages to which the owner is entitled. The witnesses may state what additional fencing will be rendered necessary and its value. In lieu of instruction 1 the court should have instructed the jury that in estimating the direct damages they should allow such a sum as they deem from the evidence is the fair and reasonable value of the strip of land taken, considering it in relation to the entire tract; also such other direct damages, if any, as directly result to the remainder of the tract by reason of the situation in which it is placed by the taking of the strip, and such additional fencing or other improvements, if any, as may be necessary to the reasonable enjoyment of the remaining land by reason of the taking of the strip; but that their finding of direct damages should not exceed in all the amount which they may believe from the evidence is the difference between the actual value of the entire tract immediately before and the actual value of the re-

mainder immediately after the taking of the strip of 2 71-100 acres, excluding from both estimates any enhancement of the land by reason of the building or operation of the railroad.

By another instruction the court should have told the jury that they should also take into consideration all the advantages and disadvantages which may be reasonably anticipated to result from the prudent construction and operation of the proposed railway, and if the balance be against the owners of the land, then to the extent that such balance diminishes its market value they should also find for them incidental damages in addition to the direct damages referred to in the first instruction; but that if the incidental advantages or enhancement of the land in value from the prudent construction and operation of the railroad equal or exceed the incidental disadvantages or depreciation in value they should find for the plaintiff only the direct damages as set out in the first instruction.

Under the first instruction compensation is made for the property taken without regard to the use to which it may be applied, and against this no offset can be made. Under the second instruction everything incidental to the prudent building and operation of the railroad, depreciating or enhancing the value of the remaining land, may be offset one against the other, and only the balance should be found in favor of the property owner in case the depreciation exceeds the enhancement.

Judgment reversed and cause remanded for a new trial,

HAGER, AUDITOR v. SHUCK,

(Filed May 25, 1905.)

1. Contract—Agreement not to sue—Public policy—A stipulation in a contract that neither party may resort to the courts is void, as tending to oppression and being contrary to the public policy.

2. Auditor—Authority—Limitation therein—Notice—The auditor of public accounts is a public agent of the State, whose duties and powers are limited by the law. All persons dealing with him in his official capacity are conclusively presumed to take notice of this limitation. Wherein he may exceed his authority his act is void in so far as it attempts to bind the State.

3. State—Liability—Statute—Appropriation—The State can not be made liable at all except under a statute passed by the legislature incurring the liability, nor can it then be liable to suit against its auditor to compel him by mandamus to issue his warrant upon the treasurer for the same unless the legislature has expressly appropriated the money to discharge the liability.

4. Implied liability—Discretion of auditor—Reapportioning appropriations.—Acceptance of reduced salary—There can be no implied undertaking on the part of the State to pay clerks employed by the auditor otherwise than out of the fund expressly appropriated for the purpose, and then only in such sums as the auditor may in his discretion determine. If the business of the office should increase as to demand an increase of the clerical force, it is within the discretion of the auditor to re-apportion the appropriation allowed by law, and if a clerk thereafter remains and continues to draw the reduced salary it is equivalent to an agreement on his part to accept the latter sum for his services to the State.

5. Compromising claim—Agreed judgment—Constitutionality—The fact that the auditor and the claimant have compromised the claim adds nothing to its validity. Its validity is dependent upon whether there was a statutory authorization of it, and an agreed judgment has no more validity than an agreement out of court when it would be a violation of the Constitution to carry either into effect.

N. B. Hays and Chas. H. Morris for appellant.

Finley Shuck and B. G. Williams for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge O'Rear.

Gus G. Coulter, when auditor of public accounts of the State of Kentucky, appointed appellee, Finley Shuck, to the position in the auditor's office known as chief of claims department, at a salary of \$2,400 per annum. The appointment was made as of the 1st of March, 1900. Appellee continued in the employment for three years. For about ten months of the first year he was paid at the rate of \$2,400 per annum. After that his salary was reduced by the auditor, and he was paid accordingly in all only \$5,325, leaving a difference between the \$7,200, which he claims he was entitled to and the sums actually paid him under the auditor's warrants, of \$1,875. Appellee brought this suit in the Franklin Circuit Court against Coulter, while the latter was auditor of public accounts, for a writ of mandamus, requiring the auditor to issue his warrant on the treasurer for \$1,875, the alleged balance due him. Auditor Coulter answered that it was not intended by the parties that the plaintiff should fill the position of chief of the claims department, or draw the salary stipulated for, except at the pleasure of the auditor; that after January 1, 1901, he was unable to continue to pay appellee at the rate of \$2,400 per annum out of the appropriation allowed to the auditor to pay for clerical assistance in view of necessities of the office for other clerical assistance, which he was required to and did furnish to conduct the business of his office; that this fact was well known to appellee; that he was paid a reasonable compensation for his services, which was accepted by him; that there were no funds in his hands, or in the State treasury, out of which his claim could be paid; that the appropriation made by the legislature for the employment of necessary clerical assistance in the auditor's office had been exhausted before the filing of the petition.

Appellee in his reply claimed that the total sum allowed by law for clerk's hire in the auditor's office, to wit, \$16,200 per year, had not been exhausted, but that, on the contrary, \$1,800 per year still remained properly to the credit of that fund. This was accounted for, as appellee claims, by the fact that the auditor had diverted from that fund that sum each year by paying \$3,000 to clerks in the land office department, whereas the law restricted the appropriation for that department to \$1,200 per year.

Coulter denied the alleged misappropriation, and the suit was thus at issue. Thereupon the parties filed in the Franklin Circuit Court the following:

"By way of compromise it is now stipulated and agreed that on his petition for \$1,875 and interest the plaintiff may take judgment awarding him a mandamus against the auditor of public accounts, directing that officer to

Issue his warrant on the treasury for the sum of \$1,500, which is to be in full satisfaction of the claim and demand sued on, and this judgment shall not be appealed from.

"Witness our hands December 10, 1903.

"GUS G. COULTER,

"Auditor Public Accounts.

"B. G. WILLIAMS,

"For FINLEY SHUCK."

On the same day the court entered this judgment in the case: "This day came the parties by attorneys and filed a written stipulation of compromise, fixing the amount to which plaintiff is entitled, in consideration whereof it is adjudged by the court that the plaintiff is entitled to the relief sought, and he is, therefore, awarded a writ of mandamus, directing and requiring the auditor of public accounts of the State of Kentucky to draw his warrant on the State treasury in favor of the plaintiff, Finley Shuck, for the sum of \$1,500 for services as clerk in the auditor's office, and this he will in nowise omit. The plaintiff will pay the costs of this proceeding, and this case is stricken."

The present auditor of public accounts has prosecuted an appeal from the foregoing judgment. A stipulation in a contract that neither party may resort to the courts is void, as tending to oppression, and being contrary to the public policy.

The auditor of public accounts is a public agent, whose duties and powers are limited by the law. All persons dealing with him in his official capacity are conclusively presumed to take notice of this limitation. Wherein he may exceed his authority his act is void in so far as it attempts to bind the State. The Constitution, section 230, provides: "No money shall be drawn from the State treasury except in pursuance of appropriations made by law."

The State treasurer pays out the money of the State upon the warrant of the auditor, which "shall not be issued unless the money to pay has been appropriated by law." (Section 143, Kentucky Statutes.)

The auditor's warrant can not, in the nature of things, create a liability against the State unless it existed before. The State can not be made liable at all except under a statute passed by the legislature incurring the liability, nor can it then be liable to suit against its auditor of public accounts to compel him by mandamus to issue his warrant upon the treasurer for the same unless the legislature has expressly appropriated the money to discharge the liability. Under sections 138, 139 and 4001a, subsection 4, Kentucky Statutes, the auditor is authorized to employ necessary clerks for the proper discharge of the business of his office, including that of the land office, which has become a part of the office of public accounts. No particular sum is directed to be paid to any clerk. As was decided in *Bosworth, Treasurer v. Shuck*, 26 Ky. Law Rep., 324: "The selection of the clerical force for the proper conduct of the business of the auditor's office, and the fixing and apportioning of their respective salaries, is left to the sound discretion of the auditor, but the aggregate of such salaries can not lawfully exceed the amount appropriated therefor by the general assembly."

Those appointed to clerkships are bound to take notice of this fact. There can be no implied undertaking on the part of the State to pay these clerks

otherwise than out of the fund expressly appropriated for the purpose, and then only in such sums as the auditor may, in his discretion, determine. It is proper and desirable that the salaries of these clerks should be fixed, and not dependent upon the whim of the head of the department. Still, the fixing of the salaries of the clerks must be so done that their aggregate will not exceed the total appropriation made by law for the purpose of paying the clerks in the office. If the business of the office should increase as to demand an increase of the clerical force, it is undoubtedly within the power and discretion of the auditor to re-apportion the appropriation allowed by law. As he may discharge any clerk, it follows that he may impose as a condition to his retaining his place that his salary be reduced. If the clerk continues in the place and continues to draw the reduced salary, it is equivalent to an agreement on his part to accept the latter sum for his services to the State. (*City of Lexington v. Renick*, 105 Ky., 779.)

While section 4001a, subsection 4, Kentucky Statutes, authorizes the auditor to employ an additional clerk at a salary not to exceed \$1,200 per year, payable out of the State treasury, on account of the merger of the land office into the auditor's office, it is not intended thereby to restrict the expenditures on account of services that may be required in the land office department to \$1,200 annually.

If it were true that all the money appropriated by law for the payment of clerks in the auditor's office for each of the years embraced in this suit had been applied and paid out to the clerks in the office, it follows that there was no liability upon the State to pay any more. No agreement of the auditor to do so upon whatever consideration could be binding upon the State. Indeed if he had done so it would have been without the warrant of law, and would have been a misappropriation to that extent of the public funds. His warrant drawn upon the treasurer therefor would have conferred no authority whatever upon the latter official to have paid out the money, consequently would have been no protection to him had he done so. (*Bosworth, Treasurer v. Shuck*, supra.)

The fact that the auditor and the claimant have compromised the claim adds nothing to its validity. It is valid or not dependent upon whether there was a statutory authorization of it. The agreed judgment in the case, for that is all it amounts to, is of no greater validity than an agreement out of court about the same matter. The trouble at the bottom of all of it is that it would violate the Constitution of the State to carry either into effect. The court would have no more power to do that than would the auditor. The state of the pleadings and the face of the record disclose the error in the judgment. It was not necessary that there should have been a motion for a new trial in order to give the court jurisdiction to review the judgment upon appeal of the auditor.

Wherefore, the judgment is reversed and cause remanded for further proceedings not inconsistent herewith.

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COURT OF APPEALS OF KENTUCKY.

WIREMAN, &c. v. WIREMAN'S ADM'R.

(Filed May 25, 1905—Not to be reported.)

New trial—Surprise—Petition—Defense—Establishing—Where an action for a new trial is brought by the defendant after the expiration of the term at which a default judgment was rendered on the ground of accident and surprise, it was as necessary for the plaintiff to establish his defense by proof, as a condition to obtaining a new trial, as it was to allege it, and failing to do so his petition was properly dismissed.

Aug. Arnett and D. D. Sublett for appellants.

Byrd & Howard for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge O'Rear.

Calvin Wireman's administrator obtained a judgment for \$600 and interest against appellant, George Wireman, and another at the May term, 1902, of the Magoffin Circuit Court. The judgment was by default. After that term of the court appellant brought this suit for a new trial, alleging that because of accident and surprise he was misled and prevented from making his defense. In his petition, as is required by the Code of Practice, section 521, he attempted to set out a defense to the original action.

It is very doubtful whether the matter relied upon would constitute a defense to that action. But if it did, it was as necessary for appellant, plaintiff, to establish it by proof as a condition to obtaining a new trial, as it was to allege it. (Section 521, Civil Code.) The evidence in this case fails to support the alleged defense. In truth there was no evidence whatever to support it.

The judgment of the circuit court dismissing the petition for a new trial is, therefore, affirmed.

CITY OF COVINGTON v. BERRY, &c.

(Filed May 25, 1905.)

1. Cities—Sewage—Injury to adjacent lands—Damages—Liability of city—In an action against the city by the owner of about eight acres of land therein, on the margin of which the city opened two sewers, discharging thereon a deposit of foul matter to the depth of two or three feet, on which there was a pretty pond which was thereby made a cess pool, and which filth spread over about three acres of the land, impregnating and poisoning the air, and destroying the comfort and endangering the health of persons living several hundred yards away, a verdict for \$2,250 under all the evidence is held not to be excessive.

2. Instructions—Measure of damages—On the trial of the case the court gave the following instructions, which are held to be correct.

"1st. The jury are instructed to find for the plaintiffs such damages as they believe from the evidence resulted to the plaintiffs' property from the discharge of sewerage from the Bank Lick street and Holman street sewers, and the deposit thereof on the plaintiff's property between May 24, 1898, and May 24, 1903.

"2d. In ascertaining said damages, the jury are instructed that there are two measures of damages: First, the diminution in value of the plaintiffs' property caused by said discharge and deposit between said dates, if there be any such diminution in value; and, second, the cost of restoration of said property to the condition it was in on May 24, 1898, if any such restoration be possible.

"3d. If the jury believe from the evidence that it is practicable and possible to restore said property to its condition on May 24, 1898, then the jury will adopt the one of said measures of damages which will result in the lesser damage to plaintiff's property, not to exceed \$5,000."

3. Same—The difference between the value of the property when the injury was inflicted and its value after the injury is not the proper measure of damages, where it is shown that there has been an increase in the value of the land due to the general enhancement of property in the neighborhood from the growth of the city.

4. Evidence—Competence—The court properly allowed the plaintiffs to show what was the expense of filling the place that was covered with slime, as this evidence tended to show the extent of the injury, and it was competent to show that they had used ordinary care to reduce the damages. The effect on the health of the neighborhood was also competent for the same reason, and to show why the market value of the property was lessened.

F. J. Hanlon for appellant.

W. C. Hall for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellees own a tract of about eight acres of land in the southwestern part of the city of Covington. The city constructed two sewers which opened on the margin of the property, discharging the sewage upon it, causing a deposit of foul matter two or three feet deep. Appellees filed this suit to recover damages for the injury. A verdict and judgment having been rendered in their favor for \$2,250, the city appeals.

The tract of land is on the outskirts of the city of Covington, partly in it

and partly in the town of Central Covington. A few years ago it lay between the two towns, neither of which had built out to it; but within the last five years streets have been constructed and a street car line built through it, furnishing rapid transit to Cincinnati. The town of Central Covington has built up to the southern boundary of the tract and the city of Covington has built a large schoolhouse near the northern boundary. The value of the land has in this way greatly enhanced. Previous to the trial the city provided sewage which relieved the property of any further accumulations and the action progressed simply for damages for what had been done. The proof on the trial showed that there was a pretty pond on the tract; that the sewage ran down into this pond, making it a cess pool, which sent out noisome odors so that persons living several hundred yards away had to close their doors and windows facing in that direction. The filth spread over the land, making a deposit of slime upon it, covering something like three acres. The soil was impregnated and poisoned. The place stunk so that appellees could not sell any of their land for lots, although there was great demand for lots in that locality. Horses would mire in it and have to be dragged out by teams. Appellees, to get rid of the stench, had the filth covered up with dirt, which relieved that difficulty, but the land is still filled with noxious matter, and if houses are built on it slime will percolate into the cellars, and such a foundation will endanger the health of the occupants of the house. This condition of things must continue until nature provides a remedy by the process of time. Under all the evidence we do not see, considering the shown value of the land, that the verdict of the jury is excessive, as there was evidence by a number of witnesses fixing the damages at more than twice as much as the jury allowed. The chief complaint of the city is that the court refused to give this instruction, which it asked: "If the jury believe from the evidence that the property of the plaintiff was damaged by reason of the sewers in Holman street and Bank Lick street, emptying onto property of the plaintiffs, if they did so empty, they should ascertain from the evidence the market value of the said property just before the commission of said injury, if any, and the market value of said property after the commission of said injury, if any, up until the filing of this suit, and the diminution, if any, in the value of said property."

It also complains that the court gave the following instructions:

"1st. The jury are instructed to find for the plaintiffs such damages as they believe from the evidence resulted to the plaintiffs' property from the discharge of sewerage from the Bank Lick street and Holman street sewers, and the deposit thereof on the plaintiff's property between May 24, 1898, and May 24, 1903.

"2d. In ascertaining said damages the jury are instructed that there are two measures of damages: First, the diminution in value of the plaintiff's property caused by said discharge and deposit between said dates, if there be any such diminution in value; and, second, the cost of restoration of said property to the condition it was in on May 24, 1898, if any such restoration be possible.

"3d. If the jury believe from the evidence that it is practicable and possible to restore said property to its condition on May 24, 1898, then the jury will adopt the one of said measures of damages which will result in the lesser damage to plaintiff's property, not to exceed \$5,000."

It is insisted that the measure of damages in cases like this is the difference between the value of the property when the injury was inflicted and its value after the injury. The following cases are relied on: *Elizabethtown v. Price*, 11 Ky. Law Rep., 367; *Maysville v. Stanton*, 12 Ky. Law Rep., 587; *Henderson v. Winstead*, 22 Ky. Law Rep., 28; *Covington v. Taffee*, 24 Ky. Law Rep., 373; *Hay v. Lexington*, 24 Ky. Law Rep., 1495. In these cases the injury was not extended through a series of years and there was no rise in the general price of property during the injury from other causes. But here the injury was continuous. It is shown by the evidence that the tract of land, taken as a whole, is worth, more now than it was five years ago when the sewage began to be run upon it in quantities sufficient to hurt it, and, therefore, if the rule contended for had been applied by the court there could have been no recovery at all. But the increase in the value of the land is due to the general enhancement of property in the neighborhood from the growth of the two towns, and the effect of the evidence is that although the plaintiff's property is worth several thousand dollars less than it would be without the accumulation of slime upon it, it is, with this upon it, more valuable than it was several years ago, before the sewage was run upon it. If property in that neighborhood had diminished in value from extrinsic causes the defendant's liability would not be thereby enhanced, and the fact that there has been a general rise in the price of property does not lessen its liability, for the reason that the rise in the price of property is from other causes and not in any way connected with the defendant's wrong. The facts are that the defendant year by year empties its sewerage upon the property.

This was a trespass just as much as if it had carted the sewerage there and dumped it on the land. The plaintiff's cause of action lies in the fact that by the wrong of the defendant their property was placed in a condition in which it was less valuable than it would have been but for the defendant's wrongful trespass.

In *J., M. & I. R. R. Co. v. Esterle*, 76 Ky., 677, this court in answer to a similar objection said: "Benefits arising directly from or out of an unauthorized act may sometimes be considered in the determination of the sum to be recovered by the injured party, but in all cases these benefits must be direct and immediate. They must be confined to the proximate consequences of the act complained of, and be of like kind with the opposite injuries for which the recovery is sought. In a case where land had been overflowed by the erection of a mill dam, the Supreme Court of Massachusetts aptly said: 'The damages are given only for the injury done to the land by flowing, and any reduction or set-off to that damage must consist from benefits arising from the same cause, that is, from flowing the land.' " (*Covington v. Ulrich*, 14 Ky. Law Rep., 302; *St. L., & Co., R. R. Co. v. Morris*, 35 Ark., 622; 4 *Sutherland on Damages*, section 1056, and cases cited.)

The instructions of the court do not allow double damages as counsel seem to think. They only allow the jury to adopt one of two measures of damages and expressly direct them to follow that rule which would be most favorable to the defendant. This is in accord with the authorities.

In *Hartshorn v. Chaddock*, 185 N. Y., 122, a case like this, the court said: "Had the defendant broken a window in the plaintiff's house there is no

doubt that the cost of completely repairing it would be the proper measure of damages. There are many cases of injury to real estate where the cost of repairing the injury may be the proper measure of damages. The owner is not in every case of injury to the soil, the trees or the fixtures, driven to proof of the diminution in value of the estate by reason of the injury, in order to establish his damages. The rule seems to be that when the reasonable cost of repairing the injury, or, in this case, the cost of restoring the land to its former condition, is less than what is shown to be the diminution in the market value of the whole property by reason of the injury, such cost of restoration is the proper measure of damages. On the other hand, when the cost of restoring is more than such diminution, the latter is generally the true measure of damages, the rule of avoidable consequences requiring that in such a case the plaintiff shall diminish the loss as far as possible."

In Sutherland on Damages, section 1048, the rule is thus stated: "The cost of restoring property to its previous condition is the proper measure of damages for injury thereto when it is less than the diminution in the market value of the property by reason of the injury; but if the cost of restoration would exceed the diminution in value, the latter measures the damages." (Seely v. Alden, 61 Pa., 302; Lentz v. Carnegie, 147 Pa., 612.)

The court properly allowed the plaintiffs to show what was the expense of filling the place that was covered with slime. This evidence tended to show the extent of the injury, and it was competent for the plaintiffs to show that they had used ordinary care to reduce the damages. The evidence was not introduced to show special damages, but simply to get the situation before the jury. The effect on the health of the neighborhood was also competent for the same reason, and to show why the market value of the property was lessened.

Judgment affirmed.

GLISSON V. PADUCAH RAILWAY AND LIGHT CO.

(Filed May 25, 1905—Not to be reported.)

1. Street railway—Collision with wagon—Injury to driver—Action—Compromise—Fraud—Pleading—In an action by plaintiff for damages for an injury in a collision with a street car, in which the defendant pleads and exhibits a receipt for \$25, signed by plaintiff as a settlement of his claim for damages, it was error for the court to give the jury a peremptory instruction to find for the defendant where the plaintiff pleaded that the paper exhibited was procured by fraud, misrepresentation and duress, which was supported by his evidence that he understood when he signed it that it was only intended to secure him medical attention.

2. Evidence—Competency—Where the evidence tended to show that the physician of the defendant was acting for the defendant in procuring the signing of the receipt, the court should have admitted the testimony offered by the plaintiff as to what the physician said and did before the paper was signed.

Taylor & Lucas for appellant.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant Glisson lives a few miles from Paducah. On May 16, 1902, he was driving along Broadway street in that city in a spring wagon, he and W. D. Pace sitting on the front seat and his wife on the rear seat. They had come into the city to the carnival and had stopped at a store where some change had been handed to Pace, who was driving the vehicle. After they had left the grocery and had gone a short way, driving slowly, Mrs. Glisson called to them that a street car was coming. Glisson seeing that Pace was engaged in counting his money reached over and pulled the lines to pull the horse away from the street car track, but, according to his testimony, too late to avoid the car running into them. According to the testimony of the street car motorman he pulled the wrong line and caused the horse to pull the wagon nearer the car track, thus bringing about the collision, when none would have occurred if he had let the horse alone. The wagon was turned over and Glisson's collar bone was broken. There was evidence that the street car was coming rapidly and that no signal of its approach was given; also, according to the plaintiff's evidence, it was impossible for him to get out of the way after they learned that the car was approaching them. At the conclusion of the evidence on both sides the court instructed the jury to find for the defendant, and the plaintiff appeals.

As there was manifestly under the proof for the plaintiff some evidence of negligence on the part of the street car employees, we conclude that this instruction was not given on the idea that the plaintiff had failed to make out his case, but that, as it was given at the conclusion of the evidence on both sides, it was based upon a plea entered by the defendant to the effect that it had paid the plaintiff \$25 in full settlement of his injuries, as shown by a written contract signed by him, which it produced. The facts in regard to the contract are these: Immediately after the accident Pace and Glisson and Mrs. Glisson were taken by the street car people to the office of Dr. Robinson, the company's physician, and there the paper was signed by Glisson and the \$25 was paid to his wife. His evidence on the trial was stronger than his pleading, as he testified on the trial that he could not write, and that he understood when he signed the paper that it was only intended to secure him medical attention. This fact was not pleaded, but it was pleaded that the paper was obtained from him by fraud, misrepresentation and duress; that at the time he signed it he was suffering intensely and did not carefully inspect the wording of it; that the agreement was that he was to receive such medical attention as he required by reason of his injuries; that the doctor refused to dress his wounds until he signed the paper, and that no medical attention was given him until certain representatives of the company were sent for and the paper obtained from him; that it was concealed from him that Robinson was the physician of the company or in anywise connected with it, and that he was induced by Robinson's statements, which he thought to be disinterested, to sign the paper; that Robinson refused to give him medical attention or to treat him any further after he left the office on that occasion, and that as soon as he learned the facts he tendered back to the company the money which it had paid to his wife. The evidence of Glisson and Pace on the trial tended to sustain these averments and, if true, tended to show that the contract was not fairly made; at least it was a question for the jury under the evidence whether the contract was

obtained by fraud or was fairly entered into. The parties were at the physician's office in twenty or twenty-five minutes after the injury, and if Glisson contracted for medical services for his injuries when the company agreed only to give him medical attention that day the minds of the parties did not meet, or if the plaintiff was suffering intensely and the physician refused to give him medical attention until he signed the paper, this fact might be considered by the jury in determining whether the contract was fairly made. It is true that Glisson only tendered back \$25. He did not tender back the amount which the company had subsequently paid Dr. Robinson for his services that day, but he did not know of the payment, and in fact it had not been made at the time he made the tender. He could not, therefore, be required to tender this amount also, but on the trial the defendant, if there is a verdict against it, should be credited by any reasonable sum paid the physician for his services to the plaintiff.

The court should have admitted the testimony offered by the plaintiff as to what Dr. Robinson said and did before the paper was signed, as the proof tended to show he induced the signing of the paper and was acting for the company in the transaction. At any rate, what passed between the parties before the paper was signed and leading up to its execution was admissible as part of the *res gestæ*.

Judgment reversed and cause remanded for a new trial.

MITCHELL & CO. v. WALLACE, &c.

(Filed May 25, 1905—Not to be reported.)

Contract—Proposition—Acceptance—Reasonable time—Where a letter from a dealer in yarns, fixing the price at which he proposed to sell his goods, was received by the buyer at Paducah on Saturday after business hours, and was answered both by telegram and letter on the following Monday accepting the proposition at the price named, such acceptance was within a reasonable time and made it a binding contract between the parties, for a breach of which the seller is responsible in damages.

Campbell & Campbell for appellants.

Quigley & Moequot and J. C. Flournoy for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by appellant against appellees for \$918.48 for goods sold to them in the early part of 1902. Appellees answered, not denying the account, but set up a counterclaim for damages by reason of an acceptance of an offer of sale of cotton yarns and a refusal of appellant to deliver the yarn according to contract, and by reason of such refusal they were compelled to purchase in the open market at an advanced price. They also alleged the nonresidency of the appellants.

The appellant replied to this answer and denied that there was any contract whatever between him and the appellees to sell them yarn for the reason that they did not accept his proposition of sale within a reasonable time, and alleged that at the time he made to appellees the proposition of sale,

quoting prices on yarn, and prior thereto, there was a custom of trade existing between all sellers and buyers of yarn and cotton goods in the market; that all quotation of prices thereof to purchasers by sellers of same were understood and were made subject to the rise and decline of such goods in the market, where such goods are sold, and that this custom was universal, acquiesced in by the trade, known to all dealers, sellers and buyers, and was reasonable and notorious, and well known and acquiesced in by the appellees. Appellees controverted these affirmative allegations. The court tried the case, a jury being waived, and found in favor of appellees to the extent of their counterclaim.

The appellant testified to the custom alleged by him to exist in Philadelphia, where he resided, but failed to prove the notice of such a custom to appellees, or that such a custom was known or existed in Paducah, the home of appellees. The proof shows without contradiction that the appellees were compelled to pay an advanced price for cotton yarns over the price quoted by appellant. The only question to be determined is whether such contract in fact existed. Appellant claims that it was not a contract because of the delay in appellees in accepting it; that they did not accept it within a reasonable time. The appellant on September 11, 1902, wrote the appellees at Paducah, Ky., the following letter:

"We have your favor of the 9th inst., inquiring price for 100,000 pounds of yarn, with delivery of 5,000 pounds weekly. We would not care to contract for 100,000 pounds of yarn at the present time. We would be willing to accept 50,000 pounds, with a delivery of 2,500 to 3,000 pounds weekly, on a basis of $14\frac{3}{4}$ cents for No. 10s cones. This would make No. 14 $13\frac{3}{4}$ cents, and other numbers proportionately, deliveries to commence at once. We have already sold on the basis we have quoted enough to run the mill up to the end of December; at the present time could not think of naming any lower quotations. Trust we may be favored with your order."

This letter was received by appellees on Monday morning, September 15, and that evening they sent to appellant the following telegram: "Ship at once ten cases each eleven and thirteen. See letter." And on the same day they wrote and mailed to appellant the following letter: "Referring to yours September 11, 1902, have wired you to-day to ship ten cases each No. 11 and No. 13. We will accept your offer of the 50,000 pounds, to be shipped each week, after above shipment, 5cs. each No. 11 and No. 13."

Appellant failed to ship the yarn, but answered, fixing higher quotations. It is evident the appellees accepted the proposition of appellant, and by this acceptance it was made a binding contract between the parties, provided the acceptance was within a reasonable time and before any notice of a change of mind by the appellant. The rule of law is that a proposition of sale, accepted within a reasonable time, considering the nature of the case, becomes a contract between the parties to the transaction. The question is, did the appellees, under the circumstances, accept appellant's proposition within a reasonable time?

The proof shows that this letter from appellant, containing the proposition for the sale of yarn, arrived in Paducah after business hours Saturday, the 13th inst.; that on Sunday the appellees did not, nor were they required to, go to the postoffice after their mail, and hence they did not receive this

letter until the morning of the 15th, and upon that day they sent the telegram and mailed a letter accepting the proposition. We are of the opinion that this was an acceptance within a reasonable time, and made it a binding contract between the parties.

Wherefore, the judgment of the lower court is affirmed.

HULSEY'S ADM'R v. LOUISVILLE, HENDERSON & ST. LOUIS
RY. CO.

(Filed May 25, 1905—Not to be reported.)

Railroads—Killing trespasser—Duty—Liability—Where deceased was on the track of appellee, in the country, not on a public highway, he was a trespasser, and those in charge of the train were not required to keep a lookout for him, and owed him no duty except to use every effort to avoid killing him after the discovery of his peril. There being no proof that they discovered him in time to have saved him from injury and death, a peremptory instruction to the jury to find for the defendant was proper.

R. G. Hill and Miller & Todd for appellant.

Helm, Bruce & Helm for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Nunn.

In the month of March, 1902, Mid Hulsey, appellant's intestate, was run over and killed by a freight train of the appellee. He was killed in about half a mile of Worthington's Station. He was under the influence of liquor and was walking on the track of the railroad where the railroad passed through the county, and in about seventy-five yards of a public crossing. The track was straight for several miles. Upon trial, after appellant introduced his evidence, the court gave to the jury a peremptory instruction to find for the appellee, and appellant is here on appeal.

The appellant contends that, under the principles announced in the case of Louisville & Nashville R. R. Co. v. Logsdon's Adm'r, 25 Ky. Law Rep., 1657, the lower court erred in giving this instruction. That opinion is not authority, for on a petition for rehearing in that case this court by a majority opinion, withdrew that opinion and wrote the opinion in 26 Ky. Law Rep., 457. Applying the principles announced in the last opinion in the Logsdon case, supra, it necessarily results in an affirmance of the action of the lower court. As stated, the deceased was on the track of the appellee, in the country, not upon a public highway, and, therefore, he was a trespasser, and those in charge of the train were not required to keep a lookout for him, and owed him no duty except to use every effort to avoid killing him after the discovery of his peril. There was no proof that they discovered him in time to have saved him from injury and death.

Wherefore, the judgment of the lower court is affirmed.

GREEN v. HART.

(Filed May 25, 1905—Not to be reported.)

Partnership—Action for settlement—Breach of contract—Damages recoverable—In an action by G. against H. to settle a partnership agreement, in which it was agreed that H. should take charge of five tracts of land belonging to G., clear them up, fence them and cultivate them, the old land to be sown in grass and clover, each to pay for one-half of the labor required, and each to furnish one-half the stock, tools and teams, H. to have the entire charge of the farms and hands and stock, to receive and pay out the money, the contract to continue for five years, and the profits to be equally divided, to which H. filed a counterclaim for damages, alleging that G. did not furnish his one-half of the stock to consume the provender raised, which was allowed to go to waste. evidence considered, and, Held—That while H. is indebted to G. on the settlement in the sum of \$105, he is entitled to damages for G.'s failure to furnish stock to consume the provender raised, which was the main source of the profits of the partnership, and there being \$1,079 of the firm assets in the hands of the court, H. is adjudged the whole of said sum in damages, and also to be relieved of his indebtedness to G. in the \$105 due on settlement of the partnership, each party to pay one-half of the cost of the suit for settlement, and H. to recover his cost on his counterclaim for damages.

J. S. Wortham, Murray & Murray and W. S. Pryor for appellant.

N. Mc. Mercer and Claude Mercer for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted to settle a partnership based upon the following contract: "Whereas, L. Green, of Grayson county, is the owner of five farms in the Forks of Rough, known by the following names, to wit: The George Pool place, where James Hornback now lives; the Tanner place, where Frank Clask now lives; the Clark Bend place, where Lee Chancellor now lives, and the place adjoining this known as the Jack place. Now Dr. J. H. Hart, of the Forks of Rough, hereby undertakes and agrees to take charge of all of the five farms for said Green upon the following terms, to wit: He is to have for his services one half of the net proceeds of said farms after all the expenses of cultivating and improving are paid for; he agrees to give his undivided attention to said farms and have them cultivated in a good and skillful manner; he is to have all of said farms put under good fences and well cleared up and improved so as to make them remunerative; all of the old and worn thin land on said places are to be sown in grass and clover, etc., and stocked with cattle, hogs and sheep on the Tanner farm; he is to have cleared and put into cultivation all of woodland lying between the cleared land and Rough river, known as the cyclone woods; he is to cultivate all of said farms so as to produce as much profit for both himself and Green as is practicable without injuring the fertility of the soil on same; he is to have all of the repairing looked after and cared for, and all necessary ones made. Both parties to this contract are each to pay one-half of all the labor required and also each to furnish one-half the stock, tools and feed, teams, etc. This contract to be in force five years from date. Said Hart is to 'tend to marketing the crops, paying off hands, etc., and is

to keep a book account of expenses for money, etc., paid out and vouchers for same, and all amounts received, and is to make report and payment of the same at least once a year. September 8, 1893." This was signed by both of the parties.

The appellant, Green, instituted this action for a settlement of accounts, and claimed that appellee failed to give his undivided attention to the farm; that he failed to have them cultivated properly; that he failed to fence the farms; failed to have the necessary repairing done, but suffered buildings and property to go to waste and failed to keep accounts or take vouchers or make report and payment at least once a year, and alleged that he was damaged by reason of these breaches of the contract on the part of appellee in the sum of \$3,750.

Appellee answered, controverting the allegations of the petition, and alleged that appellant, under their contract, had bound and obligated himself to furnish one-half of all the cattle, hogs and sheep which they determined to and which could be fattened for the market; that it was from this source that they expected to derive profit and that large quantities of the grasses and other products produced on these farms went to waste on account of the want of live stock to consume it; that appellant failed to furnish any part of such stock, or the means to purchase it, though often requested so to do, and that by reason thereof the business was a losing venture, and he was damaged by reason thereof in the sum of \$5,000.

Appellant, by a reply, controverted the allegations of the answer and alleged that the cattle, hogs and sheep to stock the farm was to be provided by the appellee with the proceeds of the farm products, and that he was only required by the contract to furnish one-half of the teams with which to cultivate the farms and prepare them for cultivation. This affirmative matter was denied by a rejoinder. The court referred the case to its master commissioner to take proof and report the state of accounts existing between the partners and also upon the question of the alleged damages. The commissioner made his report in compliance with this order, and also reported that there was in his hands the sum of \$1,079.72, balance of the proceeds from the sale of the partnership property, made under order of the court. Both parties filed exceptions to the commissioner's report and the court, after hearing same, dismissed appellant's petition and gave judgment in favor of the appellee on his counterclaim for damages the sum of \$1,878.25, with interest from the 1st of May, 1903, until paid, and his cost in the action expended, and allowed each to take half of the fund in court, but credited the sum of \$1,878.25, with the half of the sum in court, to wit, the sum of \$53 86, and directed an execution to issue in favor of the appellee against appellant for the difference, to wit, \$838.39. From this judgment appellant has appealed.

The proof, as copied in the record, is voluminous, but after a careful consideration of it we are of the opinion that appellee substantially complied with his part of the undertaking except that he was derelict in taking vouchers for the money paid out by him and in failing to make a settlement once a year, but it is not intimated in the proof that appellant was injured or suffered any loss by reason thereof. A copy of the account, as kept by the appellee, showing the expenditures and receipts of the firm is copied into this record, and the appellant does not controvert a single item thereof.

Upon a careful examination and calculation of the account existing between the parties we find it to be as follows:

Amount Green advanced firm...	\$2,045 00
Amount Green received from firm	1,267 78
Amount firm owes Green	<u>\$777 28</u>
Total expenditures by firm	8,129 34
Amount advanced by Green (as above)	2,045 00
Amount paid out by Hart	<u>\$6,084 34</u>
Amount received by firm	\$7,864 42
Amount received by Green from firm (as above)	1,267 78
Amount received by Hart	<u>\$6,596 70</u>
Amount paid out by Hart (as above)	6,084 34
Amount in Hart's hands belonging to firm	\$512 36
Amount firm owes Green (as above)	777 28
	<u>2) \$1,289 64</u>
Amount Hart owes Green to settle accounts exclusive of fund in court	<u>\$644 82</u>
The fund in court	2) \$1,079 00
Hart's part of this	<u>\$539 50</u>

Therefore, if Green takes the whole fund in court, Hart will still owe him the difference between \$644.82 and \$539.50 or \$105.32.

There now remains only one question to be determined on this appeal, and that is the claim of appellee for damages on account of appellant's failure to furnish half of the cattle, hogs and sheep to stock the farm. Appellant claims that he was to only furnish half the work stock; that it was contemplated that the cattle, hogs and sheep to stock the farm were to be purchased from the produce of the farm. We are unable to agree with appellant in this construction of the contract. There is a provision in the contract which requires the sowing of grass, clover, etc., and stocking the farm with cattle, hogs and sheep. There is another provision of the contract following this, requiring both parties to the contract to each pay one-half of all the labor required, and to furnish one-half of the stock and tools, teams, feed, etc. It is unreasonable to presume that the parties meant by the use of the word "stock," in the latter clause of the contract, to include work stock, because the word "stock" is followed by the word "teams," which comprehends and includes work stock. And we have no doubt that it was intended by the parties, in the use of the work stock in the latter clause, that each party was to furnish one-half of the cattle, hogs and sheep referred to in the previous clause.

To adopt appellant's construction of this clause of the contract, and considering it in connection with the other clause of the contract, would make it unreasonable and unjust. The contract required the appellee to put all the farms under a good fence and clear them up and improve them so as to make them remunerative and to sow grass and clover, etc., on the old land,

and required him to clear and put into cultivation all of the woodland lying between the cleared land and Rough river, known as the cyclone woods, and improve the places and make all necessary repairs. It was evidently contemplated by the parties that these things were to be done in the early part of the lease. He made the rails and repaired the fences cleared, 140 acres of the cyclone woods, built one frame and one log barn, corn cribs, cleared nineteen acres of ordinary woods and about fifty acres of old field, all at an expense of about \$3,000 or \$3,500. With this outlay of expense in the early part of the lease it must have been known and understood by the parties that the farm could not produce this sum and have anything left with which to stock the farm with cattle, hogs and sheep until the lease had at least half expired. Under such a construction of the contract there was little hope of any profit for appellee.

It was shown, without contradiction, that appellant did not furnish any stock such as cattle, hogs and sheep, except a sow and eight shoates. With this exception appellee furnished all the stock that was furnished. It is certain, from the proof, that appellee was damaged by reason of the failure of the appellant to comply with his part of the contract. It is shown that there was not enough stock to consume the provender and grasses produced on the farm, but it is indefinite as to the deficiency of the stock necessary to consume it.

We have examined the proof on this subject with care and have made an estimate upon the profit or increase made upon the stock which they had, and have arrived at the conclusion that appellee is entitled to damages on his counterclaim against the appellant in the sum of the amount of the fund in court, to wit, the sum of \$1,079, and should be relieved from the payment to appellant of the sum of \$105.32, which was due him on the settlement of the account.

Appellant's counsel contend that it is unjust to give appellee any damages against him for he has been deprived of the use of his farms for five years without any benefit to him. In this they are mistaken, for it is shown by the proof that appellant's lands have been increased in value by lasting and valuable improvements made by appellee to the extent of at least \$3,000, and if he has not made any greater profit it is by reason of the fact that he failed to comply with his part of the contract. The lower court erred in dismissing appellant's petition. He was entitled to a settlement of the partnership accounts, regardless of in whose favor the balance stood, and the partnership should pay the cost of this settlement. On the return of the case the lower court will adjudge the fund in court to the appellee and relieve him of the \$105.32 found due appellant on the settlement of accounts, and direct that each party shall pay one-half of the cost incurred in the settlement of the partnership accounts, and adjudge appellee his cost incurred in the litigation of appellant's counterclaim for damages.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

CLARK, BY, & CO. V. CITY OF NICHOLASVILLE, & CO.

(Filed May 26, 1905—Not to be reported.)

Public school building—Improper construction—Injury to pupil—Liability of city—Where a twelve-year-old girl, who was a pupil of the city school, of the city of Nicholasville, was injured by falling from the stairway of the school building to the first floor, she is not entitled to recover from the city damages for the injuries sustained, as the duty of providing public education at the public expense by building and maintaining school houses, and conducting public schools therein, is purely a public or governmental duty, in the discharge of which school districts act as the representatives of the State, and they are exempt from corporate liability for the improper construction of the houses or want of proper repair, or the wrongs of the servants employed.

Breckinridge & Shelby and N. D. Miles for appellants.

J. H. Welch and N. L. Bronaugh for appellee.

Appeal from Jessamine Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellant, Inez Clark, who is a little girl twelve years old, fell from the stairway of the school building at Nicholasville to the first floor, sustaining permanent injuries. She brought this suit against the city of Nicholasville and the board of education of the city, charging that the city owned the building; that the school was conducted in it by the board of education; that she attended the school as a pupil; that the banisters protecting the stairway were insufficient; that this was known to the city and to the board of education, but that they negligently allowed the banisters of the stairway to be insufficient; and that the defendants knew other children had fallen over the banisters before. The court sustained a general demurrer to her petition, and she appeals.

The duty of providing public education at the public expense by building and maintaining school houses and conducting public schools therein is purely a public or governmental duty, in the discharge of which school districts act as the representatives of the State and are exempt from corporate liability for the improper construction of the houses or want of proper repair or the wrongs of the servants employed. (Shearman & Redfield on Negligence, section 267; Hill v. Boston, 23 Am. Rep., 332; Nixon v. Newport, 43 Am. Rep., 85; Ford v. School District, 1 L. R. A., 607.)

In Ernst v. City of West Covington, 25 Ky. Law Rep., 1027, a child in West Covington attending the public school had fallen over a wall which had been negligently left in a dangerous condition by the school authorities. It was held that she could not recover. The court said: "The State regards it as her duty to establish and maintain a system of public education. When sums have been collected for that purpose they can not be diverted to any other use or purposes. If it could be done the system would be injured and the public suffer incalculable injury. If some one is injured by the faulty construction of a public school building, or the maintenance of the grounds, no action can be maintained against the district for such injury."

After citing a number of authorities, in closing its opinion the court considered the question whether the city was liable although the school district

was not, and disposed of it in these words: "Counsel for appellant concedes the law to be as stated, but claims that the city was not required by law to furnish the building for common school purposes; that the city had nothing to do with the maintaining of the public school; that it occupies the same position with reference to the house and lot as if the building had been used for other purposes. Although the city was not compelled to furnish the school trustees with the building for public school purposes, still it did so, and made that contribution to the public to aid in the promotion of education. The use of the building accomplished the same purpose as it would have accomplished had it been owned by the common school district. The building was not owned by the city for private or municipal uses, but for a public purpose. We are of the opinion that the doctrine of the cases cited should apply to the facts of this case." (Twyman's Adm'r v. City of Frankfort, 25 Ky. Law Rep., 1620; Simons v. Gregory, 27 Ky. Law Rep., 509; Hardwick v. Franklin, 27 Ky. Law Rep., 484, and cases cited.)

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. v. SCOTT, &c.

(Filed May 26, 1905—Not to be reported.)

1. Telegrams—Failure to deliver—Free limits rule—Reasonableness of rule—In an action for damages for failure to deliver a telegram sent from Radnor, W. Va., to Catlettsburg, Ky., thirty miles away, between 12 and 1 o'clock p. m. and not delivered until 8 o'clock of the same day, on which the company relied on the free limits rule as a defense, the sendee residing two and one-half miles from Catlettsburg, it was error in the court to submit to the jury the question as to the reasonableness of the free delivery rule. The facts being undisputed the reasonableness of the rule was a question for the court, and the rule was certainly reasonable as to one who lived two and one-half miles away.

2. Delaying operation of sawmill—Measure of damages—In an action for delay for failure to deliver a telegram for a casting to run a sawmill, by which the operation of the sawmill was delayed several days, the measure of damages is the profits which the plaintiffs would have earned by ordinary diligence in the operation of the mill if the telegram had been delivered in proper time.

3. Instructions—Duty of plaintiff—Evidence—Where there was evidence from which the jury might have inferred that plaintiffs could have done all their sawing notwithstanding the delay by the time their lease expired, in about twelve days thereafter, the jury should have been instructed that if the plaintiff, by ordinary diligence, could have gotten the casting in time to have done all their sawing before the end of their lease, then no loss of profits should be recovered.

Proctor K. Malin, Richards & Ronolds and Geo. H. Fearons for appellant.

R. S. Dinkle, S. D. Himes, R. L. Greene and J. A. Scott for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Hobson.

Scott & Castle were running a sawmill at Radnor, W. Va., thirty miles from Catlettsburg. The pinion which runs the carriage of the sawmill

broke; Scott went to Catlettsburg to get a new one; he got one which he hoped would do and sent it to the mill, directing Castle to telegraph at once if it would not do. The pinion would not do and Castle between 12 and 1 o'clock, on November 1, 1908, sent this message to Scott, at Catlettsburg:

"Pinion will not do.

C. C. CASTLE."

The message did not reach Catlettsburg until 6:08 p. m. It was delivered to Scott, according to the testimony of the telegraph agent, on the morning of the 2d, but according to Scott's evidence not until the evening of the 8d. The reason for requiring a telegram sent was that Scott had to have the pinion cast, and if it was not cast on the 1st it could not be cast at Catlettsburg until the 5th, as they only cast twice a week. Scott telephoned to the telegraph agent twice during the afternoon of the 1st to know if a message had come for him, and was told there was none for him. By reason of the failure to get the pinion the mill lay idle. If the message had been promptly delivered Scott could have gotten the pinion made on the 1st and had it at the mill on the morning of the 2d. Scott & Castle sued to recover damages for the nondelivery of the telegram, and on these facts recovered \$200. The telegraph company appeals.

Scott did not live at Catlettsburg, but at Normal, two and one-half miles away. The defendant relied upon its rule establishing free delivery limits. The court in its instructions to the jury submitted to the jury the reasonableness of the rule. This was error. The facts being undisputed the reasonableness of the rule was a question for the court. The rule was certainly reasonable as to Scott, who lived two and a half miles from Catlettsburg, and at Normal. But we do not regard this as especially material as the gist of the action was for the negligent delay in sending the message to Catlettsburg, for when the message reached there it was too late to get the pinion made on the 1st, and the rule would not protect the defendant from damages for failing to properly transmit the message, because if the message had been duly transmitted Scott would have gotten it in the afternoon when he telephoned.

The court in laying down the measure of damages said that the plaintiffs might recover such profits as would have been earned by the operation of the mill by the exercise of ordinary diligence from the time the plaintiff could have obtained the pinion, if the message had been sent and delivered with ordinary care, and the time they could, by the exercise of ordinary diligence, have obtained the pinion after the message was delivered and could have procured necessary teams and men to operate the mill. The last clause of the instruction was wrong. There was nothing in the message apprising the defendant that any damages should be anticipated from the failure to procure necessary men and teams to operate the mill. Such damages were not within the ordinary contemplation of the parties, and should not have been allowed. The plaintiff could, by ordinary care, have made arrangements to get the pinion and also at the same time have made arrangements for the return of the men without waiting for the pinion before making other arrangements. There was evidence from which the jury might have inferred also that the plaintiffs could have done all the sawing they had to do notwithstanding the delay. Their lease ended on November 15. They did not start their mill any more. The court should have qualified the in-

struction by adding to it that if the plaintiffs after the time when, by ordinary care, they could have gotten a pinion might, by ordinary diligence, have done all the sawing they had to do by the end of their lease, notwithstanding the delay in the delivery of the telegram, then no loss of profits should be recovered by them in this action.

Judgment reversed and cause remanded for a new trial.

LOUISVILLE, ANCHORAGE AND PEWEE VALLEY ELECTRIC RY.
CO. v. WHIPPS, &c.

(Filed May 26, 1905—Not to be reported.)

1. Railway—Failure to maintain station—Measure of damages to land owner—W. conveyed the defendant, L., A. and P. V. Electric Ry. Co., the right of way through her land in consideration that it would maintain a station thereon near the center thereof. In an action by W. for damages for failure to maintain such station, an instruction that if the jury find for the plaintiffs they should find such sum as would represent the difference in what would have been the fair market value of the residue of the plaintiff's land after the conveyance of the right of way if the station had been established, and the fair market value of such residue without the station, was proper.

2. Jury—Viewing land—Receiving evidence out of court—Immaterial error—In an action for damages by the owner of property for failure of a railroad company to maintain a station on land conveyed to the company in consideration thereof, where the damages consisted in the enhanced value of the property in selling it for building lots, the fact that one of the jury, while in charge of the sheriff viewing the property, asked a bystander how much hay was grown on the land, though improper, was immaterial, as the value of the property for building and not for agricultural purposes was the issue.

D. W. Sanders and O'Neal & O'Neal for appellant.

Kohn, Baird & Spindle and R. L. Greene for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Chief Justice Hobson.

Appellee, Minnie C. Whipps, owns a tract of forty-five acres of land in Jefferson county through which appellant's line runs for nearly half a mile. She and her husband conveyed the right of way to appellant in consideration that it would maintain a station near the center of the tract. Appellant failed to maintain the station, and they filed this action against it to recover damages. There was a verdict and judgment in their favor, which, on appeal by appellant, was reversed by this court on the ground that the court failed to properly instruct the jury on the measure of damages, but it was held in that opinion that this was the only reversible error found in the record. (Louisville, &c., Electric Ry. Co. v. Whipps, 25 Ky. Law Rep., 2312.)

The error pointed out in the instruction was that the court should have limited the jury, in defining the measure of damage, to the difference be-

tween the market value of the residue of the plaintiff's land without the station and what it would be with the station. On the return of the case it was tried again on the same evidence, and a verdict was again rendered for the plaintiffs in the sum of \$800, on which the court entered judgment, and the defendant again appeals. It is insisted for the appellant that the court erred again in not properly defining the measure of damages, in that the court refused to instruct the jury that they could not take into consideration the value of the strip of land deeded to appellant. But this was the necessary effect of the instruction which the court gave. The court told the jury that if they found for the plaintiffs they should find such a sum as would represent the difference in what would have been the fair market value of the residue of the plaintiff's land after the conveyance of the right of way if the station had been established and the fair market value of such residue without the station. When the jury were thus limited as to the damages which they could find it was entirely unnecessary for the court to tell them that they could not consider other things.

The jury were sent to view the premises and while they were in the charge of the sheriff the latter, not knowing where the line of the tract lay, called to a man named Conn and asked him if the line began at a hay stack. Conn told him it did not and pointed out the line. One of the jury, who was standing by, then asked Conn if that stack of hay was all the millet hay grown on the place, and Conn answered that it was only about one third. The sheriff appears not to have heard the question of the juror or the answer. The jury walked over the tract of land and stepped off the distances as they went, or at least some of them did so. It is insisted for appellant that the jury received evidence out of court and were guilty of misconduct for which a new trial should be granted. The court must, at every stage of the proceeding, disregard immaterial errors which could not have affected the result. Whether there was much or little hay grown on the land threw no light on the case, and whether the jurors counted the steps as they walked was also immaterial, as there was no controversy of fact as to the size of the tract or the distances. The value of the land, under all the evidence, depended upon its being sold into smaller tracts for suburban homes. Its value for agricultural purposes was not in issue. The proof tended to show that the land lay about fifteen miles from Louisville, and if the station had been located, as agreed, it could have been cut up into small lots and sold at \$300 or \$400 an acre to persons desiring homes out of the city. How much hay the millet on the farm that year made could not have enlightened the jury, and when they went and viewed the premises they would naturally form some conclusion as to the distances, and whether to satisfy their curiosity any of them stepped the distances on the ground was immaterial. The verdict is not against the evidence.

Judgment affirmed.

HUNT v. TAYLOR, &c.

(Filed May 26, 1905—Not to be reported.)

1. Action — Guaranty — Misrepresentation — Pleading — Demurrer — In an action by plaintiff, alleging that he was induced by defendant to invest

money, in a company in which defendant represented that he was a stockholder, and that it was a safe, legitimate and prosperous business, and that the defendant, would guarantee plaintiff a profit of 20 per cent. on February 1 thereafter, and in which he invested \$487.50, and that defendant has failed to pay plaintiff any part of the money advanced, or one cent of the profits thereon, and has wholly failed to keep and perform any part of his promise, obligation and guaranty with plaintiff, and in which he seeks to recover the sum of \$561. Held—That a demurrer to the petition was properly sustained.

2. Insufficient allegations—Absence of writing—Statute of fraud—The petition contains no allegation of a breach of the warranty which is the basis of the action, no allegation that the company did not return to plaintiff the money he invested in it with 20 per cent. profit on or before February 1, 1902, and further, it fails to allege that the guaranty sued on was in writing, which is required under subsection 4 of section 470, Kentucky Statutes, and known as the statute of frauds.

Chas. Strother for appellant.

W. A. Lee and H. G. Bott for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Barker.

The appellant commenced this action by filing in the Owen Circuit Court the following petition:

"The plaintiff, J. W. Hunt, states that on or about the 17th day of July, 1901, he was approached by the defendant, A. P. Taylor, who represented and stated to this plaintiff that he was an agent and also the president of a certain corporation located in Lexington, Ky., known as the Industrial Mutual Deposit Co., in which said defendant was a large stockholder and investor; that said company was engaged in issuing and selling its stock and coupons which said coupons it redeemed at certain intervals and times upon the payment of stated sums of money by the purchaser or holder of same, called dues; that said defendant represented to and told this plaintiff that said company was a perfectly solvent, safe and prosperous institution, engaged in a legal and legitimate business, and that defendant proposed to this plaintiff that if he would invest, not to exceed \$500 in the stock coupons of said company, defendant would guarantee to this plaintiff a return of said sum of money, together with a profit of 20 per cent. thereon, on or before the 1st day of February, 1902, and plaintiff states that having personally known the defendant for many years prior thereto, and believing that he was solvent and financially amply able to, and would, keep and fully and faithfully perform his said offer and guaranty, and for no other reason or consideration whatever, he accepted said offer of defendant and then and there drew his personal check on the Farmers Deposit Bank of Wheatly, Ky., for the sum of \$400, payable to H. H. Holbrook, agent, as said defendant directed, who drew thereon said sum of money, and that he afterward paid to said Holbrook, agent, \$67.50 for the purpose aforesaid, which he is advised and avers was invested as above set out in said agreement. Now he says that defendant has wholly failed to pay this plaintiff any part of said sums of money, or any part of the profits thereon, in fact has failed to pay to this plaintiff any part, or one cent of the money so advanced, or one

cent of profits thereon, and has wholly failed to keep and to perform any part of his said promise, obligation and guaranty with this plaintiff as aforesaid. Plaintiff says his said claim amounts to the sum of \$561, and he files herewith as part hereof an itemized statement of same, marked "A.," and says same is past due and wholly unpaid."

A general demurrer was interposed to this pleading by the appellee, and sustained by the court, whereupon the appellant declining to amend or plead further, the petition was dismissed. To reverse the judgment this appeal is prosecuted.

The circuit court was clearly right in sustaining the demurrer to the petition. In the first place, it contains no allegation of a breach of the guaranty which constitutes the basis of the action. It is not alleged that the Industrial Mutual Deposit Co. did not return to appellant the money he invested in it, with 20 per cent. profits, on or before the 1st day of February, 1902. It is alleged that appellee Taylor failed to pay to appellant the money the latter invested in the corporation, with the profits thereon; but the contract was that Taylor guaranteed that the corporation would return the money invested on or before the date alleged, and as there is no allegation that this had not been done by it, there was no breach of the guaranty. The petition is also fatally defective in that it fails to allege that the guaranty sued on was in writing. It is within both the letter and the spirit of subsection 4 of section 470 of the Kentucky Statutes (statute of frauds), which provides that no action shall be brought to charge any person upon a promise to answer for the debt, default or misdoing of another, unless the promise, or some memorandum thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent.

Judgment affirmed.

HOSKINS, &c. v. HOSKINS.

(Filed May 26, 1905—Not to be reported.)

Transaction between father and son—Conveyances—Consideration—Construction—A father conveyed to his son 200 acres of land, including farming implements, teams, wagons, cattle and growing crop, "to be taken at the estimated price of \$10,000, and the undertaking and agreement of the party of the second part to pay to the party of the first part the value of his interest and ownership in his estate, real and personal, as heir, devisee, legatee and distributee of certain-named deceased persons." Held that a deed of conveyance by the son to his father of all the estate, real and personal, legal and equitable, vested and contingent, to which the son as heir and distributee, legatee or devisee aforesaid is or may be entitled in law or equity," while in the form of a deed was only a mortgage to secure the purchase price of \$10,000 for the 200 acres of land. etc., conveyed by the father to his son.

Lane & Harrison for appellants.

Chas. F. Taylor and R. C. & J. J. Davis for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

Robert H. Hoskins, the father of J. C. Hoskins, when the latter was only

twenty years of age, entered into a contract with him by which the father conveyed to his son 200 acres of land, with the improvements thereon, in Jefferson county, Kentucky, at the estimated value of \$10,000, in payment of which the son was to convey to the father all of the former's undivided interest in the estate of certain-named deceased relatives. In pursuance of this agreement the father did convey to the son, by general warranty deed, the 200 acres of land, with improvements, and on the 18th day of August, 1894, the son conveyed to the father all his undivided interest in the estate of his deceased relatives. The material part of the deed of the son to the father is as follows:

"Witnesseth, That for and in consideration of the conveyance by the party of the second part to the party of the first part of a certain tract of land, containing 200 acres, more or less, in the county of Jefferson, in the State of Kentucky, by a deed of even date herewith, and duly recorded on this date in the office of and by the county clerk of Jefferson county, in the State of Kentucky; also of the sale, assignment and transfer by the party of the second part to the party of the first part of four mules, two horses, Jersey cows, calves and bull, hogs, poultry, wagons, harness, plows, harrows and all tools and farming implements of every description, and the growing crop on the said 200 acres conveyed as aforesaid, to be taken at estimate price of \$10,000, and the undertaking and agreement of the said party of the second part to pay to the party of the first part the value of his interest and ownership in his estate, real and personal, vested and contingent, as heir, devisee, legatee and distributee of Emma Hoskins, deceased, Anna Hardin, deceased, and Norbourn Arteburn, at such times and in such amounts as the party of the second part is at liberty to and can lawfully pay the same, so as to entitle him to a discharge therefrom, less the sum of \$10,000 as aforesaid, the agreed price of the estate, real and personal, now conveyed, sold and assigned by the party of the second part to the party of the first part, the said party of the first part has this day bargained, sold, aliened, granted and conveyed, and by these presents does bargain, sell, alien, grant and convey unto the party of the second part, his heirs and assigns, all the estate, real and personal, legal and equitable, vested and contingent, located in the county of Jefferson, in the State of Kentucky, or elsewhere, to which the party of the first part, as the heir, distributee, legatee or devisee of Emma Hoskins, Anna Hardin and Norbourn Arteburn is or may be entitled in law or equity. To have and to hold all and singular the rights, members, hereditaments and appurtenances to the same belonging, incident or appertaining, and said estates, real and personal, vested and contingent, legal and equitable, herein conveyed to the party of the second part, his heirs and assigns, with covenant of general warranty."

After the son became of age he, on the 23d day of August, 1896, executed and delivered to his father a deed of confirmation of the conveyance made by him during his infancy as aforesaid. A part of the property included in the deed of J. C. Hoskins to his father consisted of a tract of 18 4-6 acres of land in Jefferson county, near the city of Louisville, and another tract 98 106-1,000 acres in Jefferson county, and these lands are the subject of this litigation.

On the 27th day of November, 1908, Robert H. Hoskins, the father, died

intestate at his home in Jefferson county. His wife, Mary J. Hoskins, was appointed and qualified as administratrix of his estate, and as such instituted this action for a settlement of her husband's estate, making the appellee defendant. In her petition she alleges substantially the facts above set forth as to the conveyances between her husband and his son, and that the defendant, J. C. Hoskins, claimed that the conveyance by him to his father of his undivided interest in the estates of his deceased relatives, while in the form of an absolute deed, was only a mortgage to secure the purchase price of \$10,000 for the 200 acres of land and the improvements thereon conveyed by his father to him, and submitted the case to the court to decide whether or not the two named tracts belonged to the estate of her husband, or whether they belonged to J. C. Hoskins, subject to the mortgage of \$10,000. J. C. Hoskins in his answer claimed that the conveyance by him to his father was a mortgage, and alleged that his father had held his land between the date of the conveyance and his death, and that the profits of the land accruing to him equalled the amount of the interest on the \$10,000 due to his father's estate. Whether or not the conveyance by J. C. Hoskins to Robert H. Hoskins was a mortgage or an absolute deed is the question for adjudication. Upon the trial of the case the chancellor decreed that the conveyance in question was a mortgage, and entered a judgment for the sale of so much of the land as may be necessary to produce the sum of \$10,000, due from the son to his father's estate. From this judgment this appeal is prosecuted by the administratrix.

We think it apparent from an inspection of the deed that the instrument was intended by the parties only as a mortgage to secure the purchase price of the 200 acres of land conveyed by Robert H. Hoskins to J. C. Hoskins. The verbiage of the conveyance is somewhat out of the ordinary, but when analyzed it appears that Robert H. Hoskins received the conveyance of his son's undivided interest in the estate of the three deceased relatives, Emma Hoskins, Anna Hardin and Norbourne Arteburn, and undertook to pay over the same, or its proceeds, to his son at such times and in such manner as he lawfully might, except the sum of \$10,000, which was the purchase price of the farm. This he was to retain. The father could get under the conveyance of his son no other interest but this. No matter how much the property conveyed to him increased in value, he could not get anything beyond his debt. All over and above this he was to pay over to his son; so that it is apparent on its face that the instrument could only secure to the father the son's debt. In addition to this the deposition of John Caswell, who was intimate with Robert H. Hoskins in his lifetime, and for eighteen years immediately preceding the death of the latter was employed by him as overseer of his several farms in Jefferson county, was read, in which he stated that he had many conversations with Robert H. Hoskins in regard to the transaction with his son, and that he always told the witness the conveyance by his son was simply a mortgage to secure the purchase price of the farm. This evidence was uncontradicted, and, taken in connection with the language of the conveyance, leaves no doubt of the correctness of the chancellor's judgment, and it is affirmed.

TRUSTEES COMMON SCHOOL DISTRICT, No. 32, OF CARLISLE
COUNTY v. KANE & CO.

(Filed May 26, 1905—Not to be reported.)

1. Common schools—Levy of tax for school purposes—Construction of statutes—Pursuant to section 4440, Kentucky Statutes, trustees of common school districts have the power, without the interposition of an election by the people, to levy an ad valorem tax not exceeding 25 cents on each \$100 of taxable property, per school year, and a capitation tax not to exceed \$1 for four years, and this yearly tax constitutes the income and revenue which the provision of section 157 of the Constitution forbids being exceeded except by a vote of the people.

2. Same—Where the claim against a common school district for supplies furnished the district is within the annual revenue of the district as provided by law, it is the duty of the trustees to collect a sufficient sum to pay it.

3. Same—Presumption that officers did their duty—It will be presumed that the trustees in drawing their warrant upon the school superintendent did their duty, and the claim that the petition is defective because it did not allege that the superintendent did not notify the trustees in writing of the necessity for the apparatus is not tenable.

Shelbourne & Kane for appellants.

Robbins, Thomas & Bridgewater for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Barker.

In 1892 the appellee corporation, Thomas Kane & Co., furnished to the trustees of common school district, No. 32, of Carlisle county, Kentucky, school apparatus, consisting of maps, charts, etc., of the value of \$51.40, necessary for the instruction of the pupils of the common schools of that district; whereupon they executed and delivered to it the following order on the superintendent of common schools of Carlisle county, to wit:

"\$51.40.

Berkley, Ky., September 14, 1892.

"To the Supt. of Carlisle Co., Ky.:

"On or before August 23, 1894, pay to the order of Thomas Kane & Co. \$51.40, out of the funds voted for that purpose in your hands, belonging to the school district, No. 32, with interest at the rate of 6 per cent. per annum from date until paid.

"By order of board.

"J. E. SULLIVAN, C. B. T.,

"J. C. SULLIVAN,

"C. L. BODKIN."

This order was not honored for the want of funds, and appellee afterwards made demand upon the appellants, who are the present school trustees of the district, that they levy a tax, as authorized by the statutes of Kentucky, sufficient to pay its claim, which was refused. It then instituted this action for a judgment for its debt, and for a mandamus against appellants, as trustees, requiring them to levy a tax upon the property in the district liable thereto, sufficient to pay off and discharge its claim.

A general demurrer was filed by the appellants to the petition and overruled, whereupon they filed an answer, alleging, as a defense, that no tax

for common school purposes had been levied upon their district for the years 1892 or 1894, and the district, therefore, had no income or revenue for said years out of which to pay the claim of appellee; that no tax had been authorized for school purposes in the district for the years 1892 or 1894 by a vote of the people, and, therefore, there was no fund provided by law out of which to pay the claim in question. To this answer a general demurrer was interposed by appellee and sustained by the court, whereupon appellants declined to plead further, and a judgment was rendered as prayed for in the petition, of which they now complain. It is insisted that inasmuch as no tax was levied in the school district for the years 1892 and 1894, therefore, it has no income or revenue for those years, and, consequently, appellee's indebtedness is void as being in contravention of the following provision of section 157 of the Constitution: "No county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforced by the person with whom made, nor shall such municipality ever be authorized to assume the same."

Section 4440 of the Kentucky Statutes, in so far as pertinent to the subject in hand, is as follows: "Whenever the county superintendent notifies the trustees, in writing, that a schoolhouse, or the inclosures thereof, has been condemned, and needs repairing or additions, or that the furniture or apparatus is insufficient, or, in any case, it becomes necessary to purchase a site to build a new schoolhouse, then if there be no funds available for such repairing or purchasing, the trustees shall levy a capitation tax not exceeding \$1 per school year, for four years, on each male over twenty-one years of age, or an ad valorem tax, not exceeding 25 cents on each \$100 worth of taxable property in the district per school year, or both a capitation and an ad valorem tax, to be collected as provided in section 4443; and such tax shall be applied to the repairing or making additions, or to the purchase of a site, and the erection and furnishing of a schoolhouse with furniture or illustrative apparatus." * * *

By the terms of the foregoing statute the trustees of common school districts have power, without the interposition of an election by the people, to levy an ad valorem tax, not exceeding 25 cents on each \$100 worth of taxable property in the district, per school year, and a capitation tax not to exceed \$1 per school year for four years on each male over twenty-one years of age.

Substantially the statute, as above quoted, was enacted in 1886, and in the case of *Macklin, &c. v. Trustees of Common School District*, 88 Ky., 592, this construction was given it. This yearly tax constitutes the income and revenue which the provision of section 157 of the Constitution quoted forbids being exceeded except by a vote of the people of the district held for that purpose. The opinion in the case of the *Commonwealth v. Louisville & Nashville R. R. Co.*, 105 Ky., 206, in nowise militates against this view. There the trustees, in order to erect a new school building, levied a poll tax of \$1 on each white male citizen over twenty-one years of age residing in the

district for four consecutive years, and an ad valorem tax of 25 cents on each \$100 worth of taxable property in the district for the same period of time. The contract for the schoolhouse exceeded, not only the annual tax authorized to be levied by the trustees for the year in which it was made, but also the income and revenue collectible during the four succeeding years. This indebtedness was held to be within the inhibition of section 157 of the Constitution. In the case of *Grady v. Pruitt*, 28 Ky. Law Rep., 508, a contract for a schoolhouse equaled the income of the district for four years at the statutory rate, and it was held that the contract was void because it exceeded the annual income of the district. On this subject it was said in the opinion: "The petition alleged that one year's taxes had already been collected, and this exhausted all power of the trustees to levy tax without a vote. (*Commonwealth v. Louisville & Nashville R. R. Co.*, 20 Ky. Law Rep., 1127.)"

The same principle was involved in *City Council of Richmond v. Powell*, 16 Ky. Law Rep., 174. In all these cases it was recognized that where the contract does not exceed the annual income it is valid; indeed it is said by Judge Pryor in the last cited case: "Schools must be maintained and the school buildings erected, and it is the duty of those authorized by law to see that the provisions of the school law in this respect are carried out, and to first acquire the assent of the voter is one of the means required to enable those to whom this duty is confided to maintain schools, when the indebtedness about to be created exceeds the sum the council would have the right to appropriate without regard to the voice of the people." * * *

In the case at bar it is alleged in the petition, and not denied, that the taxable property in the district exceeds \$50,000. The claim of appellee is only \$51.40. A tax of 25 cents on each \$100 worth of taxable property in the district will amount to more than double appellee's debt, without reference to the capitation tax. The claim, therefore, is clearly within the annual revenue of the district, as provided by law, and not within the prohibition of section 157 of the Constitution. The fact that no school tax has actually been levied for the school years of 1892 and 1894 does not change the merit of appellee's claim. The law provided this annual revenue for the very purpose (among others) for which the indebtedness sued on was created, and gives to the trustees of the district the power to collect it as above set forth. The principle here enunciated was involved in *Burkhart v. Vine Grove Common School District Trustees*, 26 Ky. Law Rep., 262. There common school district, No. 63, of Hardin county, became indebted in the sum of \$68.40 for coal furnished and used in the schoolhouse of that district during certain school years. This debt not being paid on demand, action was instituted against the trustees of the district for a judgment, and substantially the same defense as relied on in the case at bar was set up in that cited, quoting section 4444, Kentucky Statutes, which is as follows: "Unless there are sufficient funds on hand which may be used to pay the contingent expenses, incident to conducting the school comfortably, the trustees shall assess, and the treasurer of the district shall collect, a capitation tax of \$1.50, or less, on all persons having children attending the school of the district, the same to be collected as provided in section 4443, and used to pay for fuel and other things needed to keep warm, clean and comfortable the

house where the school is conducted." We said: "Under this section the cost of keeping the schoolhouse warm, clean and comfortable must be paid by persons having children attending the school at the time. The answer filed in this case does not allege that the capitation tax of \$1.50 was levied and collected for each of the years in which the plaintiff furnished the coal to the district, but only that a capitation tax was levied for that purpose. It was plainly the duties of the trustees to have levied and collected a sufficient tax upon persons having children attending the schools for each year sufficient to have defrayed the necessary expenses, and if, as a matter of fact, they failed to do this, then plaintiff is entitled to have a sum sufficient to pay for the coal furnished by him each year to the school levied and collected from the patrons of the school for that year, provided the levy for that year did not reach a maximum of \$1.50. Of course if the full tax was levied, and there was still debts in excess of it, there is no statutory authority for its payment. But appellant is entitled to be paid for his coal by the patrons of the school at the time it was furnished, if it is practicable to do so under the statute."

In the case at bar no part of the annual revenue subject to the order of the trustees for the years 1892 or 1894 has yet been collected. As this revenue, when collected, will exceed appellee's claim, it is clear, under the principle established in the above cited case, that it is the duty of the trustees to collect a sum sufficient to pay off this debt, which the district justly owes. The proposition that the trustees have no power to levy an annual tax for any sum, without an election by the people authorizing it, abrogates the plain letter of the statute. The proposition that the district has no annual revenue or income because the trustees have failed to levy the tax, which the law authorizes them to collect without an election, takes the creditor's claim out of the protection of the principles of law, and places it at the mercy of the arbitrary whim of the trustees. Both of these propositions are erroneous. Those proposing to deal with a school district must, indeed, at their peril, take notice of the limitations of the authority of the trustees. If this be exceeded the contract is void, but if it is within this authority it is valid and enforceable. The claim that the petition is defective because it fails to allege that the superintendent did not notify the trustees in writing of the necessity for the apparatus is not tenable. Assuming, without deciding, that this provision of the statute is mandatory, we conclude that the officers having the matter in charge did their duty, and would not have issued the warrant sued on except on a regular requisition. The statutory defect, if it existed, should have been pleaded in bar of the claim.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. JARVIS, &c.

(Filed May 26, 1905—Not to be reported.)

1. Railroads—Charter authorizing construction of—Amendments to such charter—Power of stockholders—Construction of statutes—Where it was provided in the original charter that a railroad company may consolidate with other railroad companies upon such terms as the directors may agree, and

that certain other important contracts may be made by the directors without the consent of the stockholders at all, and this was subsequently amended so modifying it as to require the approval of the stockholders as to the management and disposition of the property, and power given the directors to sell or dispose of it subject to the ratification of a majority (in value) of the holders of stock, another and later amendment providing that no contract that the president and directors may make with the Louisville, Cincinnati & Lexington R. R. Co. shall be valid unless ratified by all the stockholders of the company, does not require a contract of sale to be ratified by the unanimous vote of the stockholders, but only by a majority of them.

2. Voting of stock—To require the unanimous vote of all the stock of a railroad to unite with another railroad, or to sell its franchise to another road, is to render this method of development impracticable, as it gives an opportunity to a small number of stockholders to defeat control for selfish purposes and thwart control by the majority.

3. Ratification—The expression "ratified by the stockholders of this company" is presumed to mean that the directors should bring all matters affecting the railroad before a stockholders' meeting for ratification, not by a unanimous vote, but by a majority.

4. Repeals by implication—It is a well-settled principle of statutory construction that repeals by implication are not favored by the courts, and will not be declared except it is impossible to permit both statutes to stand, and as the amendment in question is not repugnant to the other acts, but with them form a consistent whole, the contention that it repealed the foregoing amendment providing for a control of the property by a majority of the stockholders is not upheld.

Helm, Bruce & Helm for appellant.

William Jarvis and Morton V. Joyes for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Barker.

The Shelby railroad was incorporated by an act of the Kentucky Legislature in 1851, with the usual powers of such corporations, a more detailed enumeration of which is not necessary for the purposes of this appeal. Sections 8 and 21 of the original charter are as follows:

"Section 8. That a general meeting of the stockholders may be called at any time during the interval between the annual meeting by the president, and directors, or a majority of them, or by the stockholders owning at least one-fourth of the whole stock subscribed, upon giving thirty days' public notice of the time of holding the same, which shall be at some place in Shelbyville, named in the advertisement; and when any such meetings are called by the stockholders such notice shall specify the particular object of the call; and if at any such called meetings a majority (in value) of the stockholders of said company are not present, in person or by proxy, such meeting shall be adjourned from day to day, without transacting any business, for any time not exceeding three days; and if within said three days stockholders having a majority (in value) of the stock subscribed do not attend, such meeting shall be dissolved.

"Section 21. That it shall be lawful for said railroad company to branch the said road, and to run lines to any point or points in the counties of

Shelby, Spencer, Anderson, Franklin, Henry, Oldham, or Jefferson, on the terms mentioned in this act, and especially in the direction of the town of Danville, in Boyle county: Provided, The same diverges twenty degrees, or more, in the junctions thereof with the Louisville & Frankfort railroad. It shall be lawful for the company to unite this road with any other railroad in any of said counties, which now is, or may hereafter be, constructed, with the consent of the directors of said other railroad company. It shall be lawful for other railroad companies, now or hereafter to be incorporated, to unite with this road, with the consent of the president and directors of this road; and it shall be lawful for the Shelby railroad company to contract with any other railroad company which now is, or may hereafter be, incorporated in this State, for the use of the locomotives, cars, engines, vehicles, carriages or machines of any description whatever, belonging to each respective railroad company, and to be used upon the tracks of each respective railroad company, upon such terms and under such stipulations and conditions as may be agreed upon by the said companies contracting." In 1854 the charter was amended as follows: "That the president and directors of the Shelby R. R. Co., or a majority of them, are hereby authorized and empowered to form by contract a union of said company with any other railroad company, or to sell and transfer and convey when sold all the assets, real and personal estate, rights and privileges of said company, and upon such terms and conditions as have been or may hereafter be sanctioned and approved by the stockholders owning a majority of the stock of said company; and said sale and conveyance when made shall divest the Shelby railroad company of all charter rights, and it shall cease to exist as a company, and the purchaser or purchasers shall be fully invested with all the charter privileges now possessed by the Shelby R. R. Co., under and by virtue of this and all previous acts of incorporation."

And on the 8d day of February, 1869, the charter was again amended, so much of which is pertinent to the case before us being as follows: "No contract that the president and directors of said company may make with the Louisville, Cincinnati & Lexington R. R. Co., or any other railroad, shall be valid until the same shall be ratified by the stockholders of this company."

Under its charter the Shelby R. R. Co. constructed about eighteen miles of railroad from Shelbyville, in Shelby county, Kentucky, to Anchorage, in Jefferson county, Kentucky. Its stock consisted of twelve thousand and sixteen shares, of the par value of \$50 each, of which, in the course of time, the Louisville & Nashville R. R. Co. acquired eleven thousand eight hundred and sixty-four, leaving outstanding one hundred and fifty-two shares. Under the provisions of the amendment of 1854, authorizing the sale of the road by contract, sanctioned and approved by the stockholders owning a majority of the stock, the Louisville & Nashville R. R. Co. purchased all of the rights, privileges and property of the Shelby R. R. Co. for the round sum of \$162, and notified the minority stockholders that it was ready to pay to each his proper proportion of the purchase price; whereupon the minority stockholders instituted this equitable action in the Jefferson Circuit Court for the purpose of having the contract of sale annulled and set aside for fraud, for inadequacy of consideration, and for want of proper notice. Ap-

pellant filed an answer controverting the material allegations of the petition, pleading the power of sale authorized by the amendment of 1854, and alleging the sale of the property to it under this statutory authority. The appellees then amended their petition, in the second paragraph of which they pleaded the amendment of 1869 to the charter; claim that by it the amendment of 1854 was repealed, and in lieu of an authority to sell the property by a contract sanctioned and approved by the stockholders owning a majority of the stock, there was substituted an authority to make the sale in question only upon the approval and ratification by all of the stockholders of the company, and alleging that the sale here involved had not been ratified by the minority stockholders, and was, therefore, invalid. A general demurrer to this paragraph was overruled; whereupon the appellant declining to plead further, a judgment was entered substantially as prayed for in the petition, to reverse which this appeal is prosecuted.

The question presented for adjudication is a very narrow one, although an adverse decision of it is fatal to the claim of appellant to own the road under its purchase. The discussion of it by counsel took a wider range than the point actually presented. It may be conceded that, without authority in the charter, a corporation can not sell all of its rights, franchises and property, and thus go into practical dissolution, except by the unanimous vote of all the stockholders; and that, as an abstract proposition of law, an amendment to the charter of a corporation, which has not been accepted by it, is invalid unless enacted in pursuance of a power reserved by the legislature. As the case is presented on this appeal these questions are not involved. The amendment of 1854 is pleaded and relied on by appellant; the amendment of 1869, as repealing this, is pleaded and relied on by appellees; the question, therefore, of the acceptance of the several amendments by the corporation, or, as to whether or not the appellees acquired their stock prior or subsequent to the amendment of 1854, is not here. The one question with which we have to deal is whether or not the amendment of 1869 repeals that of 1854. If it does, the judgment must be affirmed; if not, it must be reversed for a trial of the issues, an adjudication of which was rendered unnecessary by the judgment here complained of.

Two cases are relied on by appellee in favor of an affirmance of the judgment of the chancellor: First, the case of *Botts v. Simpsonville, &c.*, T. P. Co., 88 Ky., 54; second, that of *Stockholders of Shelby R. R. Co. v. Lou., Cin. & L. R. R. Co.*, 12 Bush, 62.

As to the first of these: The legislature had enacted a statute authorizing the consolidation of two turnpike corporations, and incorporating the consolidated company under the name and style of the Simpsonville, Buck Creek and Fisherville Turnpike Co. The consolidation was to be made upon such terms as the boards of directors should agree, but should not take effect until the terms were ratified by a majority of the stock of the two companies. This consolidation was held to be invalid unless approved by all the stockholders. But this case has no application to that at bar, for the reason there was nothing in the charters of these corporations which authorized the consolidation. The authority to consolidate was incorporated in the charter of the new corporation. It is said in the opinion: "There is no authority in the charter of the corporation to which he (the complaining

minority stockholder) belongs authorizing a consolidation with any other company, and in such a state of case there is no authority holding that his property or rights in one company can be transferred against his will to another company."

In the second case the very point which we have here was mooted, but not decided, the court expressly waiving it, and reversing the case on an insufficiency of notice of the meeting at which the sale was had. This brings us, then, face to face with the question whether or not the amendment of 1854 is repealed by that of 1869. It is a well-settled principle of statutory construction that repeals by implication are not favored by the courts, and will not be declared, except it be impossible to permit both statutes to stand. In the case of *Murphy, Ass'or v. The City of Louisville*, 114 Ky., 762, this rule was declared in the following language: "It is well to bear in mind that the universal rule is that repeals by implication are not favored; and, further, that when one act is local in its nature or application, or relates to particular places or persons, and the other a general one, they will both be upheld, and considered as forming one consistent whole.

"It is said in *Cope v. Cope*, 137 U. S., 686, 11 Sup. Ct., 223, 34 L. Ed., 832, that 'nothing is better settled than the repeals (and the same may be said of annulments) by implication are not favored by the courts, and that no statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction.' The same rule was recognized in *McChord v. L. & N. R. R. Co.*, 183 U. S., 483, 22 Sup. Ct., 163, 46 L. Ed." Bearing this rule in mind, we will examine the charter in question, and ascertain, if possible, whether the amendments are so antagonistic as to forbid their harmonious existence together.

By section 8 of the original charter it is provided that special meetings of the stockholders may be held between the regular annual meeting by a call made in a certain prescribed way and with certain prescribed formalities; that unless a majority in value of the stock be represented, no business is to be transacted, but the meeting is to be dissolved. This is but another way of saying that at such meetings, a majority in value of the stock being represented, the business of the meeting may be done. We have, then, as a working rule for the corporation, that a majority in value of the stock constitutes a quorum.

By section 21 of the original charter it is provided, among other things, "that it shall be lawful for the company to unite this road with any other railroad in any of said counties (through which it runs), which now is, or may hereafter be, constructed, with the consent of the directors of said other railroad company. It shall be lawful for other railroad companies, now or hereafter to be incorporated, to unite with this road, with the consent of the president and directors of this road; and it shall be lawful for the Shelby R. R. Co. to contract with any other railroad company which now is, or may hereafter be, incorporated in this State for the use of the locomotives, cars, engines, vehicles, carriages, or machines of any description whatever, belonging to each respective railroad company, and to be used upon the tracks of each respective railroad company, upon such terms and under such stipulations and conditions as may be agreed upon by the said companies contracting."

We thus find it provided by the original charter that the Shelby R. R. Co. may consolidate with other railroad companies upon such terms as the directors may agree, and that certain other very important contracts may be made by the directors without the consent of the stockholders at all. By the amendment of 1854 the power which the president and directors possessed, of consolidating with other railroad companies without the ratification of the stockholders, was modified, requiring such approval by the latter, and in addition there was given to the president and directors the power to sell, absolutely, all of the property, franchises and rights of the corporation, subject to the approval and ratification by the holders of a majority in value of the stock. By the amendment of 1869 it is provided that "no contract that the president and directors of said company may make with the Louisville, Cincinnati & Lexington R. R. Co., or any other railroad, shall be valid until the same shall be ratified by the stockholders of this company." Does this amendment require a contract of sale to be ratified by the unanimous vote of the stockholders? The language does not say so. Keeping in mind that the working rule of the corporation from 1851 to 1869 had been, in so far as the stockholders were concerned, that a majority in value of its stock should control, we are not inclined to interpret this language as abrogating this general working rule. If this construction of the language of the legislature may not be escaped, then we are forced to the conclusion that it was the intention of the legislature to seriously cripple, if not entirely destroy, what might otherwise be a very valuable right of the corporation, that of an advantageous sale or consolidation with some other company. It seems to us more reasonable to presume that the legislature meant by the expression "ratified by the stockholders of this company" only to require the directors to bring all those contracts which, under section 21 of the original charter, they were authorized to make without the approval of the stockholders, before a stockholders' meeting for ratification, not by the unanimous vote of the stockholders, but by a majority. It requires but little observation to know that the trend of railroad development has been constantly from isolated fragments of railway lines towards consolidation into grand trunk lines, and that in proportion as this has been successfully accomplished has the great usefulness of this branch of the common carriers of traffic and passengers of this country been increased. It, therefore, would seem to follow, as a natural and logical conclusion, that it is much to the interest of small and fragmentary lines that they should be enabled with the utmost facility, consistent with the preservation of the rights of the owners, to enter into contracts of consolidation, or sale, with other railroads, whereby they may become parts of great systems of interstate traffic, rather than remain small, isolated lines. To require the unanimous vote of all the stock of a railroad to unite with another railroad, or to sell its franchises out to another railroad, if that be desirable, is to render this method of developing the interest of the corporation impracticable, as it simply provides an opportunity for a small number of the stockholders to entirely block the interest of the great majority of the stock for their own selfish purposes. It needs but little understanding of human nature to believe that the opportunist will be ready whenever the opportunity is presented.

It is not intended by these views to reflect in any way upon the motives

of the minority stockholders in the case at bar. We are simply seeking to express a general principle, the existence of which may throw light upon the intention of the legislature in the matter of the amendments to the charter in question. It is not to be believed that the legislature intended to jeopardize the interest of this small railroad by making impossible for it ever to become a part of a grand trunk railroad, by requiring its contracts looking to the consummation to be ratified by the unanimous vote of its stockholders. Such an intention would be to reverse the general policy of railroad interest and expediency, as demonstrated by the history of this system of common carriers for half a century.

As there is danger of opportunism in requiring the unanimous ratification by the stockholders of the contracts of the railroad, so, on the other hand, is there the correlative danger of oppression by the majority of an unwilling minority where consolidation is desired and sought. The remedy for this evil is found in the power of the chancellor to scrutinize with jealous eye all of the acts and doings of the majority, and especially such, as in the case at bar, where they contract with themselves. It is entirely within the province of the chancellor to look into the contract in question, and if the majority have acquired the property of the minority at an inadequate price, he may require them to do justice by paying to the minority their proportion of the real value of the property acquired by the contract under discussion. In this way the interests of both may be subserved by denying to the minority the opportunity to selfishly stand in the way of the material advancement of the corporation, and denying to the majority the right either to depress or defraud the minority by acquiring their property for an inadequate price. It is believed that the principles herein enumerated will enable those having the substantial interest of the road at heart to safely steer it between the scylla of factious opposition on the one hand and the charybdis of greedy rapacity on the other.

The judgment is reversed for proceedings consistent with this opinion.

FIELDS v. VALLANCE, &c.

(Filed May 30, 1905—Not to be reported.)

1. Attachments—Parties to actions—Where a defendant in an attachment proceeding sued the sheriff for damages because of the loss of his property while in the officer's possession, the latter can not complain that the judgment was for the entire amount of the property where the attaching creditor was made a party and a lien was adjudged in his favor for the extent of his debt. Such judgment protects the officer from further action either by the creditor or debtor.

2. Principal and agent—The act of a deputy sheriff in levying an attachment was the act of the sheriff, and an allegation in appellee's petition that the loss sued on was occasioned by the sheriff's agent, when the proof showed that the employment was by the deputy sheriff, is within the rule that facts may be pleaded according to their legal effect, and the act of the agent in this case was that of the principal.

Thomas R. Brown for appellant.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Hobson.

In November, 1900, Harvey, Hagan & Co. brought suit in the police court of the city of Ashland against John Vallance for a debt of \$91.60, and took out an attachment which went into the hands of a deputy of appellant, Fields, sheriff of Boyd county, and was levied by him on a boat and its contents belonging to Vallance, then in the Ohio river. The deputy sheriff took charge of the boat and put it in the keeping of a man named Ferguson, and while it was in Ferguson's care it was sunk and wrecked.

The wreck was sold under the attachment and brought but little. Vallance then brought this suit against Fields, as sheriff, for the loss of his boat and contents, charging that the loss was due to the negligence of the sheriff's agent, Ferguson. Harvey, Hagan & Co. filed their petition in the action to be made parties, asserting their right to the extent that their debt was unpaid. The allegations of negligence were denied, and on final hearing the jury returned a verdict in favor of the plaintiff for \$200. The court gave judgment on the verdict, but adjudged \$100 of the amount subject to the lien of Harvey, Hagan & Co. for the remainder of their debt. From this judgment Fields appeals.

It is insisted for him that Harvey, Hagan & Co. had a lien on the boat, and, therefore, Vallance could recover only for his own loss as the sheriff was liable to Harvey, Hagan & Co. to the extent of their debt, if liable at all. This objection we think is without merit, as Harvey, Hagan & Co. were made parties to the action, and were adjudged enough of the recovery to cover their debt. The judgment protects Fields from any further action, either by them or by Vallance. The whole question of his liability has been determined in this case, and he was not prejudiced by the form in which the matters were pleaded. No opinion is expressed as to the right of action of Harvey, Hagan & Co. without joining Vallance.

It is also insisted for him that there was a variance between the allegation and proof, in that it was alleged that the loss was due to the negligence of the sheriff's agent, Ferguson, when the proof showed that the attachment was in the hands of a deputy sheriff, and that the deputy put Ferguson in charge of the boat. The rule is that facts may be pleaded according to their legal effect. The act of the deputy was the act of the principal, and might properly be so declared on. The deputy was but the shadow of his principal, deriving his authority from him and acting for him, and it is perfectly clear from the record that appellant was in nowise misled, but understood precisely what was meant by the complaint. Section 129 of the Civil Code provides: "No variance between pleadings and proof is material which does not mislead a party, to his prejudice, in maintaining his action or defense upon the merits. A party who claims to have been so misled must show that fact to the satisfaction of the court; and thereupon the court may order the pleading to be amended, upon such terms as may be just."

Section 184 further provides: "The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

994 BD. OF ED. OF WINCHESTER V. CY. OF WINCHESTER.

The instructions of the court aptly submit to the jury the issue raised by the defendant's amended answer, which was taken as controverted of record. In this amended answer appellant made the following allegations: "The defendant says said boat was, as afterwards learned, rotten and in bad shape when he took it into his possession, and that he used due care in protecting it, but it could not, with ordinary care, be saved. He said the Ohio river raised to a high stage and he could not keep said boat from sinking."

Judgment affirmed.

BOARD OF EDUCATION OF WINCHESTER v. CITY OF WINCHESTER.

(Filed May 30, 1905.)

1. Cities—Incurring indebtedness—Voting thereon—Two-thirds voting—Constitutionality—Under section 157 of the Constitution, providing that "no city * * * shall be authorized or permitted to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election held for the purpose," where under an ordinance of a city of the fifth class the proposition was submitted to the voters of said city to incur an indebtedness of \$15,000 and issue bonds therefor, for the erection of a school building therein, more than two-thirds of the voters voting on said proposition were cast in favor thereof, the proposition was adopted, although the number of votes cast in favor of such proposition was not equal to two-thirds of all the votes cast at said election on other questions then voted on.

2. Same—Legislative restriction—Where the Constitution authorizes the incurring of an indebtedness by a city, county or taxing district by the assent of two-thirds of the voters of such city, county or taxing district, voting thereon, the legislature can not add to such constitutional restriction, and the case of *Belknap v. Louisville*, 99 Ky., 474, in so far as it holds otherwise is overruled.

J. M. Stevenson for appellant.

Pendleton & Bush for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Hobson.

The board of education of the city of Winchester, Ky., having by resolution requested the mayor and board of council of the city to incur a debt not exceeding \$15,000 for the purpose of erecting and equipping additions to the existing school buildings and to issue bonds therefor, the council adopted an ordinance submitting the question of incurring the debt to the people at the next regular election, which was held on November 8, 1904. At that election 633 votes were cast in favor of incurring the indebtedness and 300 were cast against the proposition. The highest number of votes cast in the election was 1,421. It will be thus seen that more than two-thirds of the votes cast on the proposition were in favor of it, but that not two-thirds of the electors voting at the election voted for it. Section 157 of the Constitution in part provides: "No county, city, town, taxing district or

other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for the purpose; and any indebtedness contracted in violation of this section shall be void."

In *Belknap v. Louisville*, 99 Ky., 474, it was held, construing this provision of the Constitution, that the assent of two-thirds of the voters actually voting at the general election when the question is submitted is necessary to carry it and not merely two-thirds of those who vote upon the question. But in *Montgomery County Fiscal Court v. Trimble*, 104 Ky., 629, this case was overruled, and it was held that the assent of two-thirds of the electors voting on the subject is sufficient to carry the proposition without regard to the number of votes cast for other purposes at the election. In the *Belknap* case it was also held that additional restrictions might be imposed, and that aside from section 157 of the Constitution the statute under which the question was submitted might require the assent of more than two-thirds of the electors voting at the election, and not merely of those voting on the question. In that case it was further held that the statute then before the court required the assent of more than two-thirds of all the electors voting at the election. This part of the opinion was not overruled in the *Trimble* case as the statute there only required the assent of more than two-thirds of those voting on the subject. It is insisted for the appellee that the statute and ordinance under which the vote here in contest was taken are substantially the same as in the *Belknap* case, and that, therefore, the rule there announced applies. The circuit court so held, and the board of education appeals.

Every provision of the Constitution is mandatory. When it is provided that indebtedness to a certain amount shall not be incurred without the assent of two-thirds of the electors voting at an election to be held for that purpose it necessarily follows from the constitutional provision that such an indebtedness may be incurred with the assent of two-thirds of the voters. The legislature can neither subtract from nor add to the constitutional requirement. The constitutional provision regulates the subject, and removes it entirely from legislative control. In *Cooley on Constitutional Limitations*, side page 64, it is said: "Another rule of construction is, that when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the Supreme Court of Maryland that where the Constitution defines the qualifications of an officer, it is not in the power of the legislature to change or superadd to them, unless the power to do so is expressly or by necessary implication conferred by the Constitution itself. Other cases recognizing the same principle are referred to in the note."

Again, on side page 79, it is said: "We are not, therefore, to expect to find in a Constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which

can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end. Especially when, as has already been said, it is but fair to presume that the people in their Constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication."

The statute relied on is subsection 34 of section 3490, which provides that the debt may be created "If, upon a canvass of the votes cast at such election, it appears that two-thirds of all the qualified voters in such town shall have voted in favor of incurring such indebtedness." The usual construction of such statutes, where no means are provided to ascertain the number of votes in the municipality, is that it refers to the votes cast on the question. (State v. Langlie, 5 N. Dak., 594; County of Cass v. Johnston, 95 U. S., 360; St. Joseph's Township v. Rogers, 16 Wall., 1694.)

The rule is also that a statute will, if possible, be construed to be constitutional rather than the contrary. But, however this may be, we are of opinion that the legislature can add nothing to the constitutional restriction, and the Belknap case, in so far as it holds otherwise, is overruled.

Judgment reversed and cause remanded for further proceedings consistent herewith.

LINN V. HAGAN'S ADM'R.

(Filed May 30, 1905.)

Process—Service—Witness attending court—Nonresident—Validity of service—A nonresident of this State, who has been appointed as administratrix of a decedent in this State, can not claim to be exempt from service of process on her in this State in an action against her as such administratrix, on the ground that she is in this State in obedience to a subpoena as a witness to testify on a trial.

Greene & VanWinkle and N. A. Halstead for appellant.

F. Hagan for appellee.

Appeal from Bullitt Circuit Court.

Chief Justice Hobson delivered the following opinion on motion to quash process:

On December 21, 1903, F. J. Hagan recovered a judgment against J. H. Linn in the Jefferson Circuit Court. On March 21, 1905, Linn filed a transcript of the record in this court and filed with the record a statement of the parties to the appeal, from which it is shown that F. J. Hagan is dead and that Mary J. Hagan is the administratrix of his estate. Process was issued upon the appeal and served upon the administratrix in Bullitt county. She has entered a motion to quash the process, and in support of the motion has

Filed an affidavit in which she says that when the process was served upon her she was in Bullitt county as a witness for the Commonwealth to testify on the trial of one Barbour, indicted for the murder of her husband, F. J. Hagan; that she was ordered by the court to attend, and in obedience to the order of the court came from her home near Montgomery, Ala., to testify on the trial. Section 542 of the Civil Code is relied on: "A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning or attending, in obedience to a subpoena."

This section has no application. It refers only to the venue. While a witness may not be sued in a county in which he does not reside by being served with a summons in that county while attending in obedience to a subpoena, he may be sued in his own county or in a county where the court would otherwise have jurisdiction, and may be served with a summons while attending under the subpoena. The purpose of the section is simply to prevent the courts of the county where a witness is in attendance under a subpoena from acquiring jurisdiction over him by the service of process in that county while he is there in obedience to the subpoena.

In *Lewis v. Miller*, 24 Ky. Law Rep. 2583, the heir at law under the will had come to Kentucky to testify as a witness in an appeal which she had taken from the order of the county court probating her ancestor's will, and while here was sued by a creditor of the estate. It was held, after an examination of the authorities, that she was not exempt from the service of the process. The same conclusion was reached by the Maryland Court of Appeals in *Mullen v. Sanborn*, 25 L. R. A., 721. In a note to that case, at page 781, it is said: "A resident of another State or county who has in good faith come into a State as a witness to give evidence in a cause is exempt from service of process for the commencement of a civil action against him."

Many authorities are collected supporting the text. But this case does not come within the rule. The exemption of the witness, when allowed, is a personal one. In this case Mrs. Hagan is not sued personally. She is only sued as administratrix. No personal judgment can be rendered against her. She has been appointed administratrix under the laws of this State, and there is no reason why she may not be sued as administratrix when she is in the State.

Our statutes require that if a personal representative reside out of the State, he shall be removed. (Kentucky Statutes, section 8846.) It being contemplated by our laws that a personal representative shall reside in the State, appellee, deriving her authority from these laws, can not, while exercising the office conferred by them, be allowed, on grounds of public policy, to set up her nonresidence to avoid service of process in our courts.

The motion to quash the process is overruled.

SHEMWELL, &c v. CARPER'S ADM'R., &c.

(Filed May 31, 1905—Not to be reported.)

1. Divorce and alimony—Verbal contract in settlement of claim for alimony—Death of husband—Where the husband died before a judgment of

divorce and alimony that had been agreed upon between him and his wife was rendered, she owned a potential right of dower in his lands, and cannot be barred of this by a verbal contract, and the contract relied upon in settlement of her claim being void as to the land, it was void as to all of his property, but the court, instead of adjudging a sale of the part of the land belonging to her and the payment of the proceeds to her, should have allotted dower to her for life.

8. Lands—Conveyances—Unexecuted contract—Where one conveyed land upon a condition which was not fulfilled and died with the legal title in him, a delivery of the deed by his widow can not be made without the consent of all of the parties to the transaction, because she can not, by her election, make a contract for them, and the purchaser, under such a contract, is entitled to a return of the money paid by him, with interest, and must be charged with a reasonable rent for the land while he had it in possession.

Oliver & Oliver and J. G. Husbands for appellants.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Hobson.

H. B. Carper and Frances B. Carper were husband and wife. On August 1, 1900, when they had been married about twenty years, and she was over sixty years old, she filed a suit against him for divorce and alimony in the sum of \$3,000, on the ground of cruelty and adultery on his part. Soon after that suit was filed he endeavored to persuade his wife to be reconciled with him, and after numerous efforts in this direction had failed, he made a verbal contract with her, settling the suit, by which he agreed to pay her \$3,000, and paid her \$2,800 of the amount. The only written evidence of the contract was that he executed to her a note in which it was recited that it was given for the balance of the \$3,000 to be paid her in compromise of the divorce case then pending. Before the next term of court came on at which the parties expected a judgment to be entered granting her a divorce, which was all that was left open in the action, H. B. Carper died, and this suit being filed to settle his estate, Frances B. Carper claimed her share as widow. He left several tracts of land and something like \$7,000 of personal estate. He had no children, and she claimed to own absolutely one-half of the personal estate and dower in the realty. The heirs at law, who were his collateral kindred, set up the parol contract of settlement between her and her husband in bar of her claim. The court held the contract void and adjudged her the share in the real and personal estate she claimed, charging her with the \$2,800, which she had received, and ordered a sale of the real estate and the payment to her of the percentage of the proceeds which represented her interest in the land. From this judgment the heirs at law appeal.

Frances B. Carper owned a potential right of dower in the lands of her husband. She can not be barred of this right by a verbal contract. The contract being void as to the land was void in toto, and the court properly disregarded it, charging her with the amount she had received under it. But the court erred in ordering a sale of the land and adjudging her absolutely out of the proceeds the value of her life estate. A widow can not have a sale of the land of her husband on her petition in order to secure ab-

olutely a certain part of the proceeds. She is only entitled to an allotment of dower for life. The circuit court erred in not so adjudging, and so much of the judgment as directs a sale of the land is reversed.

After the compromise had been made with his wife H. B. Carper proposed to sell to A. C. Johnson and W. S. Oliver a tract of land for \$1,680. They had \$500 to pay on the land and arranged with W. M. Gold to furnish them \$1,180. The parties agreed to meet at the county seat on a given day and close up the transaction. Carper, Johnson and Oliver met, but Gold was not there. Carper tendered them a deed, but they declined to accept it unless it was satisfactory to Gold, and refused to give their note to Carper. Finally, at Carper's suggestion, it was agreed that they should pay him the \$500, and that the note and deed should be left at the bank, and if they were satisfactory to Gold and were accepted by him, the transaction should be deemed closed, but that if Gold did not accept the deed and note, then Carper was to pay back the \$500, and the trade was to be off. They called a bystander to witness the transaction, and pursuant to it the papers were left at the bank. Gold came in a few days and refused to accept the deed, because Mr. Carper had not signed it, and the description of the land was unsatisfactory. The deed and note remained at the bank. In the meantime Carper had been taken very sick, and when he heard that Gold had declined to accept the deed, was too sick to do anything about the business. Things thus remained until after Carper's death, when one Pace, who was acting as Carper's administrator, went to the bank and got the papers. Johnson and Oliver took possession of the land under the arrangement with Carper, and after his death they filed a suit to recover the \$500 they had paid and have the contract declared incomplete. On the other hand, the administrator filed a suit against them on the note and to enforce his lien on the land. The two actions were consolidated and on final hearing the court gave judgment in favor of the administrator, and Oliver and Johnson appeal.

Under the evidence the deed was never delivered or accepted. It was simply left at the bank upon a condition which was not fulfilled, and when Carper died the legal title to the land was in him. Some six months after this his widow acknowledged the deed with a view of curing the defect in the title; but she can not, by her election, make a contract for the parties, nor, when the deed was not delivered in Carper's lifetime, can a delivery be made after his death without the assent of all parties in interest. Johnson and Oliver are entitled to a return of the \$500 which Carper received from them under the contract, with interest, and must be charged with a reasonable rent of the land while in their possession.

Judgment reversed and cause remanded for further proceedings consistent herewith.

DENHAM v. THE WESTERN UNION TELEGRAPH CO.

(Filed May 26, 1905—Not to be reported.)

Telegram—Failure to deliver—Action by remote relative of deceased—Mental suffering—Nominal damages—In an action against a telegraph company by an aunt of deceased, to recover damages for mental suffering caused by having to keep the corpse two days and nights by reason of the delay of

the company in sending telegrams to relatives of the deceased, while the court properly struck out so much of the petition as sought to recover for mental suffering, leaving alone the question of nominal damages, it was error in the court to then sustain a special demurrer to the petition for want of jurisdiction of the amount in controversy, as the plaintiff was entitled to have the question adjudicated, although the court is of the opinion that there is no merit in her claim.

W. A. Morrow for appellant.

Richards & Ronald and George H. Fearons for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Paynter.

On March 18, 1902, Vessie Simpson was injured by an explosion at Somerset, Ky., from which injuries he died within an hour after the accident. The appellant, Laura B. Denham, was his aunt. His father and mother lived at Danville, Ky. Immediately after the accident the appellant sent to decedent's father, Monroe Simpson, the following message:

"Somerset, Ky., March 18, 1902.

"Monroe Simpson,

"Danville, Ky.:

"Come at once. Vessie is blown up.

"LAURA B. DENHAM."

After his death Cornelia Cowan, at the request of the appellant, sent deceased's mother, Lizzie Simpson, the following message:

"Lizzie Simpson,

"Danville, Ky.:

"Come at once. He is dead.

"CORNELIA COWAN."

It is averred that the appellee failed to deliver the messages by reason of carelessness and negligence; that she did not know what disposition to make of the body and was compelled to keep it two days and nights, during which time she experienced great mental suffering and anxiety. The court sustained a motion to strike from the petition all allegations in regard to mental anguish. It also sustained a special demurrer to the petition. To review that action of the court this appeal is prosecuted.

Since the Chapman case, 90 Ky., 265, this court has been committed to the doctrine that an action will lie against telegraph companies in damages for mental suffering, caused by its failure to deliver special messages by reason of which the sender or person addressed is prevented from attending at the bedside, at the death of, or at the funeral of, a near relative. The court has only allowed recoveries to those of the first degree relationship. (Robinson v. Western Union Telegraph Co., 24 Ky. Law Rep., 52; Western Union Telegraph Co. v. Steenberger, 21 Ky. Law Rep., 1289; Western Union Telegraph Co. v. Wilson, — Ky. Law Rep., —.) This is not an action to recover damages because the sender of the message was not permitted to be at the bedside of a sick relative, or to attend the funeral of a near relative, but is to recover damages because she was required to keep the body of a relative for two days and nights. Even if such an action could have been maintained for mental anguish by a near degree relative on the averments

of the petition, still the appellant is not entitled to recover, because she did not sustain that relationship. There are many breaches of contracts which occasion mental suffering, but no action in damages will lie therefor.

An action would lie for nominal damages for a breach of the contract. (Talferro v. Western Union Telegraph Co., 21 Ky. Law Rep., 1299.) The court struck out the averments of the petition by which it was sought to recover damages for mental anguish, which left alone the question of nominal damages. It is insisted that this court has no jurisdiction of the appeal, because the amount remaining in controversy is less than \$200, and it is also insisted below and here that the circuit court did not have jurisdiction of the real amount in controversy, because the most that could be recovered was the cost of the messages. The circuit court took this view of it, and sustained a special demurrer to the petition. This was done upon the idea that the circuit court could be compelled to take jurisdiction of petty suits, because there was attached to it a claim for damages which had no foundation in law. The appellant claimed she was entitled to recover for mental anguish, and the amount so claimed gave the court jurisdiction. She was entitled to have the question adjudicated, although the court is of the opinion that there is no merit in her claim.

The judgment is reversed for proceedings consistent with this opinion.

VORIS' EX'ORS, &c. v. GALLAHER.

(Filed May 31, 1905—Not to be reported.)

1. Apportionment warrant—Where no apportionment warrant was issued against the owner of property no lien for street improvement exists, and the issual of such warrant against one person does not create a lien upon the property of a stranger.

2. Limitation—Where more than five years elapsed between the issual of the apportionment warrant and the filing of the amended petition making the vendor of appellee a party, the plea by him of limitation was conclusive against appellant.

Lane & Harrison for appellants.

W. O. Harris for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

This action was instituted by appellant's testator August 9, 1895, upon apportionment warrants for the improvement of Oak street. The action was instituted against several of the property owners abutting on that street. One of the defendants was named in the caption of the petition as follows: "Unknown defendants, being the heirs or devisees of S. A. Miller, deceased." The allegation of the petition was that an apportionment warrant upon seventy-five feet of ground on that street was issued December 6, 1894, against "the unknown defendants, the heirs or devisees of one S. A. Miller, then deceased, and who were then and are now the owners, etc." Upon this petition a warning order was taken and an attorney appointed to defend for Miller's heirs. On March 8, 1900, judgment was rendered ad-

judging appellants a lien on the seventy-five feet alleged to belong to Miller's heirs, and directing a sale of it, but no sale was made. On October 6, 1900, an amended petition was filed, alleging that one W. A. Bradford claimed an interest in the land, and he was made a party by warning order. The bond required to be given to nonresidents was also executed to Bradford. On May 18, 1901, another judgment was rendered adjudging and enforcing a lien against the seventy-five feet of ground. On December 21, 1901, D. C. Gallaher, now appellee in this court, appeared and tendered his petition to be made a party, together with a bond for cost, and on his motion the judgment of May 18, 1901, was set aside, and he filed his answer, in which he alleged that the property described in the petition once belonged to Miller, but was conveyed by him to Bradford on May 24, 1876, by deed duly recorded in the Jefferson County Court clerk's office, in deed book No. 201, page 9, and that Bradford had conveyed the same to appellee on October 26, 1901. It was also alleged that although Bradford was the owner of this lot during the entire period covered by the council's proceedings and the pendency of the suit, no apportionment warrant had ever issued against him and no steps taken to make him a party until October 6, 1900. It was also alleged that more than five years had elapsed between the issuing of the apportionment warrant against Miller's heirs and the filing of the amended petition making Bradford a party, and he also pleaded the five years' statute of limitation.

The appellants replied to this plea, and in substance alleged that the conveyance from Miller to Bradford was made to cheat, hinder and delay the creditors of Miller, and that Bradford asserted no claim under it until this suit was brought, and never paid any taxes on it, and that appellee Gallaher was cognizant of these facts before his alleged purchase; that Bradford concealed his claim to the property, and by such concealment so obstructed the bringing of this action against him as to defeat and prevent the application of the statute of five years' limitation as a defense to him. Appellee filed a rejoinder, which traversed the allegations of the reply. On these issues the case was tried, no proof was offered by either party, and judgment was rendered setting aside the judgment of May 18, 1901, and dismissing the petition as against Gallaher. From this judgment this appeal was taken.

We are of the opinion that the lower court did not err, first, for the reason that no apportionment warrant was ever issued against Bradford, the owner of the property at the time the improvements were made and proceedings had to enforce it. Bradford's ownership of the property was evidenced by a conveyance from Miller to him, executed May 24, 1876, and which was duly recorded in the county clerk's office of Jefferson county. An attempt was made in the reply to impeach his title for fraud, but no proof was offered in support of the allegation, which was controverted. The statutes under which the improvement proceedings were had provides that "the lien shall exist from the date of the apportionment warrant." This lien is created by statute, and if no apportionment warrant is issued no lien exists. The issual of the apportionment warrant against one person does not create a lien upon the property of another, a stranger. If the warrant, by mistake, is issued against one person, the party holding the warrant may have

it corrected by the council, if undertaken within five years. (Gosnell v. City of Louisville, 104 Ky., 208; Kerwin v. Nevin, 28 Ky. Law Rep., 947.) In this case there was never any attempt to have the apportionment warrant corrected. Second, the plea of limitation was conclusive against the appellant. The case is similar to that of Kerwin v. Nevin, supra. In that case the apportionment warrant was issued against E. E. Kerwin, and judgment was obtained against him. Afterward it was discovered that his wife, Mary E. Kerwin, owned the property, and another apportionment warrant issued against her and suit was brought upon it, to which she pleaded limitation, and that the plaintiff's claim had been merged in the judgment against her husband. The court held that there was no merger, but that the plaintiff's claim was barred by the lapse of five years.

Appellant contends that the court had no jurisdiction to set aside the judgment against Bradford at the instance of Gallaher, his vendee. If this contention be correct, it would merely result in a retrial of this case, with Bradford intervening as a nominal party for the use and benefit of Gallaher, the appellee. But we are of the opinion that section 29 of the Code authorized the procedure resorted to by appellee, which, in so far as applicable to this case, in substance says: In an action or proceeding for the subjecting of real property under an attachment or other lien, any person claiming a right to the property may file in the action his verified petition, stating his claim and controverting that of the plaintiff, whereupon the court may order him to be made a defendant, and upon that being done his petition shall be treated as his answer. But if he be a nonresident, he must give security for costs. There being no adverse possession of the land, Bradford had a perfect right to sell to appellee, and he had the right to intervene under this section and section 18, which requires actions to be prosecuted in the name of the real party in interest.

Under section 474 Bradford, being only constructively summoned, might have, within five years, appeared in the action and have had it retried, and it is true that appellee might have intervened in this action in Bradford's name for his (appellee's) benefit, but, in our opinion, this was unnecessary, as he was the vendee of Bradford, and the real and only party in interest.

Wherefore, the judgment of the lower court is affirmed.

HACKNEY, &c. v. HOOVER.

(Filed May 31, 1905—Not to be reported.)

1. Settlement of estates—Action to surcharge settlement—Res judicata.—In an action against a trustee by the cestui que trust to surcharge a settlement and to obtain a complete settlement of the trustee's accounts, everything that was litigated, or might have been, in that action is concluded by the judgment rendered in it, and the claim that the trustee failed to charge himself with certain sums is res judicata.

2. Same—Fraud—Collateral attack—Such a judgment can not be attacked collaterally where the fraud complained of lay back of the trial, but only where it related to the obtention of the judgment.

John M. Wilkins and William Cromwell for appellants.

L. A. Faurest for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge O'Rear.

In an action against a trustee by the cestui qui trust to surcharge certain settlements made by the trustee in the county court of the proper county, and to obtain a final and complete settlement of the trustee's accounts in which the trust was terminated, everything that was litigated, and everything that properly might have been litigated, in that action is concluded by the judgment rendered in it. Consequently a claim that the trustee had omitted certain duties with respect to the trust estate, whereby the cestui que trust alleges that she sustained damages, and the further claim that the trustee failed to charge himself with certain sums which he ought to have received on behalf of the cestui que trust, are matters embraced by the rule of res judicata, brought into force by the judgment. Even though it were a fact that the trustee had fraudulently failed to charge himself properly with all sums that he should have been charged with in his settlements, still the judgment in the suit for a settlement and to surcharge the previous settlements, would be conclusive as between the parties until it was reversed or set aside in a direct proceeding.

Though it be conceded that the rule exists in this State that a judgment obtained by fraud can be impeached collaterally by a party to the record, it can not be applied to this case, because that rule, where it is in effect, is applicable only where the fraud complained of was in the matter of the obtaining of the judgment, and not where it lay back of the trial, else there would never be an end to litigation where fraud had entered into the transaction about which the litigation was set on foot. We deem it not improper to add that the facts alleged in this case do not show in the slightest that there was fraud anywhere on the part of appellee.

Judgment affirmed.

LEE v. NEWTON, &c.

(Filed May 31, 1905—Not to be reported.)

1. Attachment bonds—Power of court under—Where a defendant in possession of attached property executed bond to perform the judgment of the court, the court did not lose power over the attached property by reason of the execution of the bond.

2. Same—Sale of attached property—Where the record of a sale of attached property is silent as to why it was sold, and it is not shown that any proof was heard upon the motion for an order of sale, or that the sureties in the attachment bond were insolvent, and where the issues were incomplete and not tried, it was error to direct a sale of the attached property.

N. T. Howard for appellant.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Nunn.

On the 12th of February, 1903, the appellant executed a note for \$378.50 to the appellee, W. A. Newton, and to secure the payment of this note he exe

outed a mortgage on four mules, describing them. On the 8th of August, 1904, the appellee, Newton, together with his co-appellee, the Morgantown Bank, who appeared to have some interest therein, instituted this action to enforce this mortgage lien, and with the view of obtaining a specific attachment of the mortgaged property they made the following allegations: "Says defendant had worked said mules hard and by reason of their age and being worked down they will not now bring plaintiff's debt, interest and cost, and that if defendant is allowed to continue to work them their value will be decreased, and plaintiffs will thereby lose more of their debt. And plaintiff says he has reason to believe, unless prevented by the court, the property will be sold, concealed or removed from the State."

The appellees obtained the attachment under order of the county judge by the execution of the bond required. This order of the county judge was made on the 11th day of August, 1904, and the attachment was issued and levied by the sheriff on the four mules, and on the next day the county judge made the following additional order: "The defendant may retain the property taken under the specific order of attachment herein upon his executing bond herein in the sum of \$450, as provided in section 252, Civil Code." On that day the appellant executed the following bond in the presence of the sheriff, which was attested by him, and was signed by J. B. Lee, with two sureties, J. L. Kiester and Luther Gray: "We bind ourselves to the plaintiff, W. A. Newton, etc., in the sum of \$450, that the defendant, J. B. Lee, shall perform the judgment of the court in the action, or that the property attached in the action, or its value, shall be forthcoming and subject to the order of the court. This August 12, 1904."

On the first rule day after the filing of the petition the appellant filed his answer, set off and counterclaim, in which he admitted the execution of the note and mortgage, and alleged that, in addition to the two credits endorsed on the note, of \$19 and \$26, he was entitled to other credits to the value of \$428, setting forth in the answer the items or bill of particulars. He also denied that he had injured the mules by overwork or hard work, or that they were worth less than appellees' debt, or that if he should be permitted to work them their value would decrease below the debt of the appellee. He denied that he was about to sell, conceal or remove the mules from the State, or that the appellees had any reason to believe, or did believe, that unless prevented by the court he would sell, conceal or remove them from the State.

On the 12th of October, 1904, the appellees filed their reply in open court, controverting the additional credits claimed.

On the 19th of October, 1904, and during the same term of court, the following order was made in the case: "On motion of plaintiff it is adjudged by the court that the mules mentioned in the petition and mortgage be sold, said mules being described as follows: Four dark horse mules, Jake, Mike, Jim and Tiger, Tiger and Mike being about twelve years old, gotten from G. W. Matney; Jim ten years old, known as the Haynes mule; Jake about twelve years old and being the Turner mule; and G. E. Willis, the master commissioner of this court, is directed to sell said mules, and he will advertise the time and place of sale and sell same at the courthouse door in Morgantown, Ky., as personal property is required to be sold under execution,

He will take good bond for the purchase money, payable to himself, and defendant, J. B. Lee, is directed to deliver the possession of the mules to the commissioner aforesaid for the purpose of sale upon his demand, and upon his failure to do so the sheriff is directed to deliver the mules to the commissioner for sale, and the commissioner will report the sale to the next term of this court, and defendant Lee is given thirty days to rejoin to plaintiff's reply, and this cause is continued. To all of this judgment and motion the defendant, Lee, excepts and objects and prays an appeal to the Court of Appeals, which is granted."

The appellant superseded this judgment and is here on appeal. In cases of a defendant or person in possession of attached property executing bond to perform the judgment of the court the power of the court or its officers over the property attached ceases and the plaintiff can look only to the bond for his indemnity; but in cases where the bond is to the effect that the judgment of the court shall be performed, or that the property or its value shall be forthcoming and subject to the order of the court, the lien created by the attachment and the power of the court over the attached property subsist and continue as effectually for all purposes as if no bond had been given. (Bell v. Western River Imp. and Wrecking Co., 3 Met., 564.) The bond in this case is similar to the one last above mentioned, and the court did not lose its power over the attached property by reason of the appellant having given the bond referred to.

By section 218 of the Code it is provided: "The court in which the action is pending, or during vacation the judge thereof, or if he be absent from the county the presiding judge of the county court, shall make proper orders for the preservation and use of attached property; and for the sale of it if by reason of its perishable nature or the cost of keeping it a sale would be beneficial to the parties."

The court in the case of Dunn, &c. v. Salter, &c., 1 Duv., 847, in commenting upon this section of the Code, used the following language: "The evidence upon which the inferior courts act in relation to these sales is not required to be in writing, and incorporated in the record. The evidence adduced on the motion to sell the personal property in this case, we must presume, in the absence of anything to the contrary, fully authorized the sale."

There is not an intimation in the record why the order of sale of this property was made by the court, nor does the order of the court show that there was any proof heard on the motion, or that the sureties on the bond of appellant were insolvent or unable to perform their obligation. The record shows that the appellee's claim was controverted and the issues incomplete and not tried; that appellant had executed a good bond for the forthcoming of this property or its value, subject to the order of the court, and there is not the slightest intimation in the record that there was any danger of probable loss to the appellees by permitting the property to remain in the possession of the appellant until the issues were tried. In view of these undisputed facts we are of the opinion that the court erred in directing a sale of the appellant's mules. If the record had shown that proof was heard on the trial of the motion, we would presume the evidence author-

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ized the court's action in the matter. (Weathers v. Mudd, &c., 112 B. M. 112.)

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

**HUMBOLDT BUILDING ASS'N CO., OF CINCINNATI, OHIO v.
DUCKER'S ADM'R.**

(Filed May 31, 1905—Not to be reported.)

Former opinion of court of appeals—(See Kentucky Law Reporter, volume 22, page 1073, and volume 26, page 981, above styled case.) The lower court having properly construed the two opinions in this action above cited, and the evidence not being so conflicting as to warrant this court in disturbing the verdict upon the third trial, and the credibility of the evidence being for the jury, the judgment must be affirmed.

W. W. Helm and Sam C. Bailey for appellant.

Wright & Anderson and H. Gunkel, Jr., for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Hobson.

John S. Ducker was the attorney of the Humboldt Building Association and as such received from the association the amount of a loan made by it to Helen Morrison on a mortgage executed by her. He was to pay off the liens on the property and pay the balance of the money to Mrs. Morrison. A house had recently been built on the lot and he paid the money to the contractor without paying any attention to the subcontractors or materialmen. The contractor failed to pay them and they asserted liens upon the property, which were sustained by the court. Ducker having died in the meantime, the association filed this suit to recover of him for its loss. The court sustained a demurrer to its petition, but on appeal the demurrer was held not well taken. The difficulty in the case grew out of a special act which Ducker thought to be void. This court, after laying down the rule that lawyers are not required to be infallible, but must only use such skill and diligence as men of the legal profession commonly possess, added this: "It is stated in argument that the local act in this case was invoked at a time when the bar of Kenton and Campbell counties were in grave doubt whether it had been repealed by the new Constitution which had but lately been adopted in this State, and that the attorney exercised his judgment, now seem to have been erroneously, but honestly. That, however, is a matter of defense. Whether the question raised actually existed in the minds of the profession, then, is one of fact. If it did, and the attorney honestly believed that the subcontractors had no lien because of that fact, then the jury may be warranted in finding for the defendant. But if the attorney was ignorant of the existence of the statute, or had forgotten it at the time of the transaction; or, if knowing it, carelessly failed to acquaint himself with the fact as to the subcontractor's claim for liens till after he had paid out appellant's money, we are of opinion that he would be liable. However, the existence or non-existence of these actionable facts, as well as of

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those constituting the defense, are such as properly should be found by a jury under appropriate instructions, or by the trial court if a jury is not demanded." (Humboldt Building Association Co. v. Ducker's Ex'tx, 23 Ky. Law Rep., 1078.)

On the return of the case to the circuit court there was a trial, and at the conclusion of the plaintiff's evidence the court peremptorily instructed the jury to find for the defendant. This court again reversed the judgment, and, among other things, said: "The evidence introduced by appellant tendered to support the allegations of the petition, and, therefore, constituted a prima facie case. The peremptory instruction was erroneous. The trial judge did not write an opinion, and we are, therefore, at a loss to know upon what ground he based his ruling. It is argued by counsel for appellee, however, that the circuit judge was of opinion that the duties of the attorney, John S. Ducker, in the matter of examining titles and perfecting mortgage liens on behalf of his client, the appellant association, extended only to the examination of the public records of the county where the property was situated; that as the lien which was afterward adjudged against the property to be superior to that of appellant's mortgage lien was not one of record, the attorney was not bound to look for it. Such, however, was not our construction of the attorney's undertaking when the case was here before, nor is it now. We then said the bond executed by the attorney to the association in nowise altered his undertaking to it. It merely assured its faithful performance. The association in voting the loan left it to its attorney to learn the facts and to advise it whether there were other liens upon the title of the property to be mortgaged to secure the loan, as well as learn whether the title was a perfect fee simple. When the attorney reported that there was but one lien against the title, and that it would be waived in favor of appellant's mortgage, appellant furnished the money to the attorney to pay to the mortgagor upon the completion of the lien. After the examination upon which the attorney reported, and before he had paid the money, other liens had attached to the property, that of materialmen and mechanics doing work in building a house upon the property. It is shown that the attorney knew the house was being built. He consequently knew that somebody was furnishing the material and that somebody was doing the work. Under the circumstances, so far as now appears, it was his duty before he delivered the money to the mortgagor to learn whether the liens created by statute for this material and these services were discharged, or at least were waived, so far as his client's mortgage was concerned. His failure to do this was a breach of his undertaking to his client; and, therefore, was a breach of the covenant of the bond as held in the former opinion." (The Humboldt Building Ass'n v. Ducker's Adm'r, 26 Ky. Law Rep., 931.)

On the return of the case it was tried again in the circuit court on instructions offered by the plaintiff, and the jury having found for the defendant the plaintiff appeals.

There is no inconsistency between the opinion delivered on the first appeal and the opinion delivered on the second appeal. On the second appeal the opinion delivered on the first appeal was the law of the case. The court on the second appeal merely determined that the facts proved by the plaintiff made out for it a prima facie case. The defendant's side of the case had

not then been heard. The court did not have in mind on the second appeal the evidence for the defendant, for this was not before it. Whether the attorney used due care in concluding that the local act was not in force was a question which could not properly be presented until the facts shown on the second appeal were proved, and when this proof was made then the defendant might introduce her proof to show that he had used due care. The circuit court properly so construed the opinions.

While the evidence is conflicting, it is not such as to warrant us in disturbing the verdict on the ground that it is against the evidence. The motion of the defendant for a continuance was overruled on the condition that her affidavit should be read as the deposition of her absent witness. The plaintiff made no objection to this at the time, and if it had objected to it she would have been entitled to a continuance. But the plaintiff can not try the case without objection and thereafter complain that the affidavit was read as the deposition of the witness. The statements of the affidavit were competent evidence. The credibility of the evidence was for the jury.

Judgment affirmed.

BUCKNER'S ADM'RS v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed May 31, 1905.)

1. Administrators—Appointment—County court—Jurisdiction—Action by—Plea in abatement—Where an action was brought against a railroad company by L. B. and F. R., who sued as administrators of deceased for damages for causing his death, it was error in the lower court to sustain a plea in abatement to the action on the ground that the plaintiffs were not entitled to be appointed as such administrators, because not next of kin to the deceased.

2. Same—The county court having the jurisdiction to appoint an administrator of a decedent, necessarily has the right to determine whether a given applicant is related to the decedent in the degree authorizing her appointment, and the fact that such court erred in so deciding, and appointed another, such appointment, though erroneous, is not void.

W. S. Pryor and H. P. Cooper for appellants.

W. C. McChord and Benjamin D. Warfield for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge O'Rear.

Alex. Buckner, deceased, was killed, it is claimed, by the negligence of appellee company in the operation of one of its trains. A suit was brought against appellee by Lucinda Buckner and Frank Rice, who sued as administrators of Alex. Buckner, to recover from appellee the damages sustained by the estate of the intestate by reason of the destruction of his life. Appellee pleaded in abatement that the plaintiffs, Lucinda Buckner and Frank Rice, had never been the administrators of Alex. Buckner; that the order of the county court attempting to appoint them was void because of lack of jurisdiction in that court to make the order when it was made. This plea

was based upon the fact that the county court proceeded to make the appointment of the plaintiffs as administrators before the second term of the county court after the death of decedent, when another, to wit, Birdie Buckner, the sole distributee of the decedent, was applying for letters of administration in her own name. It is claimed that section 8896 of Kentucky Statutes, limits the right of the county court in selecting administrators of the decedent's estate within the first two months after his death to such of his relations as are next entitled to distribution of his estate, and that the court is without jurisdiction to appoint a stranger administrator until after two terms of the county court have passed after the death of decedent. The case of *Underwood v. Underwood*, 111 Ky., 966, is relied on.

The fact was shown that Birdie Buckner was legally entitled to qualify as administratrix of Alex. Buckner. (See opinion this day delivered in *Alex. Buckner's Adm'r v. Birdie Buckner*.) But it does not follow that the judgment of the county court appointing Lucinda Buckner and Frank Rice as administrators of Alex. Buckner was void. The facts are materially different from the state of case presented in *Underwood v. Underwood*. Here, if Birdie Buckner was not the legitimate child of Alex. Buckner, then he died without issue, so far as the record discloses. In that event his mother would have been the next of kin, and entitled to distribution of his estate. The county court having the jurisdiction to appoint an administrator of the estate, must necessarily have the right to determine whether a given applicant is related to the decedent in the degree claimed. It was, therefore, competent for that tribunal to adjudge the fact that Birdie Buckner was not in fact a daughter of the decedent. Having the right to adjudge that fact, the judgment of the county court, though erroneous, is not void; that Frank Rice, a stranger, was appointed as co-administrator with the mother of the decedent can not affect the validity of the county court's order appointing the two so far as to make it void. If it had been true that Birdie Buckner was not decedent's daughter, then as his mother would have been entitled to administer, she alone would have had the right to complain that another was associated with her in the office of administrator. As she qualified jointly with him without complaint, no one else will be heard to raise the objection.

As the judgment of the county court appointing Lucinda Buckner and Frank Rice as administrators was not void, but merely erroneous, they, until their office was terminated by a reversal of the county court's order appointing them, or was otherwise ended, had all the authority that would have been possessed by the administrator rightfully appointed. Consequently they could bring a suit in behalf of the decedent's estate, and could bind the estate in any matter in which a legally appointed administrator could bind it. The sureties upon their bonds would be liable for their mal-administration. Therefore, the plea abatement in this case was not good, at least until the judgment of the circuit court reversing the appeal of Birdie Buckner v. Lucinda Buckner and Frank Rice.

The judgment dismissing the petition absolutely in this case is reversed and cause remanded, with directions to allow the case to proceed in the name of the rightful administrator, if it should be so desired.

KING, &c. v. SEE.

(Filed May 31, 1905—Not to be reported.)

Land—Ownership—Adverse possession—One who pleads and relies upon the ownership of a tract of land, by having it cleared and fenced and attached to another tract on which he resides, and by showing that he has so held and claimed it continuously and adversely for more than fifteen years, is entitled to recover it independent of any other title.

A. W. Baker for appellants.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge Nunn.

On the 2d of January, 1904, these appellants, the children and heirs of Joshua King, instituted this action in ejectment against appellee for the recovery of about eighty acres of land. They alleged that they were the owners of it by descent from their father.

Appellee answered, denying their ownership, and alleged that he was the owner thereof; that he purchased it from one Vance in the year 1887, and accepted a bond for title; that he obtained the deed for it in the month of June, 1888, and immediately upon his purchase of it he took possession thereof and enclosed the greater portion of it with a fence, and that for more than fifteen years next before the institution of this suit he had held and claimed the land as his own to a well-marked and defined boundary, and that he had held it adversely to the appellants as well as the world; that his possession and claim of ownership was notorious.

Appellants replied to this, and denied that appellee had held the actual, adverse and continuous possession of it for the period of fifteen years, but alleged he had only so held it for about two years. They alleged that appellee's title was obtained by a sale of the land for taxes and was wholly unfounded, and was not a good or valid title. The case was transferred to the equity docket by consent of parties, proof was taken by depositions, and the court tried the case and dismissed the petition of appellants, from which judgment they have appealed. The appellants claim that the plea of appellee of adverse possession of the land was defective by not alleging that he held the actual possession of it for more than fifteen years. Even if the petition was defective in this regard, it was cured by the reply of the appellants, they having by denial put that fact in issue. The appellee proved that this land adjoined his home farm, and when he purchased it in 1887 he cleared, fenced and attached to his home place the greater portion of this land, and claimed to the outside and a well-marked boundary, and that he was in the actual and adverse possession of this land from that time to the institution of this action, a period of more than fifteen years; that about two years before the institution of this action he permitted his son to erect a residence on it. The appellants' proof conduces to show that they regarded this two years' occupancy by the son of appellee as the only actual and adverse possession he had had. They do not deny that the appellee had taken possession of this land in the manner stated by him, but appear to not have regarded that as such actual and adverse possession as would ripen into title by lapse of time.

In this they are mistaken. Appellee's holding has every element of adverse possession, and being for a longer period than fifteen years, it has ripened into title. Having arrived at this conclusion, it is unnecessary to determine the validity of the tax title.

For these reasons the judgment of the lower court is affirmed.

THE GEORGE WEIDEMANN BREWING CO. v. WOOD.

(Filed May 31, 1905—Not to be reported.)

1. Master and servant—Use of defective scaffold—Duty of master—Duty of servant—In an action by a servant against the master for injuries by the falling of a defective scaffold furnished by the master, for use in painting a building, Held—That while it was the duty of the master to furnish the servant with safe scaffolding, it was likewise the duty of the servant to use ordinary care to inspect the same so as to discover its defects and avoid being injured, and a failure to do so will prevent a recovery.

2. Hidden defects—If, however, the scaffold was defective and so constructed as that its defective condition was not known, and could not by ordinary care have been discovered by the servant, and by reason thereof it fell and injured him, the master is liable in damages for the injury.

3. Instruction—An instruction, No. 4, "should the jury believe from the evidence that at the time of the accident plaintiff knew, or by the exercise of ordinary observation and diligence in his line of service might have discovered or known, that the scaffolding was carelessly constructed, if such be the case, but failed to so inform or protect himself from danger, whereby he was precipitated to the ground and injured, they should find for the defendant," held to be proper.

George Washington for appellant.

J. C. & B. A. Wright and W. A. Burkamp for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Settle.

The appellee, Edwin Wood, and one George Herman were injured by the falling of a scaffold upon which they were standing while engaged in the work of painting the inside walls of a building owned by appellant. The scaffold and a platform to which it was attached were also the property of appellant and constructed by its servants for the use of appellee and Herman, who, with other parties, were employed by appellant to perform the work of painting and building mentioned. By the giving away of the scaffold appellee and Herman were thrown to the floor, eight feet below, and under the scaffold, thereby crushing one of appellee's feet, breaking a bone thereof and otherwise injuring him.

For the injuries thus sustained appellee sued and recovered of appellant in the lower court \$400 in damages, and the reversal of that judgment is sought by this appeal. The action was based upon the alleged negligence of appellant in failing to provide appellee with a reasonably safe scaffold from which to do the painting required of him by appellant.

The defense interposed by appellant's answer was made up of a denial of the negligence complained of, an averment that appellee's injuries were

caused by the negligence of a fellow servant, and that he was himself guilty of contributory negligence, but for which he would not have been injured. The platform from the deck of which appellee fell was a moveable one, standing upon rollers. The scaffold attached to same was constructed upon brackets or cleats which were permanently fastened to the uprights of the moveable platform, about eight feet from the floor. Upon these cleats planks were placed upon which the painters stood when at work. These planks projected over and beyond the sides of the platform, and because of several iron columns in the room where the painting was being done it was necessary in moving the platform as the painting progressed to remove the planks from the cleats to enable it to pass the columns. The platform had been moved and the planks taken off several times during the week upon the Saturday of which appellee was injured. The cleats were permanently nailed to the platform at the beginning of the work of painting nearly a week before the accident occurred, and in fastening them to the platform appellee and Herman assisted appellant's servants entrusted with the work of constructing the scaffold.

It appears that there were three cleats upon the side of the platform, one at each end and one near the middle. Upon these were laid three planks. Two, one inch in thickness, being laid at one end, and one two inches in thickness being used for the other end. These planks should have been so placed as to rest upon the center cleat and upon each other. Upon the afternoon of Saturday, according to the evidence of appellee, appellant's servants in charge of the work moved the platform and rebuilt the scaffold by again placing the planks upon the cleats, but in doing so put one of the thin boards upon the cleats, allowing the end thereof to project beyond the middle cleat some distance, then laid upon the other end the thick board, so as to cause the inner end to stop short of the middle cleat and allow it to rest upon the end of the thin board alone, after which the second thin board was placed over the first thin board and the end of the thick one, thereby so covering the end of the thick board as to prevent appellee and Herman from seeing that it did not rest on the middle cleat, which left them, as they testified upon the trial, unaware of the danger of standing upon the scaffold. When the scaffold was thus arranged appellee and Herman were engaged in painting in another part of the room, but upon completing the work where they were engaged it became necessary for them to re-ascend the platform and scaffold to resume work on that part of the wall that could be reached from the scaffold. Thereupon appellee carrying his brushes and paints, by the use of a step ladder, went upon the platform and scaffold. According to his testimony and that of Herman he then walked the entire length of the scaffold, holding onto the main platform, for the purpose of testing it, and as it appeared to him to be safe, he went to work painting the wall and was immediately joined by Herman, who also went to work at the other end of the scaffold opposite appellee. As their work progressed they approached each other at the point where the thick board failed to reach the middle cleat and when nearly together the boards gave way beneath them, the outer ends reared up and they were precipitated to the floor beneath.

The testimony of appellant was to the effect that whatever defects existed in the scaffold were known to appellee and Herman because they had at the

beginning helped to construct the scaffold, and its defects at the time of the accident were plainly visible, or if not visible, that it was their duty and the custom of painters to see to the safety and fitness of the platforms and scaffolding used by them in performing their work, and the exercise of ordinary care upon their part would have enabled them to discover the defective condition of the scaffold and prevent their injuries.

Appellant's testimony in some measure also tended to prove that appellee and Herman fell because they went beyond the cleat at one end of the scaffold, and thereby caused that part of the scaffold to go down on the outer cleat. Upon the other hand, appellee's evidence conduced to prove that the fall thereof occurred by the defective manner in which the planks were laid upon the scaffold, and that the defect was so concealed that it could not be discovered by ordinary care upon appellee's part in inspecting it. The testimony as to all the issues made by the pleadings was conflicting, but it was the province of the jury to settle the questions of fact presented for their consideration by the instructions of the court, and as it can not be said that there was no testimony to support the verdict, or that it resulted from either passion or prejudice on the part of the jury, this court is powerless to disturb it, and this would be true even though the court were of opinion that the verdict is against the weight of the evidence. It is contended by the learned counsel for appellant that the trial court should not have given instructions "A. and B.," and that they were improper and highly prejudicial to appellant.

Instruction A. is as follows: "The court instructs the jury that if they believe from the evidence that the defendant constructed the scaffold or platform from which plaintiff fell, and that it had plaintiff to go thereon to paint upon its building, and that said scaffold or platform was not a fit place from which to paint on said building, and that it was constructed carelessly and negligently, and without the exercise of ordinary care, and that the plaintiff did not know of its defective condition, and that by reason of its careless and negligent construction it fell down and plaintiff was injured thereby, then their verdict will be for the plaintiff."

Instruction "B." is expressed in these words: "The court instructs the jury that it was the duty of defendant to furnish the plaintiff a reasonably safe scaffold from which to paint upon its building, and that if they believe from the evidence that the scaffold from which plaintiff fell was unsafe and dangerous, and that defendant knew of its unsafe and dangerous condition, or could have so known by the exercise of ordinary care upon its part, and that plaintiff did not know of its unsafe or dangerous condition, then their verdict must be for the plaintiff."

In *Pfisterer v. Peter & Co.*, 25 Ky. Law Rep., 1608, which is a well considered, and one of the most recent cases on the question here involved, we find this statement of the law: "The duty of furnishing safe tools and materials and place to work is primarily on the master, and the servant was under no duty to discover such defects, and unless he knew of their existence, or they were patent and obvious to a person of his experience and understanding, that he would not be precluded from recovery. * * * The rule of course does not apply where examination and inspection is in the line of the employe's duty."

The foregoing general rule, together with the qualification last expressed, is announced in the following cases, which are referred to and approved in *Pfisterer v. Peter & Co.*, supra, viz.: *L. & N. R. R. Co. v. Foley*, 94 Ky., 220; *Champion Ice Mfg. Co. v. Carter*, 21 Ky. Law Rep., 211.

As already stated, much of appellant's testimony conduced to show that the duty of examining and inspecting the scaffold and appliances, indispensably necessary to his vocation, rested upon the appellee. As well said by counsel: "The scaffold to the painter is the next thing to the mechanic's tool; it is an essential part of his business; without it he can not do his work."

It was, therefore, a part of appellee's duty to inspect the scaffold from which he fell for the purpose of ascertaining whether it was reasonably safe for his use in the performance of the work required of him by appellant, but while such was his duty, if by the exercise of ordinary care upon his part in making such inspection the defective or unsafe condition of the scaffold could not reasonably have been discovered, he nevertheless was entitled to recover.

Instruction "A." was improper, but in view of instruction "B.," "I." and "4," which were given by the court, it could not have been prejudicial to appellant. "B." we have already quoted. By instruction "I." the jury in substance were told that though they might believe that appellant "was guilty of the negligence in the construction of the scaffold in question," if plaintiff was also guilty of negligence, but for which his injuries would not have been received, they should find for defendant.

Instruction 4 presented to the jury the rule of law for which appellant's counsel so earnestly contends. It is as follows: "Should the jury believe from the evidence that at the time of the accident complained of the plaintiff knew, or by the exercise of ordinary observation and diligence in his line of service might have discovered or known, that the scaffolding in question was carelessly constructed, if such be the case, but failed to so inform or protect himself from danger by reason whereby he was precipitated to the ground and injured, they should find for the defendant."

We see no ground for applying the doctrine of fellow servant in this case. Though in accepting employment at the hands of appellant appellee was not relieved of the duty of examining the scaffold to be used in performing the required service because, in view of the character of work to be performed, it was in the line of his duty to make such examination, it was also the duty of appellant to provide him with a reasonably safe place and appliances for doing his work, and this duty of the master being primary, could not be delegated to another servant so as to exempt the master from liability for injury resulting to the one employed from the master's negligent failure to provide a reasonably safe place or appliances for doing his work. In other words, in a case like the one at bar, the exemption to the master from such liability must result from the negligence of the servant in failing to make the examination of the place of work or appliance to be used, when such examination would have enabled him to discover the defective or dangerous condition of the place or appliance. We think the instructions as a whole fairly presented to the jury all the law of the case.

Wherefore, the judgment appealed from is affirmed.

To so much of the foregoing opinion as approves instruction No. 4 as one that was properly given in this case, Judge Nunn dissents.

HERMAN v. THE GEORGE WEIDEMANN BREWING CO.

(Filed May 31, 1905—Not to be reported.)

Affirmed upon authority of *The George Weidemann Brewing Co. v. Wood*, decided May 31, 1905.

J. C. & B. A. Wright and W. A. Burkamp for appellant.

George Washington for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Settle.

The appellant, George Herman, was injured by the falling of a scaffold while in the employ of appellee, and engaged in the work of painting a building owned by it. He sued appellee in the Campbell Circuit Court to recover damages for his injuries upon the ground that they were caused by the alleged negligent failure of appellee to provide him a reasonable safe scaffold for use in the work required of him. On the trial of the case in the lower court the jury returned a verdict in favor of appellee and judgment was duly entered in the latter's favor pursuant thereto, from which an appeal was taken.

One Edwin Wood, another employe of appellee, who was on the scaffold with appellant at the time it fell, was also injured in the accident. He likewise sued appellee for the injuries sustained by him, but was more fortunate than appellant Herman, as he recovered judgment against appellee for \$400 in damages. Upon the appeal in that case the judgment of the lower court was this day affirmed, and as the evidence in that case was substantially the same as that presented by the record herein, and the issues and instructions practically the same as in this case, the record in the Wood case is referred to for a statement of the facts and issues involved in this case. Finding no error in the instructions in this case, and it being the province of the jury to determine the questions of fact presented for their consideration by the instructions, and there being no error complained of except such as were presented by objections made to the instructions, we find no reason for disturbing the verdict of the jury.

Hence the judgment is affirmed.

Judge Nunn dissents.

HATCHER v. WAGNER.

(Filed May 31, 1905.)

Attachments—Levy on land—Notice to subsequent purchaser—While the levy of an order of attachment on a tract of land, by giving the occupant a copy and posting another copy on it, creates a lien on that tract and affects the parties to the action, as well as subsequent purchasers, such a levy can not be extended to another and different tract at least a half a mile distant from the other so as to give a lien on it, which would affect a subsequent

purchaser, lessee or incumbrancer. There being no one occupying the land, a lien could only be created on it so as to affect a subsequent purchaser, by leaving in a conspicuous place on the land a copy of the order.

York & York and Hazelrigg & Hazelrigg for appellant.

James Goble for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn.

On the 26th of February, 1892, T. B. Scott purchased from one Meyer Schamburg and wife the tract of land in controversy, and received a conveyance for the same. On the 4th of June, 1892, Scott and wife sold and conveyed this land to T. P. Wagner, the appellee.

Before these sales A. J. Auxier and James M. York, on the 18th of June, 1890, instituted a suit against Meyer Schamburg and others on a debt against them, and sued out an order of attachment against their property, which was, on the 21st of July, 1890, levied by the sheriff of Pike county, who endorsed on it the following return: "Executed by delivering to J. H. Leslie a copy of the within, and posted a copy of the same on J. H. Leslie's land, July 21st, 1890."

Auxier and York took judgment for their debt, at the January, 1899, term of the Pike Circuit Court, sustaining their attachment, and decreeing the sale of two tracts of their land to satisfy their judgment. The second tract described in the judgment included the land in controversy. The two tracts of land were sold on the 20th of March, 1899, and purchased by the appellant, Hatcher. Appellee was present and objected to the sale, so far as it embraced the land in controversy, on the ground that he was the owner of it. The sale was approved by the court and both tracts were conveyed to the appellant and he was awarded a writ of possession. This suit was instituted to cancel the deed to appellant, in so far as it embraced the land purchased by appellee, and to quiet his title to same. He succeeded in the court below, hence this appeal.

Appellant claims that the land was under attachment, in the suit of Auxier and York against M. Schamburg, &c., at the time appellee purchased; that a *lis pendens* existed, and the title he (appellee) acquired is inferior, and should yield to his superior and better title. The appellee contends that no part of the land in controversy was levied upon by the attachment referred to, and that no *lien*, or *lis pendens* existed. The first proposition is, was the land in question levied on? It is shown to be a separate and distinct tract, situated more than half a mile distant from that on which J. H. Leslie lived; that neither Leslie nor any one else was occupying it at the time; that all the levy that was made was to give J. H. Leslie a copy of the attachment, and to post another on the land he then occupied, which was the first tract described in the judgment of Auxier and York v. Schamburg, &c. We expressly reserved, and do not decide, the question whether the levy of this attachment was sufficient to create a lien on the land between the parties to the action. The question before us is, was the description of the land in the officer's return sufficient to create a *lis pendens* lien, so as to make the title of a third party, a purchaser, subject to the lien?

The Code and statute prescribed how an attachment lien on real estate may be obtained and continued. Section 203 of the Civil Code provides: "The order of attachment shall be executed by the sheriff without delay in the following manner: First, upon real property, by leaving with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order."

Subsection 2 of section 2358 of the statutes provides: "No attachment or execution hereafter issued, nor levy or sale under either, shall in any manner affect the right, title to or interest of a subsequent purchaser, lessee or incumbrancer without notice thereof of any real estate, or any interest therein, upon which attachment or execution may be or may have been levied, except from the time there shall be filed in the office aforesaid (county clerk's office) a memorandum, showing the number and style of the action in which said attachment or execution issued, the court from which it issued, the number, if any, of such attachment or execution, the date thereof, and the name of the persons in whose favor and against whom respectively it issued. Such notice may be filed by any party in interest."

It is conceded that this provision was not complied with by the attaching creditors or any one in interest, but it is contended by appellant that appellee had notice of the existence of the levy and lien before he purchased. Upon the question of notice there was an issue, and the proof very conflicting. In our opinion the levy of an order of attachment on one tract of land, by giving the occupant a copy and posting another on it, creates a lien on that tract, and affects the parties to the action as well as subsequent purchasers, but such a levy can not be extended to another and different tract, at least one half mile distant from it, so as to give a lien on it, which would affect a subsequent purchaser, lessee or incumbrancer. There being no one occupying the land in controversy, an attachment lien could be created on it so as to affect a subsequent purchaser, lessee or incumbrancer only by leaving in a conspicuous place on the land a copy of the order. The Code requires this.

On the 2d of May, 1899, and after the purchase of the land by the appellant at the commissioner's sale, the person who was the officer who levied the attachment was permitted by the court to amend his return by giving a more particular description of the property levied upon by him. He endeavored to describe it in such a way as to include the land in controversy. What was the purpose of procuring this amended return almost nine years after the levy? If a lien existed by virtue of a levy, it was all appellant could demand; and if it did not exist to the extent to make appellee a pendente lite purchaser, the amended return could not relate back to the levy, and cut off the right of an intervening purchaser. (*Stone v. Connelly*, 1 Met., 657; *Jones v. Lusk*, 2 Met., 359.)

For these reasons the judgment of the lower court is affirmed.

STANHOPE v. AGNEW.

(Filed May 31, 1905—Not to be reported.)

Sale of horse—Uncontradicted evidence—Instructions—Warranty—In an action for damages for breach of warranty in the sale of a horse, where the

uncontradicted evidence shows the sale was made; it was proper for the court in the instruction to the jury to assume that the sale was made, and to submit only the question whether or not there was a warranty.

John T. Shelby for appellant.

Allen & Duncan for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

This is an action upon a covenant of warranty in the sale of a mare. The issues presented were, first, a denial that the defendant had sold the plaintiff, appellee, the mare; and, second, a denial that he had warranted her. The proof was all one way that the sale was to the plaintiff. Consequently the court did not err in instructing the jury in assuming that the sale was to the plaintiff. There was not a scintilla of evidence to the contrary. The plaintiff, Agnew, testified that the sale was to him, and not to Creighton, through him as agent. Creighton, alleged to have been the principal in the purchase, also testified that he did not buy the mare, nor authorize it, but that the plaintiff did. The only thing that gave color to the claim that the sale was not to the plaintiff was that the plaintiff was a general agent and manager in transacting the business of buying and handling horses for Creighton, whose name he signed to checks, including the check given in payment for the mare in this case under an arrangement with Creighton, loaning him the money to do so. Defendant admitted the sale of the mare, and admitted the transaction was with the plaintiff. He did not claim that he had any dealing whatever with Creighton.

If this had been a suit by the seller against the alleged principal upon the ground that his general agent, in acting within the apparent scope of his authority acted for him, it would present an entirely different question—one of estoppel. But that has no place in this case. The seller was not attempting to hold the plaintiff's employer, nor was he bound to plaintiff's employer in any event under the evidence in the case. It, therefore, appears as an undisputed fact in the record that the sale of the mare was to the plaintiff, Agnew, and not to Creighton, for whom he worked.

The instructions submitting to the jury the measure of damages follow the rule repeatedly laid down in this State in actions of this kind. The question whether there was or not a warranty was fairly submitted to the jury.

There is no error in the record and the judgment must be affirmed, with damages.

CONTINENTAL INSURANCE CO. v. THOMASON.

(Filed January 31, 1905—Not to be reported.)

James A. Moore, John A. Moore and R. E. Hall for appellant.

James & James and A. C. Moore for appellee.

Appeal from Crittenden Circuit Court.

Judge Paynter delivered the following dissenting opinion:

The agent receiving the money had no authority to issue a policy of in-

insurance, nor had he any authority to make a contract of insurance for the company. He did not have any authority to bind the company by contract. The company, therefore, could not be charged with notice of a fact with which his agency had nothing to do. If he could not make a contract for the company, he could not, by being made aware of a fact concerning a contract which he had neither authority to make nor abrogate, revive it after it had ceased to exist. He did not act at all, therefore, he can not be said to be acting within the scope of his authority. The court imputes to the company the knowledge of the agent's action about a matter with which his agency had nothing to do. The rule of the Spiers case has no application to the facts of the case. The court seems to think it does, because the agent might have taken an application for a policy, although it is confessed he had no authority to make a contract of insurance.

Judge Barker concurs.

For original opinion see ante, page 158.

CLAY'S GUARDIAN v. CLAY.

(Filed May 26, 1905—Not to be reported.)

1. Maintenance of child out of its own estate—Duty and obligation of parents—Where a ward had an estate sufficient to support it there was no necessity for the father to contribute to its support.

2. Same—Under the provisions of section 2082, Kentucky Statutes, it is the duty of the guardian to maintain and educate the ward out of its own estate.

Grant E. Lilly for appellant.

H. Clay Howard for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Lavinia E. Cunningham, is the grandmother of Nannie Clay, and for a time was her guardian. The appellee is the father of Nannie Clay. It is alleged that she, as guardian, spent \$2,109.04 for the benefit of her ward. She seeks to recover that sum from the father upon the idea that it was his duty to support his child; that amount was paid out of the ward's estate and her estate is sufficient to suitably maintain her. So the question presented is, should the father be compelled to support and educate his child when her estate is abundantly sufficient to do so? The claim that he should is based upon the well-recognized rule that it is the duty of parents to provide for the maintenance of their children. This obligation is a natural one, and is well recognized by the courts of the country. Usually children have no estates to maintain them. Their parents are their natural protectors. They are responsible for their existence, and it is their duty to see that they are suitably maintained, if it is in their power to do so. However, this is a case where there is no necessity existing for contributions by the father to maintain the child, for the income from the child's estate is abundant for that purpose. While the above rule has been recognized by the court, it has been held that a father and mother who are in distressed

circumstances are entitled to a suitable allowance out of a child's estate for its support. (Chapline v. Moore, &c., 7 T. B. Monroe, 178.) There are other cases to the same effect. (Section 2032, Kentucky Statutes, provides: "That a guardian shall have the custody of his ward and the possession, care and management of the ward's estate, real and personal, and out of the estate shall provide for the necessary and proper maintenance and education of the ward." Under this statute it is the duty of the guardian to maintain and educate the ward out of the latter's estate. In the case of Walker and Green v. Browne, Guardian, &c., 3 Bush, 696, the court had under consideration the 7th section of article 2, chapter 43, Revised Statutes, which is the same as section 2032, Kentucky Statutes. In that case the infant's custody had been given to the mother by the guardian without an order of court. The mother died and the medical bill was presented to her administrator for payment, which was refused, because he deemed it the duty of the guardian of the ward to have done so, and in passing upon the question the court said: "The 7th section of article 2, chapter 43, Revised Statutes, page 578 (which is word for word section 2032, Kentucky Statutes), provides that 'a guardian shall have the custody, care and management of the ward's estate, real and personal; and out of the estate shall provide for the necessary and proper maintenance and education of the ward.

"The 8th section *ibid*, authorizing a widowed mother, if allowed by order of court to have the custody, nurture and education of the ward, can not be reasonably construed as intending to devolve on her the expenses of the education, maintenance or medical treatment of the ward, whose own estate is sufficient for those purposes."

Section 8, referred to, is the same as section 2033, Kentucky Statutes. So the court had under consideration in that case the same statutes that we are called upon to consider in this case. The conclusion in that case must control in deciding the question in this case.

The judgment is affirmed.

HACKETT v. BROOKSVILLE GRADED SCHOOL DISTRICT, &c.

(Filed May 31, 1905.)

1. Public schools—Opening with prayer—Sectarianism—The Brooksville Graded School in this State is maintained by the State by taxation. It is open to all white children within certain ages, who, or whose parents, reside in the district. In opening this school every morning the following prayer was offered: "Our Father, who art in Heaven, we ask Thy aid in our day's work. Be with us in all we do and say. Give us wisdom and strength and patience to teach these children as they should be taught. May teacher and pupil have mutual love and respect. Watch over these children both in the schoolroom and on the playground. Keep them from being hurt in any way, and at last when we come to die may none of our number be missing around thy throne. These things we ask for Christ's sake. Amen." Held—That such prayer is not "sectarian" either in form or substance within the meaning of section 5 or section 189 of the Kentucky Constitution, or of section 4368, Kentucky Statutes.

2. Public worship—Objection by parents—Though it be conceded that any

prayer is worship, and that public prayer is public worship, where children, whose parents object, are not required to attend at such prayer service, the school can not be considered "a place of worship," nor are its teachers "ministers of religion" within the contemplation of section 5 of the Kentucky Constitution, although a prayer may be offered incidentally at the opening of the school by the teacher.

3. Holy Bible—Reading in schools—Sectarian instruction—We believe the reason and weight of the authorities support the view that the King James' translation of the Bible is not a "sectarian" book within the meaning of the Kentucky Statutes, section 4368, which provides that "no books or other publications of a sectarian, infidel or immoral character shall be used or distributed in any common school, nor shall any sectarian, infidel or immoral doctrine be taught therein," and when used merely for reading in the common schools without note or comment by teachers is not sectarian instruction, nor does such use of the Bible make the schoolhouse a house of religious worship.

4. Same—Sectarian book—That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, can not make it a sectarian book. The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship, nor mechanical composition of the book, nor the use of it, but its contents that give it its character.

Wm. A. Byrne for appellant.

E. L. Worthington for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, who resides in the town of Brooksville, and has children attending the Brooksville Graded Common School, brought this suit against the trustees and teachers of the school, seeking an injunction against the use of the English translation of the Bible, known as the King James or "Authorized Edition," and to prevent the teachers from opening the school with prayers or songs alleged to be of a denominational character.

On full hearing the injunction was denied, and the petition dismissed. To get at the exact question presented for decision on this appeal we will eliminate the allegation concerning worship of God by singing of sectarian songs. There was no proof whatever that any songs of any kind had been sung during the school year in which the suit was brought, nor was it either required or permitted. Whether it was permissible to have sung the songs complained of is not, therefore, a matter considered by the court.

Appellant invokes section 189 of the Constitution of Kentucky and section 4368, Kentucky Statutes, which read as follows:

"No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school." (Section 189, Constitution.)

"No books or other publications of a sectarian, infidel or immoral character shall be used or distributed in any common school; nor shall any sec-

tarian, infidel or immoral doctrine be taught therein." (Section 4368, Kentucky Statutes.)

The Brooksville Graded Common School is maintained by the State by the imposition of taxes. It is open alike to all white children within certain ages, who or whose parents are residents of the district. It is in no sense a sectarian church or denominational school. Section 189 of the Constitution was aimed not to regulate the curriculum of the common schools of the State, but to prevent the appropriation of public money to aid schools maintained by any church or sect of religionists. If the Constitution deals directly with the question of compulsory worship, it is in section 5, which reads as follows: "No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience."

If under the guise of public instruction children should be required to attend schools where worship of God was compulsory, it would seem to be within the prohibition of that section. We find from the evidence in this case that while chapters of passages from the Bible (King James' translation) were read, and prayers were offered by the teachers at the opening of the school each morning, appellant's children, who are members of the Roman Catholic Church, were not required to attend during those exercises, nor were they, or others who were conscientiously opposed to doing so, required to participate in them.

Two questions are presented by the record for decision: First. Does the offering of prayer to God in opening a school, such as was offered in the Brooksville school, make that school a "sectarian school," within the meaning of section 189 of the Constitution? Second. Is the King James translation of the Bible a "sectarian book," within the meaning of section 4368, Kentucky Statutes?

The prayer that was offered, and which it is urged converted the school into a sectarian school, is as follows: "Our Father who art in Heaven, we ask Thy aid in our day's work. Be with us in all we do and say. Give us wisdom and strength and patience to teach these children as they should be taught. May teacher and pupil have mutual love and respect. Watch over these children, both in school room and on the playground. Keep them from being hurt in any way, and at last when we come to die may none of our number be missing around Thy throne. These things we ask for Christ's sake. Amen."

It has not been pointed out to us wherein the prayer quoted is sectarian in its construction. The Rev. Father James A. Cussack, a witness for appellant, asseverates that in his opinion it is sectarian, but he admits that there is nothing in it repugnant to the doctrines of his religious belief (Roman

Catholic), nor does he claim that it is promulgated, authorized or used by any sect of religionists whatever. As neither the form nor substance of the prayer complained of seem to represent any peculiar view or dogma of any sect or denomination, or to teach them, or to detract from those of any other, it is not sectarian, in the sense that the word is commonly used and understood, and as it was evidently intended in the section quoted. The constitutional convention in framing the organic law for all the people of the State must be presumed to have used ordinary words, not according to the peculiar views of a few, but as generally used. The word "sectarian," from the connection in which it is used, can not be given the construction contended for by appellant, which seems to be that any form of prayer not authorized by a particular church is sectarian.

Though it be conceded that any prayer is worship, and that public prayer is public worship, still appellant's children were not compelled to attend the place where the worshipping was done during the prayer. The school was not "a place of worship," nor are its teachers "ministers of religion," within the contemplation of section 5 of the Constitution, although a prayer may be offered incidentally at the opening of the school by a teacher. Meetings of the general assembly are opened by prayer, and other State institutions authorize the worship of God. They have never been regarded as fostering sectarian teachings. The complaint in this case goes only to the sectarian feature of the exercises, not because they were religious. It is not contended that it was the purpose of the Constitution to prevent worship, nor to prevent teachers in the public schools from assuming worshipful relations. The great aim was to keep church and State forever separate as distinct institutions; to prevent the government of one from assuming rightful control of the government of the other. Nor is it clear that it was intended to keep religion out of the school, though it is apparent that one aim at least was to keep the "church" out. The question is not presented, and is not, therefore, decided whether any exercise which partakes incidentally of worship is prohibited.

The main question, we conceive to be, is the King James translation of the Bible, or, for that matter, any edition of the Bible, a sectarian book? There is, perhaps, no book that is so widely used and so highly respected as the Bible. No other that has been translated into as many tongues. No other that has had such marked influence upon the habits and life of the world. It is not the least of its marvelous attributes that it is so catholic that every seeming phase of belief finds comfort in its comprehensive precepts. Many translations of it, and of parts of it, have been made from time to time, since two or three centuries before the beginning of the Christian era. And since the discovery of the art of printing and the manufacture of paper in the 16th century, a great many editions of it have been printed. There is controversy over the authenticity of some parts of some of the editions, and there are some people who do not believe that any of it is the inspired or revealed word of God. Yet it remains that civilized mankind generally accord to it a reverential regard, while all who study its sublime sentiments, and consider its great moral influence, must admit that it is, from any point of view, one of the most important of books; that it has drawn to its careful study, and research into its history and transla-

tions, so many profound scholars of history, is not to be wondered at. The result has been that, while many editions of the several translations have been made, those based upon the revision compiled under the reign of King James I, 1607-1611, and very generally used by Protestants, and the one compiled at Douay some time previous, and which was later adopted by the Roman Catholic Church as the only authentic version, are the most commonly used in this country.

That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, can not make it a sectarian book. The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship, nor mechanical composition of the book, nor the use of it, but its contents that give it its character. Appellant's view seems to be that the church is the custodian and interpreter of the Bible as God's word. From that it is supposed that any Bible not put forth by authority of a church claiming that prerogative is sectarian. The question is not whether the version used is canonical or apocryphal. That question does not at all enter into the matter. Otherwise, it would inevitably lead to the state, that any book, not favored by some church authority, or which may be supposed by it to be hostile to its teachings, would be sectarian. In that way the authority of a church could largely control the course of study in the public schools, by issuing its bull against certain scientific or moral treatises as being atheistic or heretic. The very mischief aimed at by the framers of the Constitution, and by the people adopting it, would thus be accomplished, viz., the interference in matters of State by the church.

If the legislature or the constitutional convention had intended that the Bible should be prescribed, they would simply have said so. The word Bible is shorter and better understood than the word sectarian. It is not conceivable that if it had been intended to exclude the Bible from public schools that purpose would have been obscured within a controversial word. Nor can we conceive that under the American system of providing thorough education of all the youth, to fit them for good citizenship in every sense, the legislature or the constitutional convention could have intended to exclude from their course of instruction any consideration of such a work, whose historical and literary value, aside from its theological aspects, would seem to entitle it to a high place in any well ordered course of general instruction. The history of a religion, including its teachings and claim of authority, as, for example, the writings of Confucius or Mahomet, might be profitably studied. Why may not also the wisdom of Solomon and the life of Christ? If the same things were in any other book than the Bible it would not be doubted that it was within the discretion of the school boards and teachers whether it was expedient to include them in the common school course of study, without violating the impartiality of the law concerning religious beliefs. The objection does not appear to be to the matter. It is to the publication.

A learned witness for appellant, who gives it as a matter of religious belief and teaching, says that the church is the interpreter of the Bible, but that the Protestants teach, on the contrary, that every one is his own interpreter. The Constitution may be said to teach, too, that every one is his own interpreter, for it guarantees that every one may worship God (which is supposed to include the study of His revealed word), according to the dictates of his own conscience. Children are taught the Constitution in the common schools. May it not be said, then, with equal force, that to teach the Constitution, which itself teaches the right of perfect freedom in the worship of God, is sectarian, because some sect might deny that it was right to teach the children to worship God in any way, except according to the teachings of that particular sect? Milton, Newton, Gallileo, as well as Wickliffe, Whittingham and Tyndale, came under the bans of the church. The philosophy and the writings of these great thinkers, wherein they do not teach sectarianism, may be used in the public schools, and in some part are so used, in spite of the fact that at one time they were believed to be hostile to God's revelations as interpreted by the church.

This same question, in one form or another, has come before the courts of the country a number of times. It has not been so free from doubt that the conclusions of the judges have always been harmonious. This has been in part owing to the differing expressions of the Constitutions and statutes being interpreted. While allowing that because of these differences in language the opinions may not appear to be precisely in point, yet they reflect the drift of judicial opinion in this country, so far as it has been expressed, concerning the main idea, whether the Bible is a sectarian book. Likewise, whether it may be read in the public schools at all. While some of the constitutions construed, in terms, prohibit the use of sectarian books in the public schools, yet, independent of those provisions, it seems to be generally conceded that to teach sectarianism in a public school would be violative of religious freedom, which is guaranteed by every Constitution. With this explanation we will briefly review the decisions bearing on the subject.

One of the earliest cases, celebrated for the great learning displayed as well as by the distinguished ability of the judge who wrote the opinion, is *Vidal v. Girard's Ex'or*, 2 How., 127 (U. S.), opinion by Mr. Justice Story. The question for decision, so far as it bears on this case, was whether a charitable bequest of the late Stephen Girard, establishing a college, prohibited the teaching of christianity to its pupils. The will contained this restrictive clause: "I enjoin and require that no ecclesiastic, missionary or minister of any sect whatever shall ever hold or exercise any station or duty whatever in said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college."

The intention of the testator, so far as it was not unlawful, was as the law of the case. The question was, did he intend to exclude the teachings of christianity, or its being taught by the clergy? The testator himself furnished this key to his thought (page 133): "In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive

advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce. My desire is that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that, in their entrance into active life, they may, from inclination and habit, evince benevolence toward their fellow creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer."

It would be difficult to express a more fitting description of the underlying principles of our government in its treatment of the subject of public education.

In construing those provisions of the will which we have quoted, as bearing particularly on the subject whether the Bible and its teachings might be employed in the college by lay teachers, the court said: "Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college, its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of christianity, from being read and taught in the college by lay teachers? Certainly there is nothing in the will that prescribes such studies. Above all, the testator positively enjoins 'that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that on their entrance into active life they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.' Now it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of christianity? Are not these truths all taught by christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly, or so perfectly, as from the New Testament? Where are benevolence, the love of truth, sobriety and industry so powerfully and irresistibly inculcated as in the sacred volume? The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety and industry, by all appropriate means; and, of course, including the best, the surest and the most impressive."

Two points are emphasized by the reasoning of the learned judge: First, that it was sectarianism that was prohibited; and, second, that the Bible is not a sectarian book, which are the two points most prominent in this case.

Donahue v. Richards, 38 Maine, 379, 61 Am. Dec., 256, was an action against a school board for expelling a pupil who refused to read the English version of the Bible, that book having been adopted by the board as one to be used by the pupils in the course of the school work. We note that counsel for appellee contends that this case ought not to be regarded as authority because there was neither statute nor constitutional prohibition on

the subject of sectarian teaching. Yet the court held that "the common schools are not for the purpose of instruction in the theological doctrines of any religion or of any sect. The State regards no sect as superior to any other, * * * and if the tenet of any particular sect were so taught it would furnish a well grounded cause of complaint on the part of those who entertained different or opposing religious sentiments."

The court held that the King James translation of the Bible was not a sectarian book. It was said: "The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmation of the Pagan creeds."

In *Spiller v. Inhabitants of Woburn*, 12 Allen (Mass.), 127, it was held that the public school committee did not exceed their authority in passing an order that the Bible should be read at the opening of the schools on the morning of each day. "No more appropriate method could be adopted," said the court, "of keeping in mind of both teachers and scholars that one of the chief objects of education, as declared by the statutes of this Commonwealth, and which teachers are especially enjoined to carry into effect, is 'to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice, and a sacred regard for truth.'"

It is not deemed necessary in this State to define by statute now the purposes of public education. They are at least as broad as the broadest under any similar system in use in any of the States.

Pfeiffer v. Board of Education of District, 118 Mich., 560, 42 L. R. A., 536, was an application to the court to compel the board of education to discontinue the use of a certain book known as "Readings from the Bible," in the public schools of Detroit. The Constitution and laws of Michigan on the subject of religious freedom are substantially as are ours, save there was no express inhibition of sectarian instruction in public schools. The question decided by the court was that Readings from the Bible, though it was used as a text-book in the school, did not violate constitutional provisions guaranteeing to every one the right to worship Almighty God according to the dictates of his own conscience, nor was it a compulsion of any person to attend or support any place of religious worship, or to pay taxes to any minister of the gospel or teacher of religion; nor was it an appropriation of the public money for the benefit of any religious sect or society, nor was it a diminution of the civil rights of any person on account of his religious belief. One judge dissented from the opinion of the court.

In *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep., 444, it was shown that the teachers of the school were accustomed to occupy a few minutes each morning in reading selections from the Bible, in repeating the Lord's prayer, and singing religious songs; the plaintiff had two children in the school, but they were not required to be present during the time thus occupied. A statute of that State provided: "The Bible shall not be excluded from any school or institution in this State, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian."

The Constitution of the State prohibited the legislature from passing any

Law interfering with the free exercise of religious worship, or compelling any person to pay taxes to support any religion, or for building any place of worship, or the maintenance of any ministry. The plaintiff's contention was that by the use of the schoolhouse as a place for reading the Bible, repeating the Lord's prayer and singing religious songs, it was made a place of worship; that his children were compelled to attend a place of worship, and he, as a taxpayer, was compelled to aid in building and repairing a place of worship. The court held that the statute did not have any of the effects claimed by the plaintiff. In the absence of such a statute a rule of the school board to the same effect could not, of course, violate the same constitutional principles, if the statute would not have done so.

The Supreme Court of Illinois, in *McCormick v. Burt*, 95 Ill., 268, held that a rule of the directors of a public school, requiring the reading of a King James edition of the Bible for fifteen minutes each morning, at which, however, no one was required to be present or to participate in, was not unconstitutional as interfering with the religious conviction of the plaintiff and his father, who were patrons of the school and Roman Catholics.

In none of the States from which the foregoing opinions have been cited was there an express prohibition of the use of sectarian books. Still in all of them there was the familiar and fundamental constitutional provision guaranteeing religious freedom, which would have been violated, as was held in every instance, either in terms or by necessary implication, by the teaching of sectarian doctrines; that such would have been the result of such teaching seems to us to be perfectly obvious.

In the very learned and exhaustive note by Judge Freeman to *Cook v. Industrial School*, 8 Am. St. Rep., 386 (case reported in 125 Ill., 540), it is shown that the Constitutions of twenty-four States contain provisions prohibiting the payment of moneys, or any appropriation or grant for the support, benefit or in aid of sectarian schools. The editor commenting on the constitutional provisions mentioned, and others where they are silent upon the matter of sectarianism, says: "In view of the above decisions and constitutional provisions, we conclude that the words used in the several Constitutions in point, where the language does not expressly so indicate, must have been intended by the people who ratified them to provide against the promulgation or teaching of the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect in schools or institutions where such instruction was to be paid for out of the public funds, or aided by such funds or by public grants, and that a school or institution is sectarian when the doctrines or tenets of some particular faith, sect or religion are taught to the exclusion of others; and especially so where a school or institution has a distinctive or strict denominational name, descriptive or indicative of the fundamental doctrines of the sect to which it belongs; or where a school or institution is under the exclusive control of a sect having such name, and by a course of instruction excluding all others, seeks to inculcate its tenets alone, it is then sectarian, and it makes no difference that pupils of all sects, denominations and religious beliefs, or those of no belief, are permitted the advantages of such school or institution. It is what is taught that is the determining factor."

This brings us to the consideration of the authorities relied on by appellant.

State v. District Board of School District, No. 8, of the City of Edgerton, 76 Wis., 177 (20 Am. St. Rep., 41), is the principal case cited. The questions there presented were whether the reading of selected portions of the King James translation of the Bible during school hours violated the rights of conscience, compelled complainants to aid in support of a place of religious worship, and was sectarian instruction. All three propositions were decided in the affirmative. The decision is apparently against the weight of authority. The court seemed to realize as much, if they should be regarded as all bearing on the same principle. Speaking of them, but not discussing them in detail, the court said: "A number of cases in different States, supposed to have a bearing upon the main question here considered and determined (to wit, whether the King James version of the Bible is a sectarian book) have been cited, and quotations made therefrom at considerable length by the respective counsel, and by the circuit judge overruling the demurrer to the answer. None of the States in which those decisions were made seem to have in their Constitutions a direct prohibition of sectarian instruction in the public schools. It is believed that this State was the first which expressly embodied the prohibition in its fundamental law, and we are not aware of any direct adjudication of the question under consideration."

The court seems to turn the case upon the fact that the King James version, "the whole of it," was used as a reading book in the school. The opinion admits that text-books founded upon, or containing extracts from, the Bible might be properly used. It was even said: "The constitutional prohibition of sectarian instruction does not include them, even though they may contain passages from which some inferences of sectarian doctrine might possibly be drawn. Furthermore, there is much in the Bible which can not justly be characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. Much of it has great historical and literary value, which may be thus utilized without violating the constitutional prohibition. It may also be used to inculcate good morals, that is, our duty to each other, which may and ought to be inculcated by the district schools. No more complete code of morals exists than is contained in the New Testament, which re-affirms and emphasizes the moral obligations laid down in the Ten Commandments."

With profound respect to the Supreme Court of Wisconsin, we are nevertheless unable to see how its position can be maintained logically, for it takes no notice of the conscientious conviction of the Jews, or nonbelievers, any of whom may have as valid objection to the use of any part of the New Testament as Roman Catholic citizens have to the King James version. It seems to narrow the question down to matter of canonical approval of the printed volumes. The court does not attempt to argue, nor do we see how it could be maintained, that that fact alone could make a book sectarian which in its matter was not inherently so.

The next case is *State of Nebraska v. Freeman*, 59 L. R. A., 927. The Constitution of Nebraska provides: "No sectarian instruction shall be

allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes."

The action complained of was the reading of selections and extracts from the "King James version or translation of the Bible," and the singing of certain religious and sectarian songs and the offering of prayer to the Deity. The court said: "We do not think it wise or necessary to prolong a discussion of what appears to us an almost self-evident fact, that exercises such as are complained of by the relator in this case both constitute religious worship and are sectarian in their character, within the meaning of the Constitution. Nor do we feel inclined to make what might be looked upon as a spurious exhibition of learning by quoting at length from the many judicial decisions and utterances of eminent men in this country concerning the subject. Perhaps the case most nearly in point, because of similarity both of facts involved and constitutional enactments construed to the case at bar, is *State, ex rel Weise v. District Board*, 76 Wisconsin, 177, 7 L. R. A., 330."

It is undeniably the peculiar province of the supreme courts of the States to place final authoritative construction upon the Constitutions of their respective States in matters involving solely their internal policy. Whether the reasons given by the court are sound or not is not material as affecting the binding force of the construction upon citizens and others whose actions come up for consideration by the government of that State. But where the opinion is cited abroad as persuasive argument why its conclusions should be elsewhere adopted, it is of the first importance that its reasoning should be sound; that similar provisions, or the same principle of law, have frequently come before other high courts of last resort, and been by them decided in a certain way, is a fact that can not safely be ignored. It is more than likely that a general concurrence of judicial opinion on the same subject is apt to be right. Due deference to the enlightened judgment of the learned profession of the law, and to all concerned, leave no alternative, but to consider all that has been said by courts of equal rank upon a subject of such universal importance as to have been incorporated in some form in every Constitution of the States of America.

Two of the judges of the Supreme Court of Nebraska confined their concurrence to the point of "sectarian instruction." On petition for rehearing the chief justice filed a response on behalf of the court. The only case admitted to have a direct bearing on the question opposing the court's conclusions was the Michigan case cited above. But we observe what appears to us to be a modification of the original opinion in parts of the response. After pointing out that there are admittedly verbal differences between the King James and the Douay translations of the Bible, which some sectarians regard as material, the court said: "But the fact that the King James translation may be used to inculcate sectarian doctrines affords no presumption that it will be so used. The law does not forbid the use of the Bible in either version in the public schools. It is not proscribed either by the Constitution or the statutes, and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. The point.

where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse, where a teacher employed to give secular instruction has violated the Constitution by becoming a sectarian propagandist. * * * The section of the Constitution which provides that 'no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes,' can not, under any canon of construction with which we are acquainted, be held to mean that neither the Bible nor any part of it, from Genesis to Revelation, may be read in the educational institutions fostered by the State.'

The court also wisely noted that sectarian instruction might occur from frequent reading, even without note or comment, of "judiciously selected passages," and observe that whether such practices existed as amounted to sectarian instruction must be determined upon the facts of each particular case. We find ourselves in entire accord with the views quoted above from the response of the Nebraska Supreme Court.

In *Board of Education v. Minor*, 28 Ohio St., 211, the only question presented or decided was whether the school board might not prohibit the reading of the Bible in the public schools. It was held that they could; that nothing in the laws of that State made it compulsory upon the boards or teachers to use the Bible as a text-book. We believe the reason and weight of the authorities support the view that the Bible is not of itself a sectarian book, and when used merely for reading in the common schools, without note or comment by teachers, is not sectarian instruction; nor does such use of the Bible make the schoolhouse a house of religious worship.

The judgment of the circuit judge having been in accord herewith, is affirmed.

Whole court sitting, except Cantrill, J., absent.

BUCKNER'S ADM'R v. BUCKNER.

(Filed May 31, 1906.)

1. Personal representative—Who entitled to qualify—Discretion of court—Under section 3896, Kentucky Statutes, providing that "the court having jurisdiction shall grant administration to the relatives of the deceased, who apply for same, preferring the surviving husband or wife, and then such others as are next entitled to distribution, or one or more of them whom the court shall adjudge will best manage the estate," the first in rank as distributee is entitled as a matter of right to administer upon the decedent's estate, provided such distributee possesses otherwise legal qualifications to act. Where, however, there is but one distributee this discretion can not exist if the distributee makes application before the second county court from the death of the intestate.

2. Legitimacy of child—Presumptions—Where it is shown by the evidence that a child was born to the wife after her marriage to her husband, and during their wedlock and within the usual period of gestation, the law's conclusive presumption is that the offspring is legitimate.

W. S. Pryor and H. P. Cooper for appellant.

Lafe S. Pence for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge O'Rear.

Alex. Buckner, a resident of Marion county, died intestate in June. Within a few days after his death, and before another term of the Marion County Court, application was made to the county court for letters of administration upon his estate. Appellee, Birdie Buckner, applied, claiming to be his only child and heir at law. Lucinda Buckner, the mother of the decedent, waived, by a writing, her right to be appointed, and application was made on behalf of Frank Rice at the instance of a creditor of the decedent. Birdie Buckner's right to qualify was resisted by Lucinda Buckner and Frank Rice, on the ground that she was not Alex. Buckner's daughter, but that she was a bastard child of Alex. Buckner's divorced wife. The county court rejected Birdie Buckner's claim to administer, and appointed Lucinda Buckner and Frank Rice as administrators. Birdie Buckner appealed to the circuit court, where upon the evidence it was decided that she was the legitimate child of Alex. Buckner, and was consequently entitled to administer upon his estate. From the last-named judgment Lucinda Buckner and Frank Rice prosecute this appeal.

Without detailing the evidence we deem it sufficient to say on the question of fact that we are convinced that Birdie Buckner was born to Alex. Buckner's wife after their marriage, and during their wedlock, and within the usual period of gestation after he had had opportunity to have begot her. In that state of case the law's conclusive presumption is that the offspring is legitimate. Under the statutes of descent and distribution, there being no widow, the only child of the decedent became his sole distributee. By section 8896, Kentucky Statutes, it is provided: "The court having jurisdiction shall grant administration to the relations of the deceased who apply for the same, preferring the surviving husband or wife, and then such others as are next entitled to distribution, or one or more of them whom the court shall adjudge will best manage the estate."

Under this statute the relation first in rank as distributee is entitled as a matter of right to administer upon the decedent's estate, provided such distributee possesses otherwise legal qualifications to act, as, for example, is a person who is a resident of the Commonwealth, and of contractual age and capacity. By the succeeding section, if no such person apply for administration at the second county court from the death of the intestate, the court may grant administration to a creditor, or to any person in the discretion of the court. The discretion vested by these sections is, first, to select from the distributees, where there are more than one of the same rank or degree of relation, such one or more as the court shall judge will best manage the estate. Where, however, there is but one distributee, this discretion can not exist if the distributee makes application before the second county court from the death of the intestate. After that time the court may, in its discretion, grant letters of administration to any other person. Appellee having shown a legal right to qualify as administratrix of her father's estate, and being the only person so entitled to qualify, the county court erred in refusing to appoint her.

Wherefore, the judgment of the circuit court is affirmed.

LOUISVILLE RY. CO. v. JOHNSON.

(Filed June 1, 1905—Not to be reported.)

Damages—Actions against street railways—Instructions—Where an action for damages was brought against a street railway company upon the grounds that appellee, who was injured, attempted to board the car with a blind child and the motorman, after seeing her attempt to board the car, started it, throwing her to the street, injuring her, no one being in charge of the car except the motorman, instructions authorizing the jury to find for the appellee if the car was not properly officered, and if the injuries were received in the manner complained of, were properly given, and an instruction directing the jury to find for the railway company if the appellee boarded the car and attempted to alight while it was in motion was not authorized because the instructions given emphasized the fact that a verdict should be returned in favor of appellee only upon the theory upon which she claimed a right to recover.

Fairleigh, Straus & Fairleigh and R. L. Greene for appellant.

John C. Strother and Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Paynter.

The appellee, her husband and son, on the night of April 24, 1903, went to the crossing at Fourth and Oak streets, Louisville, Ky., with the view of taking the car to their home. Two cars passed that seemed to have been crowded, when a car appeared and stopped. The appellee, with her little blind son, approached the car in front of the husband, got one foot on the step and the other on the platform, and attempted to assist her son on the car. The motorman, after seeing her make an attempt to get upon the car, started it suddenly while she was in the position stated, carrying her some distance and then causing her to fall to the street on her face, from which fall she was seriously injured. No one was in charge of the car except the motorman, and it is claimed on the trial that a conductor was necessary to enable passengers to safely get on and off the car in question. Appellee sued to recover damages upon these grounds. The appellant questioned the appellee's right to recover, and claimed that it was not a regular car; that the motorman informed the appellee that she could not ride on the car. After doing so the car started, and the appellee got on the car after it started and attempted to alight therefrom while the car was in motion.

A reversal is sought because it is claimed the court did not properly instruct the jury. Under the first instruction the court gave the jury it was only authorized to find for the appellee, if it believed that the appellee, in her effort to get upon the car, was thrown therefrom as claimed by her. The jury was also authorized to find for the appellee if the car was not properly officered and started when appellee was attempting to board the car, and thus received her injury. The appellant insists that the court should have instructed the jury to find for it if the appellee boarded the car and attempted to alight while it was in motion. Under the first instruction the jury could not have found for the appellee if the latter state of facts existed. The court was not satisfied with leaving the case with the jury under the first instruction, in which the jury was in substance told that it could not

find for appellee except on her theory as to how the accident happened, viz., that her injuries resulted from the sudden movement of the car while she was boarding it, and that it was not properly officered. These instructions emphasize the fact that the jury could not find for the appellee only upon the theory upon which she claimed a right to recover. It was impossible for the jury to have believed that it was authorized to return a verdict for the appellee, if she was injured by boarding the car and afterwards attempting to leave it while it was in motion. Even if the rule announced in *Louisville Railway Co. v. Meglemery*, 25 Ky. Law Rep., 1588, with reference to instructions, ordinarily should be observed, the failure to give the instruction in question in this case was not prejudicial to appellant.

The judgment is affirmed.

WALTER PRATT & CO. v. W. C. MORRIS & CO.

(Filed June 1, 1905—Not to be reported.)

Sale by sample—Contract—Warranty—Instructions—In an action to recover for goods sold by sample and warranted to be the same in quality, material and in all other respects as the sample, and the purchaser agrees to examine and inspect them, and each part thereof at once upon their arrival, and if they fail to comply with the warranty he shall give written notice in five days thereafter by registered letter to the owner, otherwise the warranty is waived, in which the purchaser pleaded that when the goods were shipped to him they were in such condition that the quality could not be tested within five days, and that they were worthless and of no value, and this was known to plaintiff when the goods were shipped. Held—

1st. It was error in the court on the trial to instruct the jury that if the goods were of no value for the purpose for which they were sold and purchased at the time they were delivered to plaintiff, they should find for defendant, for if the goods were of value for any other purpose there was some consideration for the contract.

2d. Where the purchaser was an experienced druggist and knew whether the goods bought could be examined within five days, he can not be relieved of a contract deliberately made on the ground that it would be inconvenient for him to examine them within five days. If the defects could not be determined in five days he should not have made the contract. Contracts must be enforced as made.

3d. If the plaintiff under cover of the contract, and knowing that the goods could not be tested in five days, knowingly sent inferior goods for the purpose of perpetrating a fraud on the defendant, they can not recover if the defendant within a reasonable time discovered the defect to the goods and offered to return them.

4th. If the defendant after discovering the defects in the goods continued to control and sell them before giving notice to and offering to return them, then he is liable, but if after the plaintiff refused to take them back the defendant inadvertently sold some of them, not with the intention on his part to treat the goods as his own, he would be liable only for the goods so sold.

Byron Renfrew and W. B. Gaines for appellant.

Slims & Grider for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Hobson.

Walter Pratt & Co., through a salesman, sold by sample to W. C. Morris, doing business as W. C. Morris & Co., of Bowling Green, a bill of goods, consisting mainly of perfumery, but including some soap, hair tonic, pomade, tooth powder and other things. There was a written contract between the parties under which the goods were bought which contained the following warranty: "All goods are warranted to be the same in quality, material and in all other respects as samples shown by salesman, and if goods are returned by the consumer for any cause they may be returned as above provided. The purchaser agrees to examine and inspect the goods, and each part thereof, at once upon their arrival at destination, and if said goods fail to comply with said warranty he shall, within five days from the date of arrival at destination, give written notice by registered letter to Walter Pratt & Co., Chicago, Ill., otherwise all warranty of said goods is waived. Goods can not be returned for credit on account except as herein provided."

Morris declined to pay for the goods on the ground that they did not correspond with the sample, and when sued for the price pleaded that when the goods were shipped to him they were in such condition that the quality could not be tested within five days after receiving the goods; that the plaintiffs knew this and knowingly shipped him goods different from the samples, thus practicing a fraud on him; that the goods were worthless and of no value. He also pleaded that he had tendered the goods back to the plaintiffs; that what he had sold had mostly been returned to him; that he had not realized exceeding \$10 upon the bill of goods, and this amount he was willing to pay the plaintiffs and return them the goods; that he had at all times been willing to return the goods; that the plaintiffs refused to accept them and that the plaintiffs had practiced a fraud on him under cover of the contract. The testimony on the trial for the defendant tended to sustain the defendant's plea. The court instructed the jury as follows:

"1st. The court instructs the jury that if they believe from the evidence that the goods named in the account were of no value for the purpose for which they were sold and purchased, at the time they were delivered by plaintiffs to defendant, they should find for defendant.

"2d. The court instructs the jury that if they believe from the evidence that the goods delivered by plaintiffs to defendant did not come up to the samples shown by plaintiffs' salesman at the time the contract was made, and shall further believe from the nature of said goods that by an examination it could not be made and defects found out within five days from the date of delivery that said goods did not come up to said samples, and that defendant did within a reasonable time examine said goods and offered to return same to plaintiff, and has since and now holds them subject to plaintiff's order, they shall find for defendant.

"A. The court instructs the jury that it was the duty of the defendant to have examined the goods in controversy within five days after he received same and ascertain, if he could reasonably have done so, their character and quality, and notify the plaintiffs of any defect in material or quality within

said time, and if he failed to do so they must find for the plaintiffs, even though the goods were not of the kind or quality ordered, unless they shall believe that plaintiffs knowingly and fraudulently sent to defendant goods different from the samples and the ones agreed to be sent.

"B. The court instructs the jury that it was the duty of the defendant, in a reasonable time after ascertaining that the goods were not of the quality or material ordered, if he did so ascertain, to return or offer to return said goods, and if he failed to do so, or after ascertaining same to be defective in material or quality, if he did so, if he exercised dominion over said goods or treated them as his own or offered them for sale, then the jury must find for the plaintiffs the value, if any, of the goods as proven."

The jury found for the defendant and the court entered a judgment dismissing the plaintiff's petition, with costs.

Instruction 1 was erroneous. Although the goods were of no value for the purpose for which they were sold and purchased, if they were of value for any other purpose there was some consideration for the contract. He who buys an article for a given purpose can not keep it without paying for it because it was unfit for the purpose for which it was sold when it is of value for some other purpose. To permit him to do this would be to allow him to sell the article to another to be used for some other purpose and to keep the money without paying anything for the article. There were some articles on the account, as, for instance, the soap, which were not shown to be without value. In lieu of instruction 1 the court should have told the jury that if the goods named in any item of the account were of no value whatever, then to this extent the contract was without consideration, and as to such items they should find for the defendant.

Instruction 2 should not have been given. Morris was an experienced druggist. He understood the nature of the goods as well as the salesman, and knew whether they could be examined in five days or not. The contract was deliberately made, and the court can not make a contract for the parties. While it would have been inconvenient to have examined the goods in five days and tested them, still we think it could have been done by diligence, and whether it could or not Morris knew this when he made the contract just as well as he does now. If the defects could not be determined in five days then he should not have bought the goods under the contract. The contract must be enforced as the parties made it, there being no fraud or mistake in its execution.

Instruction A. was proper, for if the plaintiff, under cover of the contract, and knowing that the goods could not be tested in five days, knowingly sent inferior goods for the purpose of perpetrating a fraud on the defendant, they can not recover. But this instruction should have been qualified with the proviso that the defendant within a reasonable time discovered the defect in the goods and offered to return them to the plaintiffs.

Instruction B. was proper so far as it went. There was some proof that the defendant sold some of the goods before he discovered the defectiveness of them, and some few articles were sold after he offered to return them to the plaintiffs, and they refused to receive them. But these sales, as his evidence tended to show, were made by inadvertence and not with the intent to treat the goods as his own. Yet he admitted in his answer receiving

\$10, which he was willing to pay, and, in any event, judgment should have gone against him for this amount. The words "if he could reasonably have done so" should be omitted from instruction A., and the following words should be added to it: "In which event they will find nothing for the plaintiff except as directed in instruction B." Instruction B. is erroneous in directing the jury to "find for the plaintiffs the value, if any, of the goods as proven." The jury should have been told that if they found for the plaintiffs under this instruction, they should find for them the price of the goods as fixed in the contract; also that though the defendant sold some of the goods after the plaintiff refused to take them back, still, if this was by inadvertence and not from an intention on his part to treat the goods as his own, he would be liable only for the goods so sold, and if the jury so found they should by their verdict direct a return of the goods on hand to the plaintiffs and find for them the value of the goods so sold, but not less than \$10, the amount admitted in the defendant's answer.

It is true part of the goods were not delivered until August 14th and Morris gave notice of the defectiveness of the first shipment within three days after this, or on August 17. But this was not in time. The contract by its terms applies to "the goods and each part thereof," and requires the notice to be given within five days from the date of arrival. This was not done, and no defense can be maintained upon the warranty.

Judgment reversed and cause remanded for further proceedings consistent herewith.

COCHRAN, &c. v. LEE'S ADM'R, &c.

(Filed June 2, 1905—Not to be reported.)

Nonresidents—Guardian ad litem—Attorney to defend—Allowance to—Where made—Under the Code, sections 38 and 59, the court appointing the guardian ad litem or attorney for the nonresident defendant should make him a reasonable allowance for his services. The same rule applies whether the services are rendered in this court or in the circuit court. The court which makes the appointment must hear proof and fix the allowance. If either party is dissatisfied with the action of the circuit court an appeal may be had to this court, but this court has no original jurisdiction in the first instance.

R. L. Page, warning order attorney for nonresident infants.

Edward G. Hill, guardian ad litem.

E. J. McDermott for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Chief Justice Hobson.

Robert L. Page and Edward G. Hill, respectively the nonresident attorney and guardian ad litem for the infant appellants, appointed in the Jefferson Circuit Court, took an appeal from the order of the Jefferson Circuit Court to this court from the judgment of the circuit court denying the infants any interest in the estate under the will. In this court they were suc-

cessful, and obtained a judgment in favor of the infants. (Cochran v. Lee, 27 Ky. Law Rep., 64.) They have now entered a motion in this court for an allowance of \$1,500 for their services, to be paid by the administrator.

Under the Code the court appointing the guardian ad litem or attorney for the nonresident defendant should make him a reasonable allowance for his services. (Civil Code, sections 88, 59.) The same rule obtains whether the services are rendered in this court or in the circuit court. The court which makes the appointment may hear proof and fix the allowance. If either party is dissatisfied with the action of the circuit court an appeal may be had to this court, but we have no original jurisdiction in the matter in the first instance.

The motion for the allowance is, therefore, dismissed for want of jurisdiction.

DUNCAN v. GERNERT BROS. LUMBER CO.

(Filed June 2, 1905—Not to be reported.)

Damages—Patent defect—Demurrable—In an action by an employe to recover damages for an injury received in falling from a ladder because it was too short to enable him to do the work with safety, which was clearly patent to him when he ascended it, a demurrer to plaintiff's petition was properly sustained.

E. E. McKay for appellant.

R. C. Kinhead for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Nunn.

The appellee in 1901 sued the appellant for damages on account of injuries received while in its employment. A demurrer was sustained to his petition and he filed an amended petition, and a demurrer was also sustained to it and the original, and he failing to plead further, the court dismissed his action. The only question is whether he stated a cause of action. He in substance alleged that his injuries were received by reason of the gross negligence of the foreman or superintendent of appellee, and he then stated the particulars as to how he received his injuries, to the effect that there was a ladder which had been placed against a pile of lumber belonging to the appellee, and that he was directed by the superintendent of the appellee to go up the ladder and saw off some projecting timbers; that in compliance with this order he ascended the ladder to the top of it, and when standing thereon he undertook to comply with the orders given him, and while so doing, without fault on his part, he fell from the ladder, about twenty feet, striking the ladder in his descent and striking the ground below with great force, etc. He also alleged that appellee's agents and servants in charge knew, or by the exercise of reasonable diligence could have known, that the ladder was too short, and that he did not know or observe at the time the dangerous condition of the ladder, or of the work, until it was too late to

prevent the injuries. He did not allege who produced or placed the ladder in its position, or give any reason why he could not see that the ladder was too short to enable him to do the work in safety.

If the ladder was too short and was dangerous to work upon, it was certainly obvious to him when he reached the top of it. The only negligence alleged was that the ladder was too short, and that was certainly patent to him when he ascended it.

Wherefore, the judgment of the lower court is affirmed.

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COURT OF APPEALS OF KENTUCKY.

TAYLOR, JR. v. DEMOCRATIC COMMITTEE OF FRANKLIN
COUNTY, &c. (No. 282.)

(Filed June 6, 1905—Not to be reported.)

Political parties—Governing authority of—Power of courts with reference to action of—Circuit courts have no power to intervene by writs of certiorari in the governing authorities of political parties in the settlement of contests over nominations, because they are not inferior courts in the sense in which these terms are used in the common law authorities in defining the writ.

John W. Ray and Hazelrigg & Hazelrigg for appellant.

McQuown & Brown, Wm. Cromwell and J. A. Violett for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hobson.

E. H. Taylor, Jr., and L. F. Johnson were candidates for the Democratic nomination for the office of representative in the general assembly at a primary election held on November 15, 1904. Johnson received a majority on the face of the returns, and a certificate of nomination was issued to him by the committee. Taylor gave notice of contest, but the committee held that the notice was given too late. He then filed this suit, alleging that the action of the committee in so holding was fraudulent, and praying that a writ of certiorari be granted, directed to the members of the committee, commanding them to certify and remove the record of their action in relation to the contest and to produce before the court the ballots, poll books, certificates and orders of the committee, and to perform such orders as might be made in the action. The court sustained a demurrer to his petition, and he failing to plead further, dismissed it.

Certiorari is a common-law writ issued from a superior court to an inferior, commanding it to certify to the superior court the record in a particular case. It is usually in the nature of a writ of error. It lies only in cases where an erroneous determination of the inferior court can be reviewed. The governing authority of a party in trying a contest for a nomination may determine under the statute the contest, and its judgment is final. The circuit court has no power to review its determination or to intervene by a writ of certiorari, for it is not an inferior court in the sense in which these terms are used in the common-law authorities defining the writ.

Judgment affirmed.

KESSLER & CO. v. ELLIS.

(Filed June 1, 1905—Not to be reported.)

1. Contract—Action for breach—Evidence—Letters of parties—In making a contract for services to be rendered the whole correspondence between the parties with reference thereto is admissible in evidence on a trial for a breach of the contract.

2. Authority to make contract—President of company—In an action on a breach of contract for employment, which was made by J. K., as president of defendant company, where the evidence shows that J. K. was an officer and agent of the company, and authorized to make contracts with reference to its business, there was sufficient evidence to allow the case to go to the jury.

3. Trial—Instructions—Measure of recovery—On the trial of an action for damages for breach of contract for improperly discharging employe, who had a contract for twelve months' service at \$100 per month, the court properly instructed the jury that if they found for the plaintiff they should award him the sum of \$1,200, less any amount that he earned during the year, or that he might have earned by the exercise of such diligence during that time as an ordinarily diligent person usually exercised under similar circumstances, and it was not error in the court to refuse to give an additional instruction asked by defendant as to the duty of the plaintiff to seek other employment, and thereby reduce the damages.

Wm. Marshall Bullitt and Chas. H. Stoll for appellant.

N. C. Cureton and Carroll & Carroll for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Judge Paynter.

This action was instituted by the appellee, Ellis, against the appellant, Julius Kessler & Co., upon an alleged contract by the terms of which the appellant employed the appellee to manage its wholesale liquor business in Kentucky for one year at a salary of \$100 per month from December 4, 1899, to December 4, 1900. The appellee claims that the appellant refused to perform its contract by allowing him to perform the services, and in consequence thereof he was damaged \$1,200. A jury returned a verdict of \$200 for him.

A reversal is sought on three grounds: First, that incompetent evidence was admitted; second, that a peremptory instruction should have been given to find for appellant; third, that an instruction which the court gave was erroneous. Subsequent to the date of the alleged contract letters were exchanged between the appellee and persons representing the appellant. They were admitted as evidence because they tended to show that the parties understood that the alleged contract had been made. The objection does not go to the letters of appellant, but to those which the appellee wrote to it. The whole correspondence was admitted as evidence. The letters of appellee, together with responses thereto, bore upon the issue between the parties and were, therefore, competent as evidence. If the letters which appellee wrote appellant had been admitted without the answers thereto, then it might be claimed that they were not admissible as evidence, because of their self-serving character.

It is claimed that a peremptory instruction should have gone, because there was no evidence that any authorized officer of the appellant made the contract or employed appellee as claimed by him. The mere claim of Julius

Kessler that he was president of the company and was authorized to make the contract, was not sufficient to show that he held the position of president of appellant, or that he had the authority to make the contract. The appellee, by reason of the arrangement with Julius Kessler, who claimed to represent the company, was to look about for rooms in which to conduct appellant's business, and finally found rooms which were acceptable to appellant, and it rented them for a year and paid the rent therefor. The lease was signed by the appellant, Julius Kessler & Co., by Julius Kessler, president. This fact was evidence that Julius Kessler was an officer and agent of appellant, and was authorized to make contracts with reference to its business in Kentucky. The facts and circumstances developed in this case tend to show that Julius Kessler was the manager of the appellant's business in Kentucky. It was a West Virginia corporation. We think that there was sufficient evidence to allow the case to go to the jury. The conclusion we have reached is supported by *Forked Deer Pants Co. v. Shipley*, 25 Ky. Law Rep., 2299.

It is claimed that the court erred with reference to instructing the jury as to appellee's duty to have made reasonable efforts to obtain employment after he was apprised of the fact that appellant intended to violate its contract with him. In the second instruction the court was asked by the appellant to tell the jury that it was the duty of the appellee to seek other employment, and thereby reduce the amount of damages resulting from appellant's breach of the contract, if it was guilty for it, and if he failed to seek other employment the jury should find for the appellant. The court refused to give the instruction, but told the jury in substance that if it found for appellee, it should award him the sum of \$1,200, less any amount that he earned during the year, or that he might have earned by the exercise of diligence during that term, and that the court meant by diligence such diligence as an ordinary diligent person usually exercised under similar circumstances. We are of the opinion that the court in effect told the jury that it was the duty of the appellee to have used diligence during the period in question to earn money. The jury necessarily understood from that instruction that Ellis could not be idle during the period of the contract, and not seek employment and recover from appellant.

The judgment is affirmed.

NUCKOLS, &c. v. STONE.

(Filed June 1, 1905.)

Deeds—Vested estate—Deposited with third party—Power to cancel—Power not exercised—Death of grantor—Validity of deed—A deed was executed by D. to N. for land in which D. retained a life interest, and said deed was delivered to G., with written directions signed by both grantor and grantee that G. should surrender it to the grantor whenever it should be demanded by him, and the grantor then had the right to destroy it; but if not so demanded by grantor in his lifetime it should then be filed by G. in the proper office for record. The grantor died leaving a will which was executed before the deed, and without having demanded the deed from G., or in any way undertaking to cancel it, and upon the death of grantor G. filed the deed for record in the proper office. Held—That the deed and written contract must be read together, and by same the grantor vested the

fee in the grantees, reserving to himself a life estate, with power to cancel the deed in a certain way, and the deed not having been defeated in the manner prescribed, became absolute at his death.

J. D. & G. R. Hunt, L. A. Nuckols and Wallace & Harris for appellants
Breckinridge & Shelby for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Hobson.

On May 27, 1897, Dudley Dedman delivered to Z. Gibbons a deed to ninety-six acres of land in Fayette county, the appellant, S. C. Nuckols, being the grantee in the deed, and the following written agreement was then signed by the three parties:

"Agreement made and entered into between Dudley Dedman, party of the first part, and Samuel C. Nuckols, party of the second part:

"Witnesseth, That whereas the party of the first part has this day executed to the party of the second part a deed to certain real estate in Fayette county, the same conveyed to the party of the first part by Lewis Jochum and wife, by deed of record in the office of the clerk of the Fayette County Court, in deed book 206, page 215, excepting so much of said land as the party of the first part has heretofore conveyed to A. M. Fields; and said deed containing stipulations with reference to what party of the second part shall do with reference to said land, in which party of the first part retains a life interest; and said deed fixing how the property shall be disposed of by party of the second part after the death of the first party.

"It is agreed between the party of the first part and the party of the second part that said deed, which has been delivered to the party of the second part, shall be surrendered by him to the party of the first part whenever he shall demand said deed and receipt to said Z. Gibbons for the same, and in the presence of some witness; and upon receiving said deed said party of the first part shall be at full liberty to destroy said deed and cancel said conveyance as completely as if it had never been made; and said Z. Gibbons to signify his obligations, and that of his heirs and persons representing him, to hold said deed and to deliver to Dedman, party of the first part, if he shall demand same, as above provided, said Z. Gibbons signs this paper.

"Upon the death of the party of the first part the said deed is to be delivered to the party of the second part, or if he shall have died in the meantime, said Z. Gibbons shall lodge the deed for record in the office of the clerk of the Fayette County Court.

"Witness our hands this 27th day of May, 1897.

(Signed) "DUDLEY DEDMAN.
"S. C. NUCKOLS,
"Z. GIBBONS."

On July 2 Dedman demanded the deed from Gibbons and receipted to him for it in the presence of a witness, and Gibbons returned it to him. The following endorsement was then placed upon the agreement:

"On this 2d day of July, 1897, I have received from Z. Gibbons the deed mentioned in this contract, as witness my hand.

(Signed) "DUDLEY DEDMAN.

"Witness: G. A. DeLONG."

On the same day another deed was drawn, which was put in the hands of Gibbons under the following written contract:

"Whereas, Dudley Dedman on this 2d day of July, 1897, has received from Z. Gibbons the deed held by him under written contract dated May 27, 1897; and,

"Whereas, Dudley Dedman has cancelled that deed, as he retained the right to do under said written contract, now he has made a new deed to said Samuel C. Nuckols, as trustee, in trust to convey a one-tenth interest to each of his brothers and sisters, and retain a one-tenth interest in fee simple, and to convey the other undivided one-half to Mrs. Pattie D. Stone in fee simple whenever the deed prepared by Z. Gibbons and signed by Dudley Dedman shall be delivered to him according to the terms of this contract; and it is understood that all the terms of the first contract, dated May 27, 1897, excepting as herein stipulated, shall be carried out; and it is understood that said Dudley Dedman has the right to receive the said deed from said Z. Gibbons and to cancel same, and upon said cancelling said deed shall have no further effect whatever; and said Z. Gibbons is not to deliver said deed to said Dudley Dedman except upon taking his written receipt for the same, attested by witness; and said Z. Gibbons binds himself to hold said last-mentioned deed upon the same terms and conditions that he held the deed that has been cancelled.

"Witness our hands this July 2, 1897.

(Signed) "DUDLEY DEDMAN,
"Z. GIBBONS.

"Witness: JOHN J. McKENNA."

The deed referred to in the above agreement is as follows:

"This indenture made this 2d day of July, 1897, between Dudley Dedman, of Fayette county, Kentucky, party of the first part, and Samuel C. Nuckols, of Woodford county, Kentucky, party of the second part:

"Witnesseth, That in consideration of \$1 cash in hand paid, and his love and affection for the grantee and the other beneficiaries under this deed, the party of the first part has bargained and sold, and does hereby give, grant and convey unto the party of the second part and his successors and assigns, the following described land, to wit: (Description of the land):

"To have and to hold said property unto the party of the second part, and his successors and assigns, as herein provided; and said party of the first part hereby releases all his right, title and interest in said property, including the homestead exemption allowed by law, and covenants to warrant generally the property hereby conveyed. Grantor retains said property and the use, possession and occupation and entire control of same during his natural life.

"The party of the second part takes said property as trustee in trust, that at the death of grantor he shall convey an undivided one-half of said property to Pattie D. Stone in fee simple, and to each of his brothers and sisters, Charles, Henry, James and Maggie Stockton, an undivided one-tenth interest in said property in fee simple, himself retaining an undivided one-tenth interest therein in fee simple; and each of said deeds shall be by special warranty.

"If Pattie D. Stone shall die before grantor, her share shall go to her children, or the survivors of them; and any other beneficiaries dying before grantor his or her share shall go to his or her child or children; if none, to his or her brothers and sisters.

"In testimony whereof the party of the first part hereto sets his hand the day and year as above written.

(Signed) "DUDLEY DEDMAN.

"Acknowledged by Dudley Dedman 2d day of July, 1897.

(Signed) "CLAUDE CHINN, Clerk."

Thereafter, on June 31, 1902, Dedman died, leaving a will, which was executed before the deed above referred to, and without having demanded the deed from Gibbons, or in any way undertaking to cancel it. After his death Nuckols refused to carry out the deed. Thereupon this suit was filed by Pattle D. Stone, praying that she be adjudged the owner of one-half of the land, and that commissioners be appointed to divide it and set apart her share to her. The circuit court adjudged her the relief sought, and the defendant appeals.

In 8 Washburn on Real Property, section 2156, the rule of law as to deeds delivered by the grantor to a third person and directed by him to be delivered to another after his death is thus stated: "So long as the deed is within the control of the grantor, and subject to his authority, it can not be held to have been delivered. Thus where the grantor placed a deed in another's hands and directed him to keep it till he, the grantor, died, and to hold it subject to his control as long as he lived, and then to deliver it to the grantee, it was held to be no delivery. A deed can not be even an escrow unless the grantor part with control of it, until the condition on which it depends happens or fails." (9 Am. & Eng. Ency of Law, page 155; 13 Cyc., 569; note to *Munroe v. Bowles*, 54 L. R. A., 865, and cases cited.)

On the other hand, in *Ruggles v. Lawson*, 7 Am. Dec., 375, it was held by the Supreme Court of New York, where a deed was duly executed by the grantor and delivered to a third person, to be delivered to the grantees in case the grantor should die before having made a will, and the grantor died without having made a will, that the deed which was delivered after his death was valid, and took effect from its first delivery. In *Wall v. Wall*, 64 Am. Dec., 147, the deed contained this clause: "I reserve to myself the right to revoke it at any time during my life by filing in the clerk's office a written revocation under my hand and seal."

It was held by the Court of Appeals of Mississippi that the deed was valid, not having been revoked in the manner provided. Concluding the case the court said: "Upon the whole, we consider that this deed conveyed the present right to the property; to be enjoyed in possession at the donor's death, and subject to his power to annul it in the way limited in the deed. This was a substantial right in the donees, which excluded the general power of alienation by the donor, and of revocation in any other mode than that prescribed in the deed. And in this consists the difference between such a conveyance and a will, that by the former a present interest vests which will take place in possession in futuro, unless defeated in the mode and according to the terms specified in the conveyance; and in the latter no right, estate, or interest whatever vests until the death of the testator. In the one case the conveyance takes effect in present to a certain extent; in the other it has no effect whatever until the death of the testator."

These cases, and some others which follow them, are sometimes said to be in conflict with the general rule above quoted from Washburn on Real

Property, which is supported by the great weight of authority, but we do not see that they are. It is conceded in all the cases that if a present interest does not pass the deed is ineffective. If a present interest passes the interest is none the less real because it is defeasible or may be defeated by the grantor in a certain way, for if it is not defeated by the happening of the contingency it is as certain as if no condition had been annexed. So in each case, after all, the turning point is whether a present interest vests in the grantee under the deed.

In the case before us if the grantor had reserved in the deed power in himself to defeat its provisions by conveying the property to another in his lifetime by a deed duly executed, it could not be maintained that if he failed to make such a disposition of the land the deed would be invalid, for the grantor had the right to convey either a defeasible fee or a fee simple, and if the condition did not happen by which the defeasible fee would be defeated the title became perfect. Where a deed is held by the third person as the agent of the grantor and is subject to his control the deed is still his property and there has been no delivery, and, therefore, no title passes; but where the deed has been delivered, the fact that its operation may be defeated in a certain way, either by the grantor or another, renders it none the less operative until the defeasance occurs.

In the case at bar the deed and the written contract of the same date, made at the same time, must be read together. The written contract of July 2 refers to the previous contract of May 27 as part of it, and, therefore, that contract is also to be considered. In the deed the grantor retained a life estate in the property. This was entirely unnecessary if he did not intend it to have any operation, for there was no future event upon which this clause could take effect, and it was necessarily intended that it should take effect then. In other words, he then conveyed the property to the grantees, reserving to himself a life estate and also reserving by the other paper the power to cancel the deed in a certain way. He thus vested the fee in the grantees subject to his life estate, and also subject to his power to cancel the deed in the manner specified. But he could not cancel it in any other way. Reading the two papers together, we think they necessarily are the same in effect as if in the body of the deed the grantor had reserved the right to cancel the deed by a writing delivered to Nuckols, signed by him in the presence of a witness. In such cases the fact that the grantor reserves a life estate to himself is given effect as illustrating his intent that the deed should be operative as a present transfer of the title. (Ball v. Foreman, 37 Ohio State, 132; Miller v. Mears, 155 Ill., 284; Martin v. Flaherty, 19 L. R. A., 242.)

The reservation of a life estate by the grantor was meaningless unless he intended a present interest to vest in the grantees. He thereby necessarily recognized the grantees as the owners of the property, subject to the life estate. The right which he also reserved to cancel the deed in a certain way is not inconsistent with this, but rather gives force to it, for if the deed was subject to his general control and was held by Gibbons merely as his agent, then there was no need that a special mode of reclaiming the deed or canceling it should be reserved by him. When the two papers are taken together their fair meaning is that the deed was to be operative unless ce-

feated by him in the manner pointed out. The estate which was thus granted, and which then vested in the grantees, not having been defeated in the manner provided, became absolute. A cardinal rule of construction is that an instrument, if it can be fairly done, will be so construed as to give it some operation rather than so as to make it abortive. In this case the grantor acknowledged the deed. He had a carefully worded instrument drawn by an attorney, and this instrument was signed by him, the grantee, and the attorney. We can not presume that he intended to do a vain thing, if the language of the instrument is fairly capable of a construction that will give it effect. If he had intended no estate to vest in the grantees there was no reason for his reserving a life estate, and all he need have said in the other paper was that Gibbons was to hold the deed subject to his orders. We can not reject material provisions of the writings in order to arrive at a construction of them that will give no effect to the transaction.

Judgment affirmed.

MULLINS, &c. v. MULLINS.

(Filed June 2, 1905.)

1. Infants—Action against—Service of process on attorney appointed by clerk—Legality of service—In an action by the father against his infant children to set aside a deed made by him to them, he stated in his petition, which was sworn to, that he was divorced from their mother and her place of residence was unknown, but failed to state whether or not they had a statutory guardian. Upon this affidavit the circuit clerk, under section 745 of the Civil Code, appointed a practicing attorney at the bar, upon whom service of process was had for the two infants. Held—That under the facts stated the affidavit and the action of the clerk were only defective and not void, and the judgment rendered therein was not void.

2. Appeals—Jurisdiction to correct record—This court has no jurisdiction to correct the records of a circuit court.

3. Deed from father to infant children—Action to cancel—Evidence of father—Competency—In an action by a father against two of his infant children to set aside a deed made by him to them, the father was an incompetent witness to testify for himself concerning any verbal statement of or any transaction with his said infant children, who were at the time of the transaction under fourteen years of age.

4. Same—Consideration—Favor and affection is a sufficient and valid consideration to uphold a deed from a parent to his child.

5. Delivery of deed—Acceptance by infant—The fact that the father in his petition alleged that he had the deed made and recorded in the proper office was positive evidence of his intention to part with and pass the title to the land to his children. It did not require the actual manual delivery of the deed to them to make it a legal conveyance. The children being infants at the time, and the conveyance being beneficial to them, equity implied an acceptance thereof on their part, but they had the right to reject the conveyance when they became of age within a reasonable time.

W. P. Lincoln and Salyers & Baker for appellants.

Hager & Stewart and R. L. Greene for the grantee of the land in controversy, Northern Coal and Coke Co.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Nunn.

The appellee, John W. Mullins, is the father of the appellants, Anna H. Mullins, William Mullins, Sarah Mullins and Mahulda Mullins.

On August 31, 1886, in consideration of "favor and affection," the appellee signed, acknowledged and put to record a deed conveying to the four children named, "his heirs and all his heirs hereafter," the tract of land herein described, reserving the walnut trees theretofore sold and right of way for their removal.

On June 13, 1898, appellee filed his petition in equity in the Letcher Circuit Court, making the appellants defendants, alleging that they, except Anna H. Mullins, were infants under the age of twenty-one years, and that Sarah and Mahulda Mullins were under fourteen years of age; that he was their father, and that they all resided with him; that plaintiff was divorced from their mother, and that her place of residence was not known; that he had, on the 31st of August, 1886, signed and acknowledged the deed hereinbefore referred to and had it recorded in the office of the county clerk of Letcher county; that such was done without the knowledge of the grantees and without consideration; that he did not deliver the deed to the grantees, nor to any one for them, or either of them, and that the same was never accepted by them; that the grantees named were then his only children and that he intended to convey to them and any other children he might thereafter have; that it was by mistake that the deed was made to the named children alone; that he had since married and had four other children, all girls but one, the eldest being nine years of age and the youngest five years of age; that he had become a permanent cripple, unable to perform manual labor, and that he was unable to support his children without selling the land, and that he did not desire to deliver or confirm the deed, but that he desired to sell the land and educate the children; that the land in question was mountainous and rough, unsuitable for farming purposes; that he had removed to Laurel county on a farm more suitable for farming purposes, which he had not yet paid for, and that to complete the payments thereon, it was necessary for him to sell this land; that he was unable to make a sale with this deed on record, which cast a cloud upon his title, and he prayed that this deed might be cancelled, etc.

Upon the trial of this case the court granted the prayer of his petition.

On August 28, 1902, the appellants, Anna H. Mullins and William Mullins, and the latter as next friend of Sarah and Mahulda Mullins, moved the court to set aside the judgment entered December 1, 1898, upon the ground that this judgment was void, and tendered and offered to file their answer, which the court refused to allow filed, and overruled the motion to vacate the judgment, to which they objected and excepted and they have appealed from this order as well as the judgment of 1898.

The appellee's counsel argue in their brief that as appellants did not take their appeal until more than two years had elapsed from the rendition of the judgment of 1898, that their right to prosecute this appeal is barred and the appeal should be dismissed.

This would apply to Anna H. Mullins and possibly to William Mullins if the statute of limitations had been pleaded by appellee, but under no circumstances could it apply to the other two appellants as it appears that they

are still under twenty-one years of age. In the case of *Riley v. Reed*, 13 Bush, 412, the court said: "It was the practice of this court under the old Code to require the statutes of limitations to be pleaded. That practice, we think, was correct, and should be adhered to.

It has been repeatedly held that the statutes of limitations of actions can not be relied upon in an original action by demurrer, or otherwise than by an answer. One of the grounds of those decisions is that the plaintiff would be deprived by the demurrer of an opportunity to show that he is within some of the savings of the statutes. The statute limiting appeals to two years also contains savings in favor of persons under certain disabilities, and to allow an appeal to be dismissed on motion would deprive appellant of an opportunity to show that he was within some of them. And, moreover, as it does not appear that the appellant is not within some of the savings in the section imposing the limitation, it does not appear from the record that the appeal is barred."

Section 745 of the present Code is substantially the same as section 884 of the Code which was in existence at the time of the rendition of the opinion *supra*. It does appear that the appellants, Sarah and Mahulda, were under the disabilities named in this section of the Code, and it does not appear that the other two children, Anna H. and William, were not within some of the savings in the section imposing the limitations. The appellants contend that the lower court erred in failing to vacate the judgment of December, 1898, for the reason that it was and is void, because they were not summoned and the court had no jurisdiction of their person.

We will consider the question raised as to the service of process upon Sarah and Mahulda, the two who were under fourteen years of age at the institution of the action. Section 52 of the Code provides: "If the defendant be under the age of fourteen years the summons must be served on his father; or if he have no father, on his guardian; or if he have no guardian, on his mother; or if he have no mother, on the person having charge of him. If any of the parties upon whom service is directed to be served by this section is a plaintiff, then it shall be served on the person who stands first in the order named in said section, and who is not a plaintiff; and if all such persons are plaintiffs, it shall, on the affidavit of one or more of them showing that fact, be the duty of the clerk of the court to appoint a guardian *ad litem* for the infant, and the summons shall be served on such guardian."

The petition of appellee was subscribed and sworn to, and it was stated in it that he was the father of the appellants and they resided with him, and that their mother was divorced from him and her place of residence unknown. He failed to state whether or not they had a statutory guardian. Upon this affidavit the clerk appointed one Ira Field, a practicing attorney at the bar, upon whom the service of process was had for the two named infants. Appellants claim that because of the omission from the affidavit that they had no statutory guardian that the clerk was without jurisdiction to appoint Ira Field, or any one, upon whom process might be served for them. They do not attempt to show that they in fact had a statutory guardian at the time, upon whom process might have been served.

In our opinion, under the facts stated, the affidavit and the action of the clerk were only defective and not void. (*McMakin v. Stratton*, 82 Ky., 226;

Gardner v. Letcher, 16 Ky. Law Rep., 178; Robinson v. Clark, 17 Ky. Law Rep., 1401; Walch v. Davis, 17 Ky. Law Rep., 684.)

Appellants claim that the two children, Anna H. and William, were not served with process in any matter. The original record, as filed in the office of the clerk of this court, does not show that any service of process was had upon them. After this case was first submitted in this court the appellee asked the court to set aside the order of submission of the case and permit certain affidavits of the present and former clerks of the Letcher Circuit Court and of D. D. Field to be filed for the purpose of showing that processes were issued and executed upon Anna H. and William Mullins, which were not copied into the record. This motion was passed upon June 8, 1904, in, 26 Ky. Law Rep., 443, wherein the court said: "If, as a matter of fact, the alleged missing papers were ever a part of the record, their omission could be shown and supplied by a proceeding in the Letcher Circuit Court."

After that date the appellee, or those representing him, appeared in the Letcher Circuit Court, as shown by a supplemental transcript, the case was redocketed by consent, proof was heard and it is made to appear by this additional transcript that a summons was issued against Anna H. and William Mullins on the day on which the original petition was filed, and was executed upon them by delivering to each a true copy of the summons on July 22, 1898, some two months before the judgment was rendered in that action. It also appears that the appellants were represented in the matter by their attorneys, Salyer & Baker, who objected and excepted to the action of the court therein. This additional transcript is duly certified by the clerk of that court as a part of the record made by the court in the action named. The appellants, by counsel other than Salyer & Baker, objects to the filing of or the consideration by this court of the additional transcript, and present his affidavit and states in substance that this supplemental proceeding in the action was without notice served upon the appellants or himself; that Salyer & Baker were not employed by appellants; that he alone represented them by their employment; and that after he was employed he obtained the services of Salyer & Baker, resident attorneys, to aid him in looking after the interests of his clients.

If these alleged facts are true, it was the duty of the appellants to take such steps in the Letcher Circuit Court to correct the errors complained of. This court has no jurisdiction to correct the record of that court. Taking this supplemental record as true, which we must, Anna H. and William Mullins were duly served with process in that action, and the judgment against them is not void. We are of the opinion that the court erred in setting aside the deed from appellee to appellants. The appellee, the father of appellants, testified and in substance proved the allegations of his petition. His father was a witness for him, and he stated that he was present when the deed was made and that the appellants were not present at the time, and there was no consideration paid the appellee for the land. Appellee also introduced his two eldest children, defendants in that action, who stated in substance that they never paid any consideration for the land, and that their father had never delivered the deed to them, nor had they ever had possession of it, and had never heard before the deed was made that it was to be made; that they did not know that it had been made until a short time before the giving of their deposition.

The evidence of the appellee was incompetent under subsection 2, section 806 of the Code, which says: "No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by an infant under fourteen years of age, except for the purpose and to the extent of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted.

Even if his testimony were competent, and considering it with the other proof offered, it did not authorize the court to cancel the deed. This court has repeatedly decided that "favor and affection" is a sufficient and valid consideration, and will uphold a deed from a parent to his child. Appellee alleged in his petition that he made and executed this conveyance and had it recorded in the proper office. These acts were positive evidence on the part of appellee that it was his intention to part with and pass the title to this land to his children. It did not require the actual manual delivery of the deed to his children to make it a legal conveyance. The children, at the time being infants and the conveyance being beneficial to them, equity implied an acceptance thereof on their part, but they had the right to reject the conveyance upon their arrival at age within a reasonable time. (*Owings v. Tucker*, 90 Ky., 297; *Looknane, &c. v. Hoskins*, 24 Ky. Law Rep., 639; *Bunnell, &c. v. Bunnell, &c.*, 28 Ky. Law Rep., 800.)

For the foregoing reasons the judgment is reversed and the cause remanded for further proceedings consistent herewith.

BRIGHT v. LOUISVILLE & NASHVILLE R. R. CO.'

(Filed June 6, 1905—Not to be reported.)

1. Railroads—Condemnation of property—Compromise and settlement—Limitation—Where a condemnation proceeding was dismissed upon the execution of a contract providing for the straightening of the channel of a creek, after the lapse of thirty-two years the presumption will be indulged that the work was done as provided for in the contract.

2. Same—Where the contract also provided for the building of a bridge, which was subsequently built by the city of Louisville, if there was any right of action against the railroad company it accrued when the city built the bridge, and as more than fifteen years elapsed from that time until the suit was brought the right of action to recover the land was barred.

Wm. Furlong and W. W. Crawford for appellant.

Helm, Bruce & Helm and Benjamin D. Warfield for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Opinion of the court by Chief Justice Hobson.

James Guthrie owned at his death in 1869 a large tract of land near the city of Louisville. He died, leaving three daughters, and after his death the property was divided among them. In June, 1870, the Louisville & Nashville R. R. Co. and the Louisville, Cincinnati & Lexington R. R. Co. contemplated connecting the two systems by a track which ran for about three-quarters of a mile through the property of James Guthrie's estate

along Beargrass creek, on the eastern side of the city. The land was surveyed, the right of way was staked off, condemnation proceedings were instituted and commissioners were appointed to assess the damages to the land. At this situation of the case the following written contract was entered into:

"Memorandum of understanding and agreement between W. B. Caldwell, for, and on behalf of, himself and the other heirs of James Guthrie, deceased, and N. Green, president, for and on behalf of the Louisville, Cincinnati & Lexington and Louisville & Nashville R. R. Companies.

"Witnesseth, That for and in consideration of the right of way, and all damages thereto pertaining, for the connecting line of railroad to run through the lands of said first parties as condemned by the commissioners, to be given and conveyed by the said first-mentioned parties, the said railroad companies undertake and agree, first, that within one year from this date they will excavate and remove the channel of Beargrass creek from the point where said railroad line shall cross said creek near Kentucky street, northwardly through the lands of said parties, so that the western line of land granted for said railroad shall be the eastern top of the bank of the creek, except at a point of high land where the railroad makes a cut, at which point the creek may be run out onto land not lying higher than the grade of said road; and, second, that upon the opening and making of Breckinridge street said railroad companies will make a good and substantial bridge, with stone abutments and iron superstructure, not less than thirty feet width of wagon way, and of sufficient length to pass said street way safely over said railroad, with footways on either side of said bridge, outside of said wagon ways. The foundations of the pillars for said bridge to be made, and the pillars built, whilst the street is being filled and made, so as to make abutments for receiving the fill of the street, whenever said parties shall commence to make and fill up said street.

"W. B. CALDWELL,

"For the heirs of James Guthrie,

"N. GREEN,

"Pres't L., C. & L. R. Co.,

"W. B. CALDWELL.

"Louisville, September 17, 1870."

W. B. Caldwell, who signed the contract, was the husband of Anna Caldwell, one of the daughters of James Guthrie, who at that time owned the property in controversy, and was the mother of the appellant, Augusta C. Bright. W. B. Caldwell was also one of the executors of Mr. Guthrie and the father of Mrs. Bright. The condemnation proceedings, so far as the property was concerned, terminated with the compromise agreement. The railroad companies wanted immediate possession of the strip to build and operate their lines upon it, and proceeded at once to build the line and to straighten Beargrass creek as provided in the agreement. No objections were made, so far as appears, at the time to the manner of carrying out the contract, although it is now alleged that the work was wholly ineffectual. From 1870 until this time the railroad companies have been in possession of the property. On December 8, 1903, Mrs. Bright brought this suit, claiming that she was the owner of it, and the court having dismissed her petition, she appeals.

After the railroad companies had been in possession some twenty odd years, in May, 1893, H. S. Bright, appellant's husband, when the railroad company was building some additional tracks, demanded that the work should be discontinued until the title to the property could be established. The railroad company thereupon ceased work, but in June, 1893, after some investigation, the claim to the property was abandoned and nothing more was done until the filing of this suit. The railroad company had spent when this suit was filed large sums of money in the construction and improvement of its tracks over the property. These tracks were the connecting link between its southern system and Cincinnati and other eastern cities. In the meantime the Caldwells had sold off much of the land adjoining the strip to manufacturers, and side tracks had been built out by the railroad company to them. The bridge referred to on Breckinridge street had been built by the city, and there is no complaint that it does not in fact come up to the contract, although it is conceded that it was not built by the railroad company. The ground of the plaintiff's action seems to be that she insists that the railroad company not having paid the consideration, can not retain the property. There would be more force in this claim if the suit had been seasonably brought or if the owners of the land had not in fact received any part of the things that they contracted for. After so many years the presumption must be that the straightening of the channel of Beargrass creek was done as provided in the contract. This work was to be done within one year from its date, or by September 17, 1871. If it was not done by that time a cause of action then accrued, and yet this action was not begun for more than thirty-two years afterwards. It is true the bridge was not to be built until the opening and making of Breckinridge street; but when this would be done neither party at the time the contract was made could know. The contract was made in view of the railroad company immediately taking possession of the land and building its railroad upon it. It was evidently made as a substitute for a judgment in the condemnation proceedings. In other words, the owners of the land received what they took under the contract in lieu of the money judgment they would have gotten had that proceeding progressed to a final determination. The parties could not have contemplated that if the railroad company failed to build the bridge on Breckinridge street at some remote time in the future when the street was opened it should forfeit its right to the land. On the contrary, the parties must have contemplated, in view of the amount of the expenditures which the railroad company was to make and in view of the fact that the track was to be a connection between two great systems, that the building of this bridge was to be a condition subsequent to the vesting of the title. The building of the bridge was a part of the consideration for the land. If the railroad company failed to build the bridge then a cause of action arose to recover such damages as the owners of the land sustained by this breach of the agreement. This cause of action accrued when the street was opened if the bridge was not built. The language of the contract does not create a condition precedent, for the parties must have contemplated that the railroad was to be built immediately, while the bridge was not to be built until the street was opened, and they could not reasonably have contemplated that the railroad company, after it went to the expense of

building its railroad, and when the connecting track was essential to a great system, would be without title to the strip. The peculiar language of the instrument was used because Dr. Caldwell was not the owner of the land and was acting for the owners, but his authority to make the contract is conceded, and the only reasonable construction of the agreement is that it was made as a settlement of the condemnation proceedings.

This action was not brought to recover damages for the failure to build the bridge. It is simply an action to recover the land. So far as the straightening of Beargrass creek goes, the plaintiffs have slept upon their rights until they have lost all right to complain, and, therefore, they must be held at least to have received this part of the consideration. The bridge was built by the city of Louisville something like twenty years before this suit was filed, and no demand was made at any time of the railroad company to build the bridge. Equity aids the vigilant, not those who have slept upon their rights. If appellant had any cause of action against the railroad company for not building the bridge, it accrued when the bridge was built by the city, for it was seemingly then known that the railroad company was not going to build the bridge, and apparently more than fifteen years elapsed after the cause of action accrued before this suit was brought. The rule is settled in this State that the vendor of land who takes a note for the purchase money, and allows the note to be barred by limitation, is without remedy. The same principle should apply where he takes an obligation not for the payment of money, but for the performance of some other thing and the cause of action thereon is barred by limitation. (Vandiver v. Hodge, 4 Bush, 538; Yates v. Weeden, 6 Bush, 438; Farley v. Farley, 91 Ky., 497.) But whether the cause of action to recover compensation for the failure of the railroad company to build the bridge is or not barred by limitation is a question not presented by the record, as the suit is not brought therefor. This question is not, therefore, determined.

Judgment affirmed.

KENTUCKY DISTILLERIES AND WAREHOUSE CO. V. LEONARD.

(Filed June 6, 1905—Not to be reported.)

1. Verdict—Form of—Bill of exceptions—A verdict as follows: "We, of the jury, find for the plaintiff 1,800. Morris Sheets, Foreman," was sufficient to support a judgment for \$1,800 for the plaintiff, where the bill of exceptions shows it to have been read by the clerk as of that amount; that the jury reported they had agreed, and informed the court that it was their verdict, there being no objection as to the form of the verdict at the time it was returned, nor any motion made to correct the order book until the day after it was signed by the judge.

2. Same—The verdict was in such form that the court could tell from its contents the intention of the jury, and it being assented to by the jury was ample warrant for entering judgment upon it.

Joyes & Jarvis, M. D. Joyes, D. W. Lindsey and J. B. Lindsey for appellant.

B. G. Williams for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

This is the second appeal of this case, the former opinion being in 25 Ky. Law Rep., 2046. This court in that opinion stated fully the facts as proven, and the evidence on the last trial being substantially the same, we deem it unnecessary to restate them. This court in that opinion decided that appellant was not entitled to a peremptory instruction, as there were facts proven authorizing a submission of the case to the jury. The case was reversed for the reason that the lower court failed in the instructions to give the law governing the case to the jury. On the last trial it appears the court gave the instructions in conformity with the former opinion.

The appellant presents several propositions upon which it asks this court to reverse the judgment appealed from, but, in our opinion, only one question is involved in this record, either of law or of fact, which was not passed upon in the former opinion, and that question is as to the form of the verdict. It was as follows: "We, of the jury, find for the plaintiff 1,800. Morris Sheets, Foreman."

The bill of exceptions shows that the verdict was read by the clerk as follows: "We, of the jury, find for the plaintiff \$1,800. Morris Sheets, Foreman."

The jury reported that they had agreed, and the court directed them to hand their verdict to the clerk, and he read it as stated. The jury was asked by the court if that was their verdict, and answered in the affirmative, and a poll of the jury was not demanded. A judgment by the court was immediately entered in favor of the appellee for \$1,800. There was no objection made by the appellant to the form of the verdict at the time it was rendered, nor the manner in which the clerk read it, nor the manner in which the verdict was entered on the order book, nor was any motion made to correct the order book until the day after it was signed by the judge.

The appellant contends that this verdict was incomplete; that it did not show whether the jury intended it to mean 1,800 cents or \$1,800, and relies upon section 325 of the Civil Code, which is as follows: "The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether or not it is their verdict. If any juror disagree, the jury must be sent out for further deliberation; but if no disagreement be expressed, and neither require the jury to be polled, the verdict is complete and the jury discharged from the case."

The provision in this section of the Code, that the verdict shall be signed by the foreman, is as explicit as that the verdict shall be written, and in the case of *Berry v. Pusey*, 80 Ky., 166, the court uses the following language, the foreman in that case having failed to sign the verdict: "We think this provision of the Code is merely directory, particularly in civil cases, and certainly the objections come too late after the jury has been discharged. The jury, when the verdict in this case was returned into court, heard the special interrogatories read by the foreman, and the verdict was then handed to the clerk, and again read by him, and the jury asked if it was their verdict, and an affirmative response was made. The verdict was then entered of record, and made the judgment of the court, and is binding on the parties to it."

This action was for \$2,000; the verdict was for "1,800;" it was read in

their presence, and in the presence of the court by the clerk, "\$1,800; the jury assented to it as read by the clerk, thus making it their verdict.

The intent or object of a written verdict is to bring to the mind of the court the finding of the jury. When that object is accomplished the use of a written verdict is satisfied. In our opinion this verdict was in such form that the court could tell from its contents the intention of the jury, and in view of their assent to it as read there was ample warrant for entering judgment upon it. It is provided by section 184 of the Civil Code that the court must in every stage of an action disregard any error or defect in the proceedings that does not affect the substantial rights of the adverse party, and no judgment shall be reversed on account of such error or defect. The objection urged against this verdict is technical, and not substantial. It is apparent from the record that the court, and the counsel for both parties, understood the verdict of the jury to mean \$1,800.

We are aware that in the case of *Nave v. Collier*, 6 Ky. Law Rep., 602, decided by the Superior Court, an opinion was rendered upon facts similar to these, contrary to the views herein expressed; but upon a careful consideration of that case we are not inclined to follow the principles there announced. To do so would be having regard for a defect not affecting the substantial rights of the parties.

The judgment is, therefore, affirmed.

MURDOCK, &c. v. LOESER, &c.

(Filed June 6, 1905—Not to be reported.)

1. Wills—Descent—Character of estate—In an action to obtain a sale of real estate left by will where all of the heirs at law, who are the devisees under the will, are all parties to the action and properly before the court, they only having any interest in the estate sold, the widow never having sold any of the estate, nor encumbered it, what she left went to her children and heirs at law as provided by the will, and it is unnecessary to decide whether she took a fee simple or a life estate in the property devised to her by her husband.

2. Same—Purchaser of estate need not look to distribution of proceeds—Where an estate sold under an order of court was a vested estate and in possession it was such an estate as could be sold under section 490, subsection 2, Civil Code, and a purchaser of such an estate need not look to the distribution of the proceeds.

3. Description of property—Where a lot was misdescribed in the judgment and notice of sale, but was correctly described in a supplemental decree and its actual dimensions given, and the purchaser does not complain that he was misled in any way by the incorrect description of the property, and he got what he purchased, takes by the deed of the court's commissioner a good title to the property.

E. P. Slattery for appellants.

A. M. Marratt and A. H. Marratt, Jr., for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle.

This equitable action was instituted by L. J. Loeser and others, children of John Loeser and Eva Loeser, deceased, and devisees of the former, to obtain a sale of the real estate left by the parents and a division of the proceeds.

Certain real estate sold under the decree rendered in the action was purchased by appellant Murdock, and his bid and purchase having been assigned to the appellant, A. F. Vreeling, the latter filed exceptions to the report of sale, and his exceptions having been overruled he prosecutes this appeal. The exceptions present the contention that appellant, under the decree and sale, did not receive a good and sufficient title to the lot purchased by Murdock and assigned him, first, because under the will of John Loeser his widow, Eva Loeser, took a fee simple estate in the property devised, and hence at her death the property received by her under the will descended to her children and heirs at law under the statute instead of the will of John Loeser; second, that John Ernest Loeser, an idiot son of John and Eva Loeser, had a particular and not a vested estate in possession in the land devised by his father and left by his mother; third, that the lot claimed by the appellant, Vreeling, was improperly described in the decree and advertised for sale as a sixty foot lot, when in fact it was but a thirty foot lot.

As to the question raised by exception No. 1, we deem it unnecessary to decide whether the widow took a fee-simple title or a life estate in the real and personal estate devised her by the will of her husband, for in any event her children and the children of her deceased son, Albert Loeser, are her only heirs at law, and also the only devisees under the will of her husband, and are all parties to the action and properly before the court. They alone have any interest in the real estate sold, and as the widow during her life had never disposed of any of the real estate devised by her husband, or in any way encumbered it, what she left went in any event to her children and heirs at law as provided by the will.

By the provisions of the will John Ernest Loeser will be entitled to \$500 in excess of what is to be received by the other children, but whether he takes a life estate or fee simple under the will is immaterial. If he takes a life estate his committee is allowed by the will to use it all, if necessary, for his support, and his brothers and sisters and the children of the deceased brother can in any event only get of his share what was left unconsumed in his support. Upon the other hand, if the will gives him an absolute estate, or fee in the share devised him, as by reason of his idiocy, he will never be mentally capable of selling or otherwise disposing of it, all that he leaves goes under the statute to his heirs at law, brothers and sisters, or to the children of such of them as may be dead at the time of his death. If, however, John Ernest Loeser took an interest in the property sold as an heir at law of his mother, it can not affect the rights of the purchaser at the decretal sale. The latter is not bound to look to the distribution of the proceeds of the realty, but is only interested in knowing that the steps by which the sale was had were regular and legal. In any event, whether John Ernest Loeser's interest in the realty sold was in fee or remainder, it was certainly a vested estate and he had possession of it, therefore, it was such an estate as could be sold under section 490, subsection 2, Civil Code.

The same is true of the interests of all the other children and grandchildren of John and Ernest Loeser.

We are also of opinion that the third exception was not well taken. While it is true that the lot purchased by appellant was improperly described in the judgment and notice of sale as a sixty foot lot, when it was but a thirty foot lot, by a supplemental decree entered before the sale took place it was correctly described and its actual dimensions given, and though no correction of the misdescription was made in the advertisement of the property for sale, yet, as a matter of fact, the thirty foot lot was the one sold. It was known to the purchaser, and he does not complain that he was misled in any way by the misdescription of the property in the original judgment. He in fact concedes that the lot purchased by him was the one belonging to the parties to the action and intended and adjudged to be sold, and so he got what he purchased, and takes by his purchase and the deed that will be made him by the court's commissioner a good title to it.

Finding no substantial error in the record the judgment appealed from is affirmed.

LEONARD'S ADM'R v. COWLING.

(Filed June 6, 1905.)

1. Trial by court—Appeal granted in judgment—Motion for new trial—Abandonment of original appeal—Appeal granted by appellate court—Motion to dismiss original appeal—A judgment was rendered on April 9, 1904, on a trial by the court without a jury, which concluded with these words: "The defendant excepts and prays an appeal to the Court of Appeals, which is granted." On April 11 the defendant filed grounds and moved the court for a new trial, which was overruled and sixty days' time given to file bill of exceptions, but no appeal was then granted. The bill of exceptions was filed on July 9. On August 5 defendant executed an appeal bond and a supersedeas was issued. On September 1 an administrator was appointed for defendant, who had died after the execution of the appeal bond. On January 16, 1905, an order of revivor was entered in the circuit court in the name of the administrator, and he was then granted an appeal to this court from the judgment. On March 21 he filed the transcript with the clerk of this court and an appeal was granted him and the appearance of the appellee was entered. On April 26 an agreed order of revivor was made in this court, appellee entering her appearance and consenting thereto. On May 9 appellee filed notice and entered a motion to dismiss the appeal granted by the circuit court because the record was not filed in this court twenty days before the second term after the granting of the appeal. Held—That though defendant had been granted an appeal on April 9, the entry of his motion for a new trial was an abandonment of the appeal which had been granted, and the appeal bond and supersedeas executed on August 5 were void, as the evident purpose of the defendant was not to appeal from the judgment, but from the order refusing him a new trial. The circuit court had lost jurisdiction over the case in January, 1905, and, therefore, appellant properly filed his record with the clerk of this court and had an appeal granted here. Appellee having entered her appearance to the appeal the case stands regularly on the docket for hearing, and the motion of appellee to dismiss, with damages, the appeal granted by the circuit court is overruled.

2. Bill of exceptions—Motion to strike out—The bill of exceptions was filed

within the time allowed by the court, the appeal which had been previously granted had been abandoned by the motion for a new trial, the court had power under the Code when it overruled the motion for a new trial to give time for the filing of the bill of exceptions not beyond a day in the next term, and the time given was not beyond the limit thus fixed, and appellee's motion to strike out the bill of exceptions is overruled.

Greene & Van Winkle and Dallam, Farnsley & Means for appellant.

A. C. Rucker for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Chief Justice Hobson.

This was an ordinary action brought by L. D. H. Cowling against S. N. Leonard. It was submitted on the law and facts to the circuit court without a jury. The court on April 9, 1904, filed a written opinion and his conclusions of law and fact, pursuant to which on that day a judgment was entered in favor of the plaintiff for \$605.04. At the conclusion of the judgment are these words: "The defendant excepts and prays an appeal to the Court of Appeals, which is granted."

On April 11, 1904, the defendant filed grounds and moved the court for a new trial. On May 14 the motion for a new trial was overruled and sixty days' time was given the defendant to file a bill of exceptions, but no appeal was then granted. The bill of exceptions was filed on July 9. On August 5 Leonard executed an appeal bond and a supersedeas was issued. On September 1 the Jefferson County Court appointed J. D. Leech administrator of the estate of S. N. Leonard, who had died in the meantime after the execution of the appeal bond. On January 16, 1905, an order was entered in the circuit court reviving the action in the name of Leech as administrator, and he was then granted an appeal to this court from the judgment in the action. On March 21 he filed the transcript with the clerk of this court, and an appeal was granted him and the appearance of the appellee was entered to the appeal. On April 26 an agreed order of revivor was made in this court, appellee entering her appearance and consenting to the revivor. On May 9 appellee filed notice and entered a motion to dismiss, with damages, the appeal granted by the circuit court because the record was not filed in this court twenty days before the second term after the granting of the appeal.

The rule is that the entry of a motion for a new trial suspends the judgment, and that the judgment does not become final until the motion for a new trial is overruled. Though the defendant had been granted an appeal on April 9, he could not, while insisting upon that appeal, also maintain a motion in the circuit court for a new trial. The entry of his motion for a new trial and the pressing of that motion were an abandonment of the appeal which had been granted. It may be that so much of the order of April 9 as granted an appeal was an inadvertence, but whether it was or not the defendant had a right to enter his motion for a new trial so as to bring up for review in this court questions which might not otherwise be presented, and to this end he might have had the order of April 9, so far as it granted an appeal, set aside. The evident purpose of the defendant was not to appeal from the judgment, but to appeal from the order refusing him a new

trial so as to bring up every question raised by the record. His adopting this course was necessarily an abandonment of the appeal granted in the original judgment. The appeal bond was executed after the motion for a new trial was overruled, and was no doubt executed under the idea that an appeal had then been granted by the circuit court. But as no appeal was then granted, and as the appeal which was granted on April 9 had been abandoned, the appeal bond and supersedeas are void. The circuit court had lost jurisdiction over the case in January, 1905, and, therefore, appellant properly filed his record with the clerk of this court, and had an appeal granted here. Appellee having entered her appearance to the appeal, the case stands regularly on the docket for hearing. The motion of the appellee to dismiss with damages the appeal granted by the circuit court is overruled, as the only appeal granted by the circuit court was abandoned.

Appellee is at liberty to proceed to enforce her judgment unless it is superseded as provided by law by the execution of a bond before the clerk of this court. The bill of exceptions was filed within the time allowed by the court; the appeal which had been previously granted had been abandoned by the motion for a new trial; the court had power under the Code when it overruled the motion for new trial to give time for the filing of the bill of exceptions, not beyond a day in the next term, and the time given was not beyond the limit thus fixed.

Appellee's motion to strike out the bill of exceptions is, therefore, overruled.

TEETS, BY, &c. v. THE SNIDER HEADING MANUFACTURING CO.

(Filed June 6, 1905.)

1. Action—Suing corporation instead of partnership—Plea in abatement—Amended petition—Where an action was brought by an infant by next friend against the Snider Heading Manufacturing Co., alleging that it was a corporation and service had on C. as its agent, to which a plea in abatement was filed by the company, denying that it was incorporated, but was a partnership, composed of M. S. & L. S. and C., doing business as the Snider Heading Manufacturing Co., it was error in the court to dismiss the action and refuse to allow an amended petition then tendered withdrawing the averment that the defendant was a corporation, and making the members of the firm doing business in that style as partners defendant to the action.

2. Same—The fact that the plaintiff might have brought another action after the dismissal of this, or that another summons against the parties constituting the partnership will be necessary, can not affect plaintiff's right to file the amended petition offered in the lower court.

A. D. Cole for appellants.

W. C. Halbert for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Wesley Teets, an infant, by his next friend, sued in the Lewis Circuit Court to recover damages of the Snider Heading Manufacturing Co. for injuries sustained to his hand, and alleged to have been caused

by the negligent manner in which its servants operated a saw in its manufacturing establishment.

It was alleged in the petition that the Snider Manufacturing Co. was a corporation engaged in the manufacture of barrel heading in Lewis county. Summons in the action was served on C. S. Cottingham, as agent of the company. At the appearance term an answer containing a plea in abatement was filed by the Snider Heading Manufacturing Co., in which it was denied that it was incorporated, or that its corporate name was as charged in the petition. It was, however, averred in the answer that the manufacturing plant and business, in the name and style of the Snider Heading Manufacturing Co., was and is a partnership, composed of Martin Snider, Lawrence Snider and C. S. Cottingham; that the Sniders are nonresidents of the State, and that the firm name and style of the partnership was and is the Snider Heading Manufacturing Co.

It was also admitted in the answer that appellant was injured while in the service of the firm composed of Martin Snider, Lawrence Snider and C. S. Cottingham, doing business as the Snider Heading Manufacturing Co., but not admitted that his injuries were caused by the negligence of the firm or its servants. The answer was subscribed and sworn to by C. S. Cottingham as a member of the firm in question, and it was not denied therein that he resides in Lewis county, is the manager of the partnership plant and business, and the only agent of the firm in this State. At the same term of the court, and immediately after the filing of the answer presenting the plea in abatement, appellants tendered in open court and offered to file an amended petition withdrawing the averments of the original petition, that the Snider Heading Manufacturing Co. was an incorporated concern, and making the members of the firm doing business in that style partners defendant to the action, but the court refused to allow the amended petition to be filed, and dismissed the action, of which appellants complain.

Section 134, Civil Code of Practice, provides: "The court may at any time in furtherance of justice, and on such terms as may be proper, cause or permit a pleading or proceeding to be amended, by adding or striking out the name of a party, or by correcting a mistake in any other respect, or by inserting other allegations material to the case." * * *

Assuming that the facts stated in the petition constitute a cause of action, the question to be determined is, was the amendment offered in furtherance of justice? Manifestly it could not have had the effect to change substantially the claim of plaintiffs, or any defense on the merits that might have been interposed by the defendants. The firm as such was sued in the original petition in its proper name and style, but the partners composing the firm were not as such made defendants. The purpose of the amendment, therefore, was to correct the mistakes made in the original petition in averring that the Snider Heading Manufacturing Co. was a corporation instead of a partnership, and that its corporate name was as indicated; and further, to make parties to the action, as defendants, the individual members of the partnership constituting the firm, the style of which was correctly given in the original petition. In other words, the error of the plaintiffs was not that they sued the wrong parties, but that they did not include in the petition all the necessary parties.

We have not been referred to any case in which this court has held that an amendment such as was offered by the appellants could not properly be filed. In the case of *Letherman v. Times Co., & Co.*, 88 Ky., 292, cited by counsel for appellees, the facts were in many respects unlike those of the case at bar. The action was one of libel. In the original petition the Times Co. was sued as a corporation, an answer was filed in the name of the Times Co., which failed to disclose whether or not it was incorporated, but averred the truth of the alleged libelous matter charged. More than a year after the pleadings had been made up the Times Co. filed an amended answer, averring that it had not been incorporated. Thereupon the appellant filed an amended petition, averring his mistake in stating in the original petition that the Times Co. was a corporation, and setting forth the fact that it was an unincorporated concern, owned by Haldeman & Logan as partners, who were made defendants. Upon being summoned, they answered, alleging that more than one year had elapsed since the publication complained of, and pleaded the statute of limitation in bar of the action. A reply was filed by the appellant, controverting the plea of the statute of limitation, to which a demurrer was filed by the appellees and sustained by the court, and the action dismissed. Upon appeal this court affirmed the judgment of the lower court upon the sole ground that the necessary parties, owners of the Times, had not been brought before the court until after the cause of action was barred by the statute of limitation.

But in the case at bar no such delay occurred. Upon being informed that the Snider Heading Manufacturing Co. was a mere partnership, instead of an incorporated company, appellants immediately offered an amended petition correcting the mistakes of the original petition, and making the members of the partnership parties to the action. In this case there is no question of limitation presented, the infant appellant being protected on that score by the disability arising from his infancy.

In *Pike, Morgan & Co. v. Wathen*, 25 Ky. Law Rep., 1264, the petition for a rehearing raised the question that the appellant company was sued as a corporation, which fact was denied by their answer, and that as no proof was offered by appellee in the lower court to prove that it was incorporated the judgment appealed from should have been reversed, and the action dismissed. Upon the question thus presented this court said: "Upon the issue of fact as to whether Pike, Morgan & Co. was a corporation there was no proof introduced. So we have the corporation of Pike, Morgan & Co. sued. In the answer a positive denial of any such corporation, no proof on the subject and judgment for the plaintiff; under the pleadings the burden was on appellee to prove that appellant was a corporation, and having failed to make the proof, he should have failed to recover. * * * If Pike, Morgan & Co. is not a corporation, but is or was a partnership doing business under that name, then the proceeding was defective, for all suits against a partnership must be brought against the members by name. * * * On the return of this case the court should permit the parties to amend their pleadings if they desire. For these reasons the judgment of the lower court is reversed and cause remanded for further proceedings consistent with this opinion."

If it was proper, as held in the case *supra*, to permit an amendment bring-

ing the members of the partnership before the court, after the firm had been sued as a corporation and that fact put in issue by a denial and tried out, surely it can not fairly be contended that an amendment for the purpose of correcting an error in the original petition and bringing the real and necessary parties before the court offered to be filed in this case before an answer interposing a defense on the merits was filed, should have been rejected. The fact that appellants might have brought another action after the dismissal of this, or that another summons against the persons constituting the partnership doing business under the name of the Snider Heading Manufacturing Co. will be necessary, can not, in our opinion, affect their right to file the amended petition offered in the lower court.

Being of the opinion, therefore, that the lower court erred in refusing to allow appellants' amended petition to be filed, the judgment is reversed and cause remanded for further proceedings consistent with the opinion. But appellants should be required to pay all costs accruing in the lower court before and down to the time of offering to file such amendment.

TAYLOR, JR. v. DEMOCRATIC COMMITTEE OF FRANKLIN
COUNTY, &c.

(Filed June 6, 1905.)

1. Primary elections—Contest—Notice—Under section 1596a, subsection 12, Kentucky Statutes, primary election contests for members of the general assembly are governed by the former law, approved June 30, 1892, which requires only a fifteen days' notice of the contest.

2. Committeeman—Disqualification—Under the rule of the common law that no man may be a judge in his own case, and, if he acts, the judgment is void, a brother of one of the parties to an election contest is not qualified to sit as one of the committeemen in the trial of a primary election contest.

3. Other bias—The fact that the seats of one or more members of the committee are contested does not disqualify them from acting in other contested cases, so long as they are members of the committee. If the contests are decided against them, then their powers cease, but until then their powers are not affected by a contest.

4. Same—The fact that certain members of the committee are friends of one of the parties to the contest and induced voters to vote for him in the primary, in the absence of any statute disqualifying them, are not disqualified on common law principles, as they act under oath, and are responsible if they do not act honestly and faithfully.

5. Governing authority—Discretion—Interference of court—This court has no authority to require the committee to recount the vote. They are the governing authority, and may determine the form and manner of the proceedings in the case. While the court may require them to act, the court can not control their discretion. This must be exercised under their oath and according to their honest judgment.

John W. Ray and Hazelrigg & Hazelrigg for appellant.

McQuown & Brown, Wm. Cromwell and J. A. Violet for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hobson.

E. H. Taylor, Jr., and L. F. Johnson were candidates for the Democratic nomination for the office of representative in the general assembly at a primary election held on November 15, 1904. On the face of the returns Johnson received a majority of four votes. A certificate of nomination was issued to him by the committee on November 19 and on November 30 Taylor gave notice of contest. The committee refused to consider the contest on the ground that it had adopted a resolution limiting the time for beginning a contest to ten days, and that Taylor's notice not having been given in time, they could not consider it. Taylor then brought this suit against the committee to obtain a mandatory injunction requiring them to meet and hear the contest. The circuit court dismissed his petition, and he appeals.

It was held in *Hill v. Holdam*, this day decided, that the time within which a contest must be begun is regulated by the statute. The resolution of the committee fixing a different time from that allowed by law was, therefore, void. The act of October 24, 1900 (section 1596a, subsection 12, Kentucky Statutes), excepts from its provisions contests for the office of representative in the general assembly, and so these contests are governed by the former law, which provides that in case of a senator or representative the notice of the contest must be given within fifteen days. (Section 5 of article 8 of the act to regulate elections, approved June 30, 1892.)

So far as members of the general assembly go contests are regulated by the former law, and as notice was given in this case within fifteen days it was in time. Taylor alleged in his petition that one of the defendants, George Johnson, is a brother of the contestee, L. F. Johnson, and is thereby disqualified from acting in the trial of the contest. The rule of the common law is that no man may be judge in his own case, and if he acts the judgment is void. (Cooley on Constitutional Limitations, side page 411; 17 Am. & Eng. Ency. of Law, page 732.) The rule applies not only to judges but also to executive or ministerial officers. Thus it has been applied to probate judges (*Sigourney v. Sibley*, 21 Pick., 101); also to county commissioners laying out a highway (*Wilbraham v. County Commissioners*, 11 Pick., 322), or to jurors (*Davis v. Allen*, 11 Pick., 466), or to appraisers of land sold under execution (*Wolcott v. Ely*, 2 Allen, 338), or to a referee (*Strong v. Strong*, 9 Cush., 560). There are many other cases in which the principle has been applied. (23 Am. & Eng. Ency. of Law, 370; *Hall v. Mayer*, 7 Am. Rep., 573; *Lillard v. Lillard*, 44 Ky., 340; *Knott v. Jarboe*, 58 Ky., 504; *Phillips v. Tucker*, 60 Ky., 69.) Under these principles the brother of the contestee is not qualified to sit.

Appellant also alleged that three members of the committee were contestees in a contest over their right to be committeemen. This would not disqualify them from acting. They may act as long as they are members of the committee. If the contests are decided against them then their powers cease, but until then their powers are not affected by a contest. He also alleged that two other members of the committee were friends of Johnson and on the day of the election, by money and promises of other things, induced voters to vote for Johnson and against him. While this might create some bias in their minds, in the absence of any statute disqualifying them from acting, they, having no direct interest in the proceeding and not being kin to either of the parties, are not disqualified upon common law principles.

The allegations as to the use of money or the promise of other things to influence votes were denied and are not proven. In heated elections most men in the county take sides, and if the fact that they did so was sufficient to disqualify them, few members of the committee, in many cases, could act. They act under their oaths and are responsible under the statute if they do not act honestly and faithfully. Section 1563, Kentucky Statutes, on this subject, provides: "Before entering upon the discharge of the duties set forth in this article the committee or governing authority shall be sworn by some officer authorized by law to administer an oath to faithfully and honestly discharge the duties herein imposed; and the failure upon the part of any member of the committee or governing authority to discharge such duties faithfully and honestly shall be deemed a misdemeanor, and the persons so offending shall, upon indictment and conviction in the circuit court of the county or district, be fined not less than \$100 nor more than \$500, and be imprisoned in the county jail not less than sixty days nor more than one year."

Among other things, Taylor alleged that he had been in fact elected, and prayed the court to recount the vote and so determine. This can not be done. The governing authority of the party under the statute is given authority to hear and determine the contest. The committee may also determine the form and manner of the proceedings in the case. It is its duty to receive legal evidence and to give it such weight as in their judgment, faithfully and honestly exercised, it is entitled to. The court can require the committee to act, and when they act the law requires of them that they shall faithfully and honestly discharge their duties. In acting they are discharging official duties, and should discharge them according to law. While they may be compelled by the court to act, the court can not, by mandamus or mandatory injunction, control their discretion. This they must exercise under their oath of office and according to their honest judgment.

Judgment reversed and cause remanded for further proceedings consistent herewith.

Judge Paynter not sitting.

OFFUTT, &c. v. COOPER.

(Filed June 9, 1905—Not to be reported.)

Appeals—Jurisdiction—In an appeal from a judgment allowing a city attorney \$190 against the city for services and salary where the case does not involve the possession of the office, only the salary, this court has no jurisdiction of the appeal.

H. S. McElroy for appellants.

Hugh P. Cooper for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by H. P. Cooper to recover of the city of Lebanon, and its mayor and councilmen, certain sums of money alleged to be due him, in part as salary as city attorney and in part for special services

rendered. The case was submitted on the law and facts to the circuit judge, who rendered a judgment in appellee's favor for \$190. From this judgment the city has appealed. The minimum jurisdiction of this court in cases of judgment for money is \$200. This case does not involve the possession of the office of city attorney, only the salary.

The motion to dismiss the appeal for want of jurisdiction must be sustained, and it is so ordered.

ALDERSON, &c. v. ALDERSON'S GUARDIAN.

(Filed June 6, 1905.)

Real estate—Liability for debts of ancestor—Sale by heirs or devisees—Limitation—Formerly, under the common law the heir or devisee could alienate lands received by devise or descent at any time after the death of the ancestor, and pass a good title to a bona fide purchaser for a valuable consideration, but under the present statutes of this State this can not be done until after six months from the date of the death of the ancestor. And the only way to prevent or defeat the creditors of the deceased from subjecting his land to the payment of their claims is by a voluntary alienation by the heir or devisee after six months from the date of the death of the ancestor.

W. P. McClain, Montgomery Merritt and Dorsey & Kanty for appellants,
T. E. & E. C. Ward for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn.

A short history of the matters involved will be necessary to a clear understanding of this case. In the year 1898 a judgment for \$1,350 was rendered in the Henderson Circuit Court on appeal against J. W. Alderson in favor of Lola Green, infant daughter of Rosa Green, on a writ of bastardy. Execution on this judgment was returned "no property found." During the pendency of that prosecution J. W. Alderson was indicted for the seduction of Rosa Green. He defeated that prosecution by marrying her. After twelve months had lapsed from the time of the marriage, they never having lived together, J. W. Alderson sued his wife for a divorce. During the pendency of this action for divorce, and on the 1st of February, 1900, J. J. Alderson, the father of J. W. Alderson, died, leaving five children, his only heirs, and his widow, Carrie Alderson, surviving him. On the 8d of February, three days after the death of Alderson, the Ohio Valley Banking and Trust Co., as guardian for Lola Green, instituted this action in the Henderson Circuit Court against J. W. Alderson and the widow and all the children of J. J. Alderson, deceased, describing the real estate, which consisted of several tracts of land, and sought to subject the one-fifth undivided interest of J. W. Alderson therein for the satisfaction of the \$1,350 judgment due Lola Green, and also for the purpose of setting aside a conveyance by J. W. Alderson to his father, J. J. Alderson, for a one-half interest in seventy-four acres of land. It was alleged that this was a fraudulent conveyance; that it was executed for the purpose of defeating this child from the collection of its judgment. This case was consolidated with the one brought by Alder-

son against his wife for a divorce. The court on the trial of these cases adjudged that J. W. Alderson was entitled to a divorce from his wife, and decreed that she should pay the cost, and refused her alimony. And in the same judgment the court decreed that the appellee herein had a lien on the undivided one-fifth interest of J. W. Alderson in the real estate of his father, and directed that this lien be enforced. In these consolidated actions J. W. Alderson sought to defeat the claim of appellee upon the ground, as he claimed, that his marriage with the mother of appellee legitimated the child and satisfied the judgment. The court refused to give him relief upon this ground, and he appealed to this court. This court determined that the marriage did not satisfy the judgment, and also that there was no error in enforcing appellee's claim upon the one-fifth undivided interest which he owned in his father's estate. (24 Ky. Law Rep., 595.)

While the actions referred to were pending in the Court of Appeals, and on the 11th of April, 1902, Carrie Alderson, as administratrix of J. J. Alderson, instituted an action in the Henderson Circuit Court to settle the estate. She made defendants to this action the appellee, the children of decedent and such of the creditors as she had information of. On the return of the mandate in the two consolidated cases they were consolidated with this one, and the court made an order referring them to the master commissioner for a report and settlement, and also directed a sale of all the land after setting apart thirty acres as dower for the widow. The commissioner sold the land, except the dower, which it appears from his report brought \$5,215.03, from which was deducted \$1,484.19, the amount of the claims of two creditors who held mortgages on the land, leaving about \$3,731 for the general creditors and the children of J. J. Alderson, deceased. The lower court, without regard to the interest of the general creditors, whose claims amounted to between \$900 and \$1,000, and the brothers and sisters of J. W. Alderson, gave appellee a judgment for one-fifth of this balance of \$3,731, after deducting the cost of \$195, and from this judgment appellants have appealed.

The appellants contend that the general creditors should have also been paid out of this fund before dividing it into fifths; that by the action of the lower court they have erroneously been compelled to pay or contribute to the payment of J. W. Alderson's debt to his child, Lola Green. In other words, they have been compelled to pay all the general creditors, leaving the interest of J. W. Alderson free from the payment thereof. After a careful reconsideration of this case we have arrived at the conclusion that this was error.

At common law the heirs and devisees took the realty by descent free from the debts of the ancestor. (3 Bibb., 23; 4 Bibb., 229; 17 B. M., 534; 97 Ky., 306; 105 Ky., 71; Kent's Com., volume 4, page 420) This rule obtained except where the ancestor expressly charged or bound the heirs or devisees for the payment of his debts. This common law rule was changed by statute in 1797. Since that time the heir or devisee takes by descent or devise the property of the ancestor, subject to all valid claims against the ancestor's estate, taking it with all the burdens he left upon it. Lands which descend or are devised are regarded in equity as funds for the payment of debts of the ancestor, and the heirs or devisees should be regarded in chancery as holding the same as a trust fund or property, and the chancellor may either

subject the land as a trust fund or, if the land has been alienated, the chancellor may lay hold of the proceeds for the payment of the ancestor's debts or render the heir or devisee personally liable to the extent of the value of the land received. (Buford v. Rawling's Ex'tx, 5 Dana, 288.)

Formerly the heir or devisee could alienate lands received at any time after the death of the ancestor and pass a good title to a bona fide purchaser for a valuable consideration, but under the present statute this can not be done until after six months from the date of the death of the ancestor. And the only way to prevent or defeat the creditors of the deceased from subjecting his land to the payment of their claims is by a voluntary alienation by the heir or devisee after six months from the date of the death of the ancestor. In equity and good conscience the debts of the deceased should be paid out of the estate left by him before it should be made to pay the individual debts of the heir or devisee.

By its proceedings the banking company, as guardian, only obtained a lien upon the interest of J. W. Alderson in the estate of his father, J. J. Alderson. It obtained no greater right or interest than J. W. Alderson had, and he certainly had no right to take his whole one-fifth interest and leave the creditors of his father unpaid. The general rule is that between mere equities that which is prior in time is regarded as the best, and takes precedence over any which may be subsequently created, and our opinion is that the equities of the creditors and the other children of J. J. Alderson are prior in time to the equity created in favor of appellee by its proceedings referred to. Appellee claims that the former opinion of this court makes the question herein *res adjudicata*. To this we can not agree. This court only decided that appellee, by its proceeding, had a valid lien on the interest of J. W. Alderson in the estate of his father, but this lien can not be extended beyond the interest that J. W. Alderson held or owned in his father's estate, and this he received subject to the prior equities of the creditors of his father. Having arrived at this conclusion it necessarily results that the former opinion in 26 Ky. Law Rep., 1260, should be, and is, withdrawn.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

HILL v. HOLDAM, &c.

(Filed June 6, 1905.)

1. Primary elections—Contests—Proceedings—Under section 1563, Kentucky Statutes, in reference to primary elections, in case of a tie vote or contest the committee has the power to hear and determine who is entitled to the nomination, but in case of a tie the question does not arise until, upon a count of the vote, it is ascertained that two candidates have received an equal number of the votes, and then under section 1551 it must be settled by the casting of lots as provided in section 1598a, subsection 11, for, under section 1551, the primary election must be held and conducted in the same manner and under the same requirements as the regular State election, and this includes not only the receiving of the votes, but the counting of them and the ascertaining of the result.

2. Same—A contest can not arise in a primary election until it is insti-

tuted by the candidate defeated on the face of the returns. When it is instituted by him the proceedings must be in the same form and manner as the governing authority shall determine upon, but until it is instituted there is nothing for them to act upon.

8. Governing authority—Jurisdiction—Power of courts—The governing authority of the party is given exclusive jurisdiction to determine the contest. The court can not review or correct the decision of the committee on the merits of the contest, but the court may require the committee to act, or it may restrain them from acting when they have no jurisdiction.

4. Notice—Time given—The time within which notice of a contest must be given is a matter not to be determined by the committee. By the statute in this State, for over fifty years, contests for county offices have been required to be instituted within ten days after the final action of the canvassing board, and under the present statute the time limit is the same, and contests in primary elections being, by section 1563, to be decided by the governing authority of the party holding the election, the grounds of the contest should be filed before it and notice given the contestee within ten days after the canvassing of the returns, otherwise the committee was without jurisdiction to proceed.

M. C. Saufley and P. M. McRoberts for appellant.

Robt. Harding, Sam Owsley and Ed. Puryear for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Hobson.

T. J. Hill and G. W. DeBorde were candidates for the Democratic nomination for sheriff of Lincoln county at a primary election held on December 8, 1904. On the face of the returns Hill received one vote more than DeBorde, and on December 6 the committee, after canvassing the returns, issued to him a certificate of nomination. On December 16 DeBorde instituted proceedings of contest, and gave notice to Hill and the committee. Hill insisted that the notice was too late, but the committee overruled his objection and fixed a day for the hearing of the contest. Hill thereupon brought this suit against the committee and DeBorde to enjoin them from proceeding further in the matter. The circuit court dismissed his petition, and he appeals.

In *Batman v. Megowan*, 58 Ky., 533, it was held under a statute requiring notice of contest to be given in ten days, that where the final action was taken on the 6th of the month, and notice was given on the 16th, it was too late. This case has been since followed by the court. Primary elections are regulated by sections 1550-1565, Kentucky Statutes. Section 1551 provides: "All primary elections held in this Commonwealth by the various political parties shall be held and conducted in the same form and manner and under the same requirements as are, or shall be, provided by law for the holding of regular State elections, except in such particulars as are herein excepted."

Section 1563 further provides: "The duly authorized and constituted committee or governing authority in the county or district in which a primary election may be held hereunder is hereby empowered to count the votes received by all candidates in such primary elections, and to declare the candidate or candidates, in cases where candidates for more than one office are to be nominated, receiving the highest number of votes the nominee of such

political party for the office for which he was voted for at such primary election. In all cases of a tie vote or contest the committee or governing authority of the political party holding such primary election shall have the power to hear and determine such contest, and decide who shall be entitled to the nomination. The proceedings in such cases shall be in such form and manner as the committee or governing authority shall determine upon."

The committee had not prescribed the form and manner in which proceedings of contest were to be made, and it is insisted that the time within which notice of contest must be given was a matter to be determined by the committee. We do not so understand the statute. By section 1551 all primary elections must be held and conducted in the same form and manner and under the same requirements as are provided by law for the holding of regular State elections, except in such particulars as are excepted in the statute. The only provision of the statute referring to the matter before us is section 1563, above quoted. Under that section, in the case of a tie vote or contest, the committee has the power to hear and determine who is entitled to the nomination, but in the case of a tie the question does not arise until upon a count of the votes it is ascertained that two candidates have received an equal number of votes, and then under section 1551 it must be settled by the casting of lots as provided in section 1596a, subsection 11, for, under section 1551, the primary election must be held and conducted in the same manner and under the same requirements as regular State elections, and this includes not only the receiving of the votes, but the counting of them and the ascertaining of the result. A contest can not arise until it is instituted by the candidate defeated on the face of the returns. When it is instituted by him the proceedings must be in such form and manner as the governing authority of the party shall determine upon, but until it is instituted there is nothing for them to act upon, just as there is nothing for them to act upon in the case of a tie vote until two candidates are found to have received the same number of votes. As there is nothing for the committee to act upon until there is a contest, and as primary elections are governed by the statute regulating State elections, except as otherwise expressly provided, its provisions limiting the time for beginning contests must control contests of primary elections. If the committee had the power to regulate when notice of contest might be given, then there would be no uniform rule for instituting such contests, and the committee by failing to meet or provide for the contest might defeat the right of a candidate to contest altogether. The statute was intended to put primary elections on the plane of regular elections. It only makes the committee the forum in which the contest is to be determined, leaving it to decide the form and manner of the proceedings and exempting primary elections from the statute prescribing how the evidence must be taken and within what time. The governing authority of the party is given exclusive jurisdiction to determine the contest. (*Commonwealth v. Coombs*, 27 Ky. Law Rep., 751.) The courts can not review or correct the decision of the committee on the merits of the contest. (*Beasley v. Adams*, 26 Ky. Law Rep., 573.) But the court may require the committee to act, or it may restrain them from acting, when they have no jurisdiction. (*Mason v. Byerley*, 26 Ky. Law Rep., 487; *Neil v. Young*, 25 Ky. Law Rep., 186; *Brown v. Republican Committee*, 23 Ky. Law Rep., 2421; *Eagan v.*

Grewe, 112 Ky., 232.) In *Henry v. Secrest*, 24 Ky. Law Rep., 1505, we said: "If appellee intended to institute a contest he should have done so in the usual and only proper manner, by giving notice to the committee as well as to the candidate whose right to the nomination was to be contested, and by filing with the committee specifications showing fully the grounds upon which the contest was to be based."

By the statute in this State for over fifty years contests for county offices have been required to be instituted within ten days after the final action of the canvassing board. By the present statute such contests shall be by a petition filed in the circuit court, but the petition must be filed within ten days after the final action of the board of canvassers. The time limit within which contests must be instituted remains the same, and contests of primary elections being by section 1563 to be decided by the governing authority of the party holding the election, the grounds of contest should be filed before it and notice given the contestee. Appellee properly served his notice on the appellant and also lodged it with the committee, but not having instituted his proceeding in time the committee was without jurisdiction to proceed.

Judgment reversed and cause remanded for a judgment as herein indicated.

OFFUTT, &c. v. HALL'S EX'OR, &c.

(Filed June 9, 1905—Not to be reported.)

Wills—Sale of land by executor—Discretion of executor—Where testator by his will directed that "all the residue of my estate be equally divided among my four daughters in kind, so far as the same can be done, and in case same can not be divided in kind I direct my son-in-law, William Finley, shall sell and convey in behalf of my estate all that can not be divided in kind, and divide the proceeds among my four daughters equally." Held—That in the absence of language refuting the idea the testator intended to vest complete discretion in the matter to his executor, and where the proof shows that the property could not be divided in kind without impairment of its value, its sale by the executor was authorized under the will.

W. S. Kelley for appellants.

V. F. Bradley & Son and Montgomery & Lee for appellees.

Appeal from Scott Circuit Court.

Opinion of the court by Judge O'Rear.

Buford Hall disposed of a considerable estate by will. In addition to numerous specific devises he directed that the residuum go as follows, by clause 8: "I will that all the vest and residue of my estate be equally divided among my four daughters in kind so far as the same can be done, and in case same can not be divided in kind, I direct that my son-in-law, William Finley, shall sell and convey in behalf of my estate all that can not be divided in kind, and divide the proceeds among my four daughters equally."

By another clause of the will the estate of the testator's daughters was limited to their lives, with remainder to their children. Several tracts of land and other property passed under the residuary clause. Some of this

land the executor has heretofore sold and conveyed, and a remaining tract of about 151 acres he has contracted to sell to Mrs. Askew. The power of the executor to make the last-named sale is the point presented for decision on this appeal.

The land was such that it could not have been divided advantageously into four parts of equal value, or at least into four lots, each of equal value. To have done so would have been to seriously impair the value of some, if not all, the different tracts. In other words, they were so peculiarly situated that to divide any of them would be to lessen its value, whether for use or sale. It was not practicable to so partition the lands as that four equal parcels could have been made without dividing some one or more of the tracts. We think it was the intention of the testator to conserve the value of the estate being given to his children, rather than to have them keep the property in specie. It must have been his purpose, then, to provide that if by dividing the residuum of his estate, or any part of it, in lots of the kind, that it would lose in value by that fact, it was to be sold by his executor, and the money divided equally. But the main question is, who was to determine whether the property could be divided in kind? It is clear that if the state was that it could not be so divided, the executor was to sell and convey, terms, times and manner of sales being left to the executor's discretion. The testator must have known that as he had not himself determined the advisability of a sale instead of partition in kind, somebody would have to exercise judgment in the matter, would have to determine the fact to be that the property could not be divided without impairment.

The testator scarcely contemplated that the ascertainment of a minor fact should be done only by an expensive and tedious proceeding through the courts, while the far more important one, the sale with its terms and conditions, was left to the discretion of the executor. It seems to us that, in the absence of language refuting the idea, the testator intended to vest complete discretion in that matter to his executor; that the greater included the lesser power. Besides, the proof shows that the state of affairs existed contemplated by the testator as a possibility, namely, that this property could not be divided in kind without impairment of its value, and, therefore, its sale by the executor was authorized by the terms of the will.

The judgment of the circuit court is affirmed.

COMMONWEALTH v. STANDARD OIL CO. (Case No. 872-70.)

(Filed June 18, 1905.)

Taxation—License—Selling oil from wagons—Continuous act—Under the provisions of the revenue laws of this State a license tax of \$5 is imposed on "each wagon" used in transporting or retailing lubricating or other oils for one year. Section 4901, Kentucky Statutes, provides that "any person who shall engage in the business, or sell or offer to sell any article on which a license is required before procuring the license and paying the tax thereon, * * * shall be fined not less than \$50 nor more than \$1,000 for each offense unless otherwise specifically provided," the tax is on the wagon and the offense of operating the wagon is a continuous one, and only one fine can be imposed for the violation of said statute in any one year.

N. B. Hays, Chas. H. Morris and B. A. Crutcher for appellant.

Humphrey, Hines & Humphrey for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Barker.

The Standard Oil Co., a corporation, was indicted by the grand jury of Jessamine county, charged with the offense of selling by retail to H. L. McLean, petroleum, lubricating or other oils, from a wagon used in transporting same without having first procured the license required by section 4224 of the Kentucky Statutes. This indictment, which is styled No. 12 on the docket of the trial court, was returned by the grand jury on the 14th day of November, 1904. The defendant pleaded not guilty, and also pleaded in bar its former conviction under indictment No. 1 in the same court for the same offense. Indictment No. 1 was also returned by the grand jury on the 14th day of November, 1904, and charged appellee with a violation of the statute in question by an unlawful sale of oil to Forrest F. Miller.

The two indictments are identical, except as to the name of the parties to whom, and the time, the sales were made. Upon trial of the case, it appearing from the evidence that the sales charged in both indictments, although made on different days and to different persons, were from the same wagon, No. 1463, and the defendant, by a verdict and judgment rendered on the 6th day of March, 1905, had been fined in the sum of \$225, the trial court held that judgment a bar to appellee's conviction under indictment No. 12, and peremptorily instructed the jury to find it not guilty, which was done. From this judgment the Commonwealth has appealed.

The question presented for adjudication is whether each unlawful sale from the wagon constitutes a separate offense, or whether the offense consists of operating the wagon without a license for the license year involved, and is, therefore, a continuing one, which may not be split up by separate indictments covering the same period of time. The language of the statute is "to sell by retail petroleum, lubricating or other oils, for each wagon used in transporting or retailing oils, \$5." The statute is purely a revenue law, and the license is for the wagon used in the business of retailing oil for one year.

In the case of *Standard Oil Co. v. Commonwealth*, 26 Ky. Law Rep., 927, in which it was held that the statute now under consideration inaugurated a new system of taxation for the retailing of oil in wagons, different from peddling, it was said: "The unit of taxation is the wagon used in the business of transporting oil for sale." The subject, then, of taxation is the operation of the wagon for the license year. Section 4201, Kentucky Statutes, is as follows: "Any person who shall engage in the business, or sell or offer to sell any article on which a license is required before procuring the license and paying the tax thereon, as required by law, shall be deemed guilty of a misdemeanor, and on conviction be fined not less than \$50 nor more than \$1,000 for each offense, unless otherwise specially provided." The offense is the operation of the wagon, as a means of carrying on the retailing of oil, without a license. The tax is on the wagon, and the offense of operating the wagon without a license is a continuous one. The sale, or offer to sell, from the wagon is made by the statute conclusive evidence of the

operation of the business, but it is not necessary to allege a sale to any particular person in order to state an offense under the statute.

The question involved here is in all respects similar in principle to that in *Wilson v. Commonwealth*, 26 Ky. Law Rep., 685. In that case Wilson had been indicted three times for violating section 4 of an act to amend the charter of the Kentucky State Dental Association, which is as follows: "Any person who shall, in violation of this act, practice dentistry or dental surgery in the State of Kentucky, for fee or reward, shall be subject to indictment by the grand jury of the county in which the offense is committed, and upon conviction shall be fined not less than \$50 nor more than \$200 for each offense."

The three indictments were returned by the same grand jury, covering the same period of time, the only difference between them being the name of the persons upon whom the unlawful practice of dentistry had been performed. The defendant was tried and found guilty on one of the three indictments, and when the other two were called for trial the former conviction was pleaded in bar, but not allowed by the court, and the defendant was fined in each case. The last two judgments were reversed, the plea of former conviction being held valid.

It is not necessary to extend this opinion by a repetition of what was said in the case cited. In principle it involved the same question we have here, and the judgment in this case is affirmed upon the authority of that.

COMMONWEALTH v. STANDARD OIL CO. (Case No. 5.)

(Filed June 13, 1905—Not to be reported.)

N. B. Hays, Chas. H. Morris, Denny P. Smith and W. M. Smith for appellant.

C. B. Blakey for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Barker.

The question presented by this record is in principle the same as that involved in *Commonwealth v. Standard Oil Co.*, No. 872-70, ante, 1073, this day decided, and the judgment is affirmed upon the authority of that case.

COMMONWEALTH v. STANDARD OIL CO. (Case No. 6.)

(Filed June 13, 1905—Not to be reported.)

N. B. Hays, Chas. H. Morris, Denny P. Smith and W. M. Smith for appellant.

Humphrey, Hines & Humphrey and C. B. Blakey for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Barker.

The question presented by this record is in principle the same as that involved in *Commonwealth v. Standard Oil Co.*, No. 872-70, ante, 1073, this day decided, and the judgment is affirmed upon the authority of that case.

COMMONWEALTH v. STANDARD OIL CO. (Case No. 4.)

(Filed June 18, 1905—Not to be reported.)

N. B. Hays, Chas. H. Morris and Chas. Safford for appellant.

Humphrey, Hines & Humphrey and C. B. Blakey for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Barker.

The question presented by this record is in principle the same as that involved in Commonwealth v. Standard Oil Co., No. 872-70, ante, 1073, this day decided, and the judgment is affirmed upon the authority of that case.

GARVIN'S ADM'X v. VINCENT.

(Filed June 9, 1905—Not to be reported.)

Mortgage—Disguised as deed—Usury—Redemption—Where appellee conveyed to appellant a tract of land for \$1,500 paid in hand, and at the same time a writing was given by appellant to appellee, agreeing to reconvey the land to appellee for \$2,000, payable in one year, and if not so paid in a year said writing to be void. Held—That the transaction was simply a lending of money, and the deed was executed in place of a mortgage, and the other writing was a disguise to conceal the real transaction and to secure a usurious rate of interest, and in such case the deed will be held to be a mortgage and redemption allowed, notwithstanding the form in which the parties have put the contract.

R. D. Davis and Hazelrigg & Hazelrigg for appellant.

Theobald & Theobald for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Hobson.

L. E. Vincent owned a tract of land and desired to borrow \$1,500 upon it from Johnson Garvin. Garvin agreed to lend him the money, but said he would not lend it upon a mortgage, but would lend it if Vincent would convey to him the land. Vincent thereupon made Garvin a deed to the land and Garvin executed to Vincent the following contract:

"THIS AGREEMENT,

"Made this the 29th day of May, 1901, by and between J. Garvin, party of the first part, and L. E. Vincent, party of the second part:

"Witnesseth, That for and in consideration of the sum of \$2,000, of which \$1,000 is paid cash in hand, the receipt of which is hereby acknowledged, and the remainder is to be paid on or before 29th day of May, 1902, the party of the first part has optioned and agrees to convey, with covenant of general warranty to second party, his heirs and assigns, upon payment of the aforesaid balance of purchase money, the following described property, to wit: (Here follows description of the land.)

"This agreement, however, is conditioned as follows: That should the second party fail or decline to pay said purchase money on or before May 29, 1902, then this contract shall be and become void and of no effect; and it is

agreed and understood that the payment of, or refusal to pay, said deferred payments of purchase money is at the option of the second party; that is to say, he may, if chooses to do so, decline or fail to make said deferred payments, in which event this contract shall become null and void without further liability upon any party hereto.

"In testimony whereof, witness the signatures of the parties hereto, this the day and year first above written.

"J. GARVIN."

On May 6, 1908, or within two years from the date of the above contract, Vincent brought this action against Garvin's representatives to have the deed adjudged a mortgage, and the court having so adjudged, they appeal. The proof leaves no doubt that the transaction was simply a lending of money, and that the deed was executed in place of a mortgage by Vincent and the other paper signed by Garvin simply as a disguise to conceal the real transaction and to secure for Garvin a higher rate of interest than 6 per cent. The court never allows any device to defeat the laws against usury. If this were allowed, the usury statutes would be of little avail. Where the proof is clear that the transaction was a borrowing of money, and that the deed was made to secure the money borrowed, the deed will always be treated as a mortgage, and redemption will be allowed notwithstanding the form in which the parties may have put the contract. Were the rule otherwise borrowers would often be imposed upon. The case is much the same as *Jenkins v. Stewart*, 18 Ky. Law Rep., 112.

Judgment affirmed.

BARBER AND VANSANT V. RUGGLES.

(Filed June 9, 1905—Not to be reported.)

Surety—Signing note upon condition that another would sign it—Knowledge of payee—In an action against a surety on a note, an answer by a surety that he signed it upon the condition that P. was also to sign it as surety and that plaintiff had knowledge of this fact when he accepted it, presented a good defense, and a demurrer thereto should have been overruled.

Hager & Stewart and Greene & VanWinkle for appellants.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Hobson.

Charles Ruggles lent J. L. Kitchen and J. F. Mannan \$400 and took a note for the money signed by them and by R. H. Vansant and J. W. Barber as their sureties. When he sued upon the note Barber pleaded that the note was without consideration, and that after the note fell due Ruggles had extended the time for six months upon it in consideration of the promise of Kitchen and Mannan to pay interest upon the note for that time at 10 per cent. Vansant filed the same plea. He also pleaded that when Mannan and Kitchen brought the note to him to sign it was agreed between him and them that L. C. Prichard should also sign the note as surety before its delivery to Ruggles, and that he signed it upon this understanding; that Prichard did not sign the note, and that it was delivered to Ruggles contrary to the agreement without Prichard's signature, and that of all this

Ruggles had knowledge and notice at the time the note was delivered. The court sustained a demurrer to this paragraph of his answer, and the case having been tried by the jury on the other defenses, there was a verdict for the plaintiff, and the defendants appeal.

The court submitted the issues to the jury in instructions that are not complained of, but it is insisted that the verdict is against the evidence.

We do not think so. The evidence fails to show that there was any valid extension of time by Ruggles for any definite period upon a valid consideration. In other words, the evidence shows that Ruggles indulged the principals in the note because they did not have the money to pay it, but it does not show that they could not have insisted upon his taking the money any day they had wanted to pay it. But the court erred in sustaining the demurrer to the paragraph of Vansant's answer, in which he pleaded that it was agreed that Pritchard was to sign the note before its delivery, and that Ruggles accepted the note knowing of the agreement upon which he had signed it. If a surety signs a note upon an agreement with the principal that another surety is to sign it, he is bound, although the note is delivered in violation of the agreement, if the payee in the note accepts it without notice of the breach of the condition. But if the note is signed upon a condition, and the payee has notice of it, then he can not hold the surety liable if he accepts the note knowing of the condition and knowing that it has not been fulfilled.

The judgment as to Barber is affirmed. The judgment as to Vansant is reversed for the error in sustaining the demurrer to the paragraph of his answer above indicated, and the cause as to him is remanded for further proceedings consistent herewith.

SKINNER v. CREASY.

(Filed June 9, 1905—Not to be reported.)

Sale of timber—Intention of parties—When the court by the aid of parol testimony is placed in the situation of the parties, there can be no mistake as to the land intended to be conveyed.

Greene & VanWinkle and R. B. Dohoney for appellant.

Baird & Richardson for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge O'Rear.

This is a suit involving the construction of a contract for the sale of land and timber, being an action for the specific performance of the contract brought by the vendee.

The circuit court sustained a demurrer to the petition. The contract identifies the property intended to be conveyed. When the court, by the aid of parol testimony, is placed in the situation of the parties there can be no mistake as to the land intended to be conveyed.

The judgment sustaining the demurrer is reversed and cause remanded for further proceedings not inconsistent herewith.

YOUNG, &c. v. AMBURGY, &c.

(Filed June 9, 1905—Not to be reported.)

Wills—Devise to R. H. and heirs of her body—Construction—Where a testator by his will devised his estate to his wife for life, and at her death to Rachel Young and the heirs of her body, there being nothing in the instrument to show that the words "heirs of her body" were not used in their ordinary sense, a fee simple estate in the land passed to Rachel Young upon the death of testator's widow.

Fleenor & Patton for appellants.

J. J. C. Bach, H. H. Smith, B. F. Combs, Bach & Patrick and Hazelrigg & Hazelrigg for appellees.

Appeal from Knott Circuit Court.

Opinion of the court by Chief Justice Hobson.

The will of David Calhoun is in these words:

"Know ye all men by these presents: That, I, David Calhoun, of Knott county, Kentucky, being of sound mind, but sick in body, for my last will and testament on earth, have and by these presents do bequeath to my wife, Rachel Calhoun, all my property, both real and personal, of every species and character, after my debts are paid, to have, hold and use the same in her own right during her natural life, and at her death the said property, both real and personal, with increase as may attach thereto, shall descend to Rebecca Young and the heirs of her body; and I hereby declare that the foregoing will and testament shall take effect and be in full force at the time of my death, and shall so remain thereafter."

Rachel Young had four children. The widow, Rachel Calhoun, is dead. This suit was brought by the four children, asserting that under the will they took the estate jointly with their mother, subject to the life estate of the widow. The circuit court dismissed their petition, and they appeal. It is insisted for them that the words "the heirs of her body" in the will were used by the testator as synonymous with children, and the following cases are relied on: *Allen v. Terrell*, 1 Ky. Law Rep., 886; *Montgomery v. Montgomery*, 11 Ky. Law Rep., 87. But in these cases there was a devise to one for life, with remainder to the heirs of her body, thus showing that the devisee was confined to a life estate. In *Combs v. Eversole*, 23 Ky. Law Rep., 932, which is also relied on, there were other words in the instrument showing that the testator used the words "heirs of her body" as synonymous with children. The same is true of the other cases in which the word "heirs" has been held as meaning children, but in the case at bar Rachel Young is not given the property for life. On the contrary, the devise is to her and the heirs of her body. These words at common law would create an estate tail which by our statute is changed to a fee simple, there being nothing in the instrument to show that the words "heirs of her body" are not used in their ordinary sense. (*Brown v. Alden*, 53 Ky., 116; *Johnson v. Johnson*, 59 Ky., 833; *Prewitt v. Holland*, 92 Ky., 642; *Jones v. Mason*, 21 Ky. Law Rep., 842.)

Judgment affirmed.

KING v. KAHNE, &c.

(Filed June 9, 1905—Not to be reported.)

Office and officer—Usurpation—Action to oust—By whom brought—An action can not be maintained by a citizen and taxpayer to oust members of the city council from office on the ground that they had failed to take the oaths of office. Such action must be in the name of some person entitled to the office, or by the Commonwealth, and when by the latter must be brought by or upon information of the attorney general.

Straley & Hasbrouck and D. W. Steele, Jr., for appellant.

R. L. Greene and Proctor K. Mallin for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge O'Rear.

Appellees were elected members of the city council of Ashland, and entered upon the discharge of the official duties of their offices. This suit was brought by appellant, a citizen and taxpayer of the city, to oust them from the offices, upon the ground that they had failed to take the oaths required by the Constitution and statutes. Appellant does not claim that he was in any event entitled to hold any of the offices mentioned.

The gist of the action is that appellees are usurpers of the offices they hold. In lieu of the ancient writ of quo warranto, there is provided a common law action by Code (section 480, Civil Code) to prevent the usurpation of an office. The suit must be in the name of the person entitled thereto, or of the Commonwealth, and when in the name of the latter must be brought by or upon information of the attorney general, when the office is a city office. (Sections 483-4-5, Civil Code; Wheeler v. Commonwealth, 98 Ky., 59.)

Though it were true that appellees had not qualified, and were usurpers of the offices they hold, appellant had not the right to maintain an action to oust them. It follows that the judgment of the circuit court sustaining the special demurrer to the petition must be affirmed.

SEBREE v. NUTTER, SHERIFF.

(Filed June 9, 1905—Not to be reported.)

Taxation—Omitted property—County court judgment—Recitals—Validity—In a proceeding in the county court to list omitted property for taxation, Held—First, it is not necessary to its validity that the judgment should state the rate of taxation, as the rate for each of the years is fixed by law; second, the property is sufficiently described as "notes, mortgages and cash;" and, third, in reciting that appellant had failed to properly list his personal property for the years involved to the extent of \$7,000, and then adjudging that it be listed for these years, amounts to a judgment that the property had been "omitted" for the years mentioned.

J. C. B. Sebree and Hazelrigg & Hazelrigg for appellant.

Jas. B. Finnell for L. F. Sinclair.

Jas. F. Askew for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Barker.

The auditor's agent for Scott county, Kentucky, under section 4241 of the Kentucky Statutes, instituted a proceeding against J. C. B. Sebree in the Scott County Court for the purpose of forcing him to list, as omitted property, \$7,000 worth of "notes, mortgages and cash" for taxation for the years 1889 to 1898, inclusive.

The judge of the county court, upon a hearing of the proceeding, entered a judgment against Sebree as prayed for by the officer, from which the former appealed to the circuit court. The case coming on for trial there, and Sebree having filed no controverting pleading to the statement of the auditor's agent, or in any other way attempted to make a defense to the merits of the case, his appeal was dismissed, thus leaving the judgment of the county court in full force and effect. Upon appeal to this court that judgment was affirmed in an opinion delivered in *Sebree v. Commonwealth*, 25 Ky. Law Rep., 121.

Upon return of the case an execution was issued upon the judgment, and placed in the hands of the sheriff of Scott county, against whom Sebree then instituted this action in equity to enjoin the execution of the writ. The grounds set out in his petition are as follows: First, the judgment listing the property does not fix a rate of taxation; second, the property is not described with sufficient particularity; third, it does not in terms adjudge that the property mentioned was "omitted" for the years involved in the proceeding, but that it had been "improperly listed." Of these in their order.

1st. The rate of taxation for each of the years involved in the proceeding is fixed by law, and it is not necessary that the rate should be stated in the judgment.

2d. The property is amply described as "notes, mortgages and cash." (*Commonwealth v. Zweigart's Adm'r*, 24 Ky. Law Rep., 21, 47; *Commonwealth v. Riley's Curators*, 24 Ky. Law Rep., 2005.)

3d. The judgment, in reciting that appellant had failed to properly list this personal property for the years involved to the extent of \$7,000, and then adjudging that it be listed for those years, amounts to a judgment that the property had been omitted for the years mentioned. The learned chancellor ruled correctly in sustaining a general demurrer to the petition, and upon failure to amend, in dismissing it. The auditor's agent, whose petition to be made a party was overruled by the court, received all the relief to which he was entitled by the judgment dismissing the petition.

Judgment affirmed.

LOGAN, &c. v. BEAN'S ADM'R.

(Filed June 9, 1905.)

Wills—Afterborn child—Mention in will—Pretermitted—Testator died in 1900. His daughter and only child, Caroline (appellant), was born in 1893. By his will, written in 1892, testator devised all his estate, real and personal, to his wife to do with as she pleased, and further provided: "If my wife has any children at my death, I desire that this will be the same, or that she have full control of all money arising from my property that I may have at my death." Testator's widow, after his death, married John E. Bean, and

soon thereafter died. The infant child, Caroline, by her guardian, set up claim to testator's land, on the ground that she was not born at the time this will was written and was not provided for or mentioned in the will. Held—That under Kentucky Statutes, sections 4842 and 4848, the appellant, Caroline, was "mentioned" in the will, and, therefore, took no interest in the property under the statute.

Robt. Harding, C. R. McDowell and Ed. Puryear for appellants.

Pendleton & Bush and Hazelrigg & Hazelrigg for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Hobson.

L. S. Logan died on March 14, 1900, the owner of some valuable land in Lincoln county. He left a will, which was duly admitted to probate after his death, and is as follows:

"Danville, Ky., November 7, 1898.

"I desire that my brother, D. F. Logan, act as my administrator without bond.

"1st. I desire that all my debts and funeral expenses be paid.

"2d. I desire that all money left after my debts and funeral expenses are paid to be paid over to or invested for my wife (Ann C. Logan) as she desires. The sale of all my property, both real and personal, is to be done as my brother, D. F. Logan, thinks best. If I should at any time be killed my accident policy with F. N. Lee, agent, for \$5,000 is also to be my wife's, to do with as she pleases, and all my property left at her death is to be her's, to will or give away as she sees best.

"If my wife has any children at my death, I desire that this will be the same, or that she have full control of all money arising from any property that I may have at my death."

At the time the will was written he had no children, but a daughter, Caroline, was born to him in the year 1898, after the will was written. His widow, Ann C. Logan, after his death married John E. Bean, and not long thereafter died, on June 26, 1903, a resident of Clark county. Bean qualified as her administrator, and brought this suit to settle her estate. The infant child of Lucien Logan, Caroline Logan, by her guardian appeared in the action and set up claim to the land on the ground that she was not born at the time the will was written, and that she was not provided for or mentioned in the will. Section 4847 of the Kentucky Statutes is as follows: "If any person dies leaving a child, or his wife with child which shall be born alive, and leaving a will made when such person had no child living, wherein any child he might have is not provided for or mentioned, such will, except so far as it provides for the payment of the debts of the testator, shall be construed as if the devises and bequests therein had been limited to take effect in the event that the child shall die under the age of twenty-one years, unmarried and without issue."

The circuit court held that the infant child was mentioned in the will, and, therefore, took no interest in the property under the statute. She, by her guardian, appeals.

In determining the proper construction of section 4847, Kentucky Statutes, we should read it in connection with section 4842 and section 4848, which are as follows:

"Section 4842. If the testator has a child or grandchild living at the time of his death whom, then and at the time of making the will, the testator believes to be dead, or if a child dies out of the State within the knowledge of the testator, leaving issue of which the testator has no knowledge at such time, and no provision for or exclusion of such child, grandchild or issue is made by the will, the child, grandchild or issue shall take of the testator's estate as if he had died intestate, and as is hereinafter provided in favor of a pretermitted child." * * *

"Section 4848. If a will is made when a testator has a child living, and a child is born afterward, such afterborn child, or any descendant of his, if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate; toward raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute ratably, either in kind or in money, as a court of equity in the particular case may deem most proper."

The purpose of all three of these sections is to prevent injustice from the pretermision of children. Though there is some slight difference of phraseology, the mischief to be remedied in all is much the same, and the proper construction of one throws light on the meaning of the others. In *Leonard v. Enoch*, 92 Ky., 187, the testator had one child of the age of seven years at the time he made his will, and about two months after his death a daughter was born. He made his wife the sole object of his bounty, making no reference to either his living child or the one unborn. The court held that as the living child was excluded by the will the intention was to be gathered from the will to exclude his children as a class. This case was followed in *Porter v. Porter's Ex'or*, 27 Ky. Law Rep., 699, where the will showed on its face that the testator contemplated that he might have other children and made no provision for them.

The language of section 4848 is fully as strong or stronger than in section 4847. In the case before us the testator expressly says in the concluding clause of his will: "If my wife has any children at my death, I desire that this will be the same." This shows that he had in mind that children might be born to them, and to provide for this contingency he expressly stated in his will that if such children were born he desired the will to be the same. The words "if my wife has any children at my death" manifestly refer to children by him, for at the date of the will neither he nor his wife had any children.

She had not been married before, and he did not contemplate providing against children which might be born to her from a second marriage, for such children would take no interest in his estate in any event.

The case of *Knut v. Knut*, 23 Ky. Law Rep., 972, turns on the phraseology of the will there before the court. It has no application where the will evinces the testator's intention to exclude the unborn child, as in the will before us.

After the death of L. S. Logan the land was not sold as directed in his will, but the widow, Ann C. Logan, assumed the debts and held the land as long as she lived, she and the executor, D. S. Logan, having made a

written agreement by which he was discharged. She was in equity the owner of the land subject to the charge of the debts, and when she died the land in her hands was liable also for her debts. The county court of her residence had jurisdiction to appoint an administrator of her estate, and the circuit court of that county had jurisdiction to settle the estate. The written contract between the executor and the widow concludes with these words, placed at the foot of his final settlement: "Said Mrs. Ann Logan has paid and taken up a note given said D. F. Logan, as executor and individually, for the sum of \$284.93, to Boyle National Bank for borrowed money, and it is now agreed that said executor is released from all responsibility on account of said estate, and said executor, having no claim against the estate or against Mrs. Logan, the Boyle County Court is hereby directed to accept this statement above as a full and complete settlement of said executor. This April 10, 1901."

The executor being discharged, no one had any interest in the land except the widow and the creditors. As she had assumed the payment of the debts of the estate, executor regularly should have conveyed the land to her, retaining a lien for the payment of the debts; but the omission of this bare form did not change or affect the substantial rights of the parties.

Judgment affirmed.

COMMONWEALTH, BY BOWMAN, SHERIFF, &c. v. CHESAPEAKE & OHIO R. R. CO.

(Filed June 9, 1905.)

1. Foreign corporations—Franchise—Double taxation—Kentucky Statutes, sections 4077 to 4091, inclusive, prescribe an elaborate system for the taxation of the franchises of all corporations, whether foreign or native, doing business in this State, and sections 4080 and 4081 are applicable to foreign corporations alone. These show conclusively the legislative intent to tax the franchises as foreign corporations, and not as naturalized corporations.

2. Same—The cardinal principle of ad valorem taxation in Kentucky is that all property not specifically exempt therefrom by the Constitution, whether real or personal, tangible or intangible, and whether owned by individuals or corporations, must, for the benefit of each taxing jurisdiction in which it is liable, be taxed once and no more.

A. D. Cole for appellant.

W. D. Cochran for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Barker.

Passing the several technical questions of procedure so learnedly discussed in the briefs of counsel, and assuming for the purposes of this appeal all of them adjudicated in favor of appellant, the real question presented by this record is whether or not a foreign railroad corporation, which has complied with the provisions of section 841 of the Kentucky Statutes, is subject to the payment of two franchise taxes annually.

Conceiving that because the Chesapeake & Ohio Ry. Co., a Virginia corporation operating an interstate railroad, in part through Lewis county, Kentucky, had complied with section 841, and thus become a Kentucky cor-

poration within the meaning of the statute, and although it had paid the franchise tax due as a foreign railroad corporation, it must, in addition, pay a franchise tax as a Kentucky corporation, the sheriff of Lewis county, in the name of the Commonwealth, instituted this proceeding under section 4241 of the Kentucky Statutes to require it to list its franchise as a Kentucky corporation.

The theory upon which is based this attempt to tax appellee twice in the same fiscal year upon its franchise, under the guise of the existence of two corporations and two franchises, is untenable. It is true section 841 requires each foreign railroad corporation, as a condition precedent to operating in this State, to do certain things, and when these are done pronounces it "a corporation, citizen and resident of this State," but it does not follow that this naturalized corporation is a distinct entity from the old. In the case of *Commonwealth v. N. O. & T. P. R. R. Co.*, 26 Ky. Law Rep., 1106, the very question we have here was, in principle, involved. There the foreign railroad corporation had complied with section 841; and under the inspiration of the same theory held by appellant, that it thereby became a new corporation, the auditor's agent sought to enforce the payment of an organization tax under section 4326 of the Kentucky Statutes, but we held that a compliance with section 841 did not create a new corporation within the meaning of section 4326, but merely naturalized the foreign corporation in order that the State might better control and supervise it. The same reasoning applies here with equal force and efficacy, and the same conclusion must necessarily be reached as to franchise taxes.

The soundness of this conclusion is assured by a glance at the laws of the State with reference to the taxing of corporate franchises. Sections 4077 to 4091, inclusive, Kentucky Statutes, prescribe an elaborate system for the taxation of the franchises of all corporations, whether foreign or native, doing business in the State, and sections 4080 and 4081 are applicable to foreign corporations by name. These show conclusively the legislative intent, to tax the franchises of foreign corporations coming into the State as foreign corporations, and not as naturalized corporations. For the purpose of taxation they are named foreign corporations, and the mode of estimating the value of their franchises is specifically pointed out, as is also the method of enforcing the payment of the tax, by the jurisdiction to which it is due. It is obvious that there is but one corpus or property, one franchise or privilege; it is, therefore, immaterial that the corporate entity from one point of view may be considered a naturalized citizen of the State, and from another a foreign corporation. The law looks through the mere semblance of things into the essential substance, and taxes that. It taxes things not names.

Without further prolixity, it may be said that the cardinal principle of ad valorem taxation in Kentucky is that all property not specifically exempted therefrom by the Constitution, whether it be real or personal, tangible or intangible, whether owned by individuals or corporations, must, for the benefit of each taxing jurisdiction in which it is liable, be taxed once and no more.

The judgment dismissing the petition is affirmed.

CITY OF OWENSBORO v. BROCKING.

(Filed June 9, 1905—Not to be reported.)

1. Trespass to land—Defective petition—Cure by answer—In an action by a land owner against a city to restrain it from digging a ditch across his land, a defect in the petition in failing to specify the officers and agents of the city who had entered upon the land, was cured by the answer of the city claiming a prescriptive right to the land over which the ditch was to be constructed.

2. Using ditch—Prescriptive right—While the city had been in possession of a narrow ditch used for carrying water from the city for many years as a claim of right, gave it the right to clean it out and maintain it in its previous condition, it has no right to double its width and depth and thus take from the plaintiff additional property.

C. S. Walker for appellant.

R. G. Hill for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted by Brocking, &c., against the city of Owensboro to recover damages for forcibly entering upon land with a crew of men, with the intention of excavating a large ditch across the plaintiff's land, and to restrain the city from doing so. A demurrer was filed to the petition, which was overruled. An answer was filed, and the court heard the evidence and gave judgment against the city. It is urged that the demurrer should have been sustained to the petition because it was not specifically averred what officers or agents of the city were guilty of the acts of which the complaint was made, or that they were directed by the proper authorities of the city to excavate the ditch in question. Perhaps, under the doctrine of *Clayton v. The City of Henderson*, 108 Ky., —, the plaintiff did not sufficiently specify the officers and agents which had entered upon the land, or which branch of the municipal government had directed the work to be done. This may be true, still the court did not err in hearing testimony, because the defect in the petition was caused by the answer. While the city in its answer endeavored to avoid curing the defect in the petition, yet in our opinion it did so because it asserted a prescriptive right to the land over which the ditch was to be constructed, and asked the court to adjudge that right existed. This was in effect a ratification of the act of its alleged agents or servants in entering upon the ground. The evidence shows that the ditch had been used for the purpose of carrying water from certain parts of the city for a great many years, and it had been so used under a claim of right. While thus used it was a small ditch. The purpose of entering upon the land was to make the ditch about five feet deep and eleven feet wide, which would take twice as much of the plaintiff's land as it had previously used.

Of course the city had a right to clean out the ditch and maintain it in its previous condition, but it had no right to double its width and depth and thus take from the plaintiff his property. This can only be done in a legal and constitutional way. Private property can not be taken without just compensation previously paid or secured. To widen the ditch and thus

take land was as much a violation of the plaintiff's constitutional rights as it would have been to construct the ditch at a place where none had previously existed.

The judgment is affirmed.

COLES' ADM'X. v. ILLINOIS CENTRAL R. R. CO.

(Filed June 9, 1905.)

1. Actions—Same transaction—Separate recoveries—Estoppel—Where an action is brought and a recovery had by the personal representative for the killing of plaintiff's intestate, a subsequent action can not be maintained for the killing of a horse and destruction of a buggy which occurred at the same time of the killing of plaintiff's intestate. The rule is that the entire claim arising out of a civil transaction, whether in the nature of a contract or tort, can not be divided into separate and distinct claims and each form the basis of an action.

2. Distribution of judgment—Different parties—The fact that one item of damage should be distributed in a different way from another does not prevent a recovery in one action. Under proper instructions the jury could have said what part was for the destruction of the horse and buggy, and what part for the destruction of the life of the intestate, as the action for both items of damage was in the personal representative and the liability against the same defendant.

W. J. Webb for appellant.

Robbins & Thomas, J. M. Dickinson and Pirtle & Trabue for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Paynter.

This is an action by the administratrix of F. M. Coles to recover damages for killing a horse and demolishing a buggy which belonged to plaintiff's intestate. Among other defenses interposed was one that the plaintiff's intestate was killed at the time the horse was killed and the buggy demolished, that it was the same negligence, if any, which resulted in the death of the plaintiff's intestate and horse and the destruction of the buggy. The defendant pleaded that there was but one cause of action; that the plaintiff had recovered a judgment against the company for the destruction of the life of her intestate and that the judgment had been paid. The question for decision is, can this action be maintained in view of the facts stated?

Section 83, Civil Code of Practice, provides: "Several causes of action may be united, (a) if each affect all parties to the action, (b) may be brought in the same county, and may be prosecuted by the same kind of action, if all of them be brought * * * for injuries to person and property."

The record shows that it was the same tort which destroyed the life of the intestate and his property. Under section 6, Kentucky Statutes, the action for the negligent killing of the human being must be brought by the personal representative. The action for the killing of the horse should likewise have been brought by the personal representative. So the cause of action for both items of damage was in the same person and the liability was against the same defendant, therefore, under section 83, Civil Code of Practice, the cause of action was in the personal representative of the intestate.

The rule seems to be almost, if not, universal that the entire claim or items arising out of a civil transaction, whether in the nature of a contract or tort, can not be divided into separate and distinct claims and each form the basis of an action. In *Covington & Cincinnati Elevated R. R. Co. v. Kleimeier, &c.*, 20 Ky. Law Rep., 1415, it is said the rule is elementary that a party can not split the cause of action and sue upon a part at one time and the remainder at another. It was said in *Louisville Bridge Co. v. Louisville & Nashville R. R. Co., &c.*, 25 Ky. Law Rep., 405: "Numerous authorities are cited by counsel in support of the proposition that where an entire cause of action is split a judgment in one case will bar a second action for the rest of the claim. The principle is sound, and has been applied very often by the courts."

It is urged that this rule should not be applied, because the recovery for the destruction of the intestate's life would, under the statute, go to the widow and children, while the recovery for the horse and buggy go to his estate for the payment of debts and distribution. The statute provides that an action for the destruction of life shall be brought by the personal representative, and that the recovery shall go to the widow and children, except costs, attorney's fees, etc. The recovery is an asset of the estate for distribution in a certain way. A recovery for the destruction of the horse and buggy would likewise be an asset of the estate for distribution in a specified way. The mere fact that one item of damage should be distributed in a different way from another item of damage does not prevent a recovery in one action. Under proper instructions the jury could have said what part of the recovery was for the destruction of the horse and buggy, and what part was for the destruction of the life of the intestate. In our opinion a recovery for the destruction of the life of the intestate estops the plaintiff from bringing this action for the item of damage for the loss of the horse and buggy.

The judgment is affirmed.

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COURT OF APPEALS OF KENTUCKY.

HARRIS v. BRUCE, CLERK, &c.

(Filed June 9, 1905.)

Primary elections — Contests — Notice — Governing authority — Review — Under section 1563, Kentucky Statutes, which provides that "in all cases of a tie vote or contest in primary elections the committee or governing authority holding such primary shall have the power to hear and determine such contest and decide who shall be entitled to the nomination," it is essential that notice of such contest be given to enable the committee to try the contest. The courts have no jurisdiction, directly or indirectly, to review the action of the committee or governing authority.

Winslow & Howe and James B. Duncan for appellant.

W. S. Pryor, John S. Gaunt and James Hemphill for appellees.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Paynter.

At a primary election regularly called by the governing authority of the Democratic party in Carroll county the appellant, George P. Harris, and appellee, M. L. Downs, were candidates for county judge. The county committee (the governing authority of the party) canvassed the returns and certified that Downs was duly nominated, and gave him a certificate to that effect. On the day that the committee met and canvassed the returns the appellant appeared before it and filed a petition and affidavit in which it was averred that several persons had been allowed to vote without having registration certificates, and moved the committee to set aside the primary election and call a new one, which the committee declined to do. The facts are made to appear by the petition filed in this case, and for which reason he seeks to enjoin the county clerk from placing the name of Downs upon the ballot as the Democratic candidate for county judge of Carroll county. The court below dismissed the petition, upon the ground that it had no jurisdiction to, directly or indirectly, review the action of the committee, of which appellant complains. By this proceeding appellant seeks to contest the election of Downs.

He asks the court to set aside the primary election because illegal votes were cast at it. Section 1563, Kentucky Statutes, provides: "In all cases of a tie vote or contest the committee or governing authority of a political party holding such primary election shall have the power to hear and determine such contest, and decide who shall be entitled to the nomination."

This section gives the governing authority of a party the right to hear and determine a contest. The legislature evidently did not intend the courts should hear and decide contests growing out of primary elections. The contest referred to in the statute is calling in question the result as certified by the governing authority of the party. This court in *Beasley v. Adams*, 26 Ky. Law Rep., 82, said: "This makes the decision of the contest committee final. The language that the committee shall have the power to hear and determine such contests, and decide who shall be entitled to the nomination, precludes the idea that there shall be an appeal. The entire matter is referred to the governing authority of the party for its decision."

In the case of *Henry v. Secrest*, 24 Ky. Law Rep., 1505, the court had under consideration substantially the same case as the one at bar, and held that the plaintiff was not entitled to maintain the action. No notice of contest was given in that or in this case. It was essential that such notice should be given to enable the committee to try the contest. The court has no jurisdiction to determine whether or not illegal votes were cast at the primary election. The question could have been decided by the committee had the contest been instituted by giving notice as provided by the statute. The judgment is affirmed.

WHEELER V. COMMONWEALTH.

(Filed June 9, 1905.)

1. Homicide—Joint indictment—Separate trial—Concerted action—Threats of deceased as to any one—Competency—Where it is shown by the evidence that the deceased had enmity against four persons who were jointly indicted for killing him, all growing out of the same transaction, proof of threats made by deceased against all or any one of the four was competent on a separate trial of any one of them for the killing of deceased, whether communicated to defendants or not, especially as bearing on the question of whether deceased was the aggressor and assailant at the time he was killed.

2. Instruction—Self-defense—On a separate trial of defendant C. H. Wheeler, who was jointly indicted with his father and two others for killing deceased, where the evidence shows that deceased was killed by some one of the four acting together, it was error in the court to instruct the jury that "if you believe from the evidence, beyond a reasonable doubt, that W. P. K., M. K., and L. W., with the consent and acquiescence of and aided and abetted by defendant, C. H. W., were armed with deadly weapons and sought deceased with intent to kill him, or doing him some other great bodily harm, or first attacked or assaulted him with such intent, then defendant can not avail himself of his plea of self-defense," as it in effect advised the jury that if defendant at any time aided or abetted his codefendants to seek deceased, armed and with the intention of killing him, he was thereby deprived of the right to defend himself or them from danger, real or apparent, at the hands of deceased, though neither defendant nor his codefendants may have made an attempt to carry out the intention of killing deceased, or were first attacked by him.

3. Commencing difficulty—Effect—The court in lieu of the instruction given should on a retrial instruct the jury that if they believe from the evidence, beyond a reasonable doubt, that appellant or his codefendants, or any of them, commenced the difficulty with deceased by making the first demonstration to shoot, or if he or they and deceased met, armed, determined on a conflict, and on meeting, the combat was engaged in by mutual consent, then, in either event, appellant could not rely on the right of self-defense, nor act in defense of his codefendants.

J. T. Yager, Wm. Carroll, Joe Clore, J. S. Morris and D. H. French for appellant.

J. D. Carroll and N. B. Hays for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Settle.

William Kelly, his son, Maurice Kelly, Lucien Wheeler and his son, C. H. Wheeler, were jointly indicted in the Oldham Circuit Court, charged with the murder of Jack Maxfield, whom they, or some of them, shot and killed May 1, 1903.

At the June term, 1904, of the court all the defendants were tried together for the crime charged, and the jury failed to agree upon a verdict, but at a subsequent term of the court there was a separate trial as to C. H. Wheeler, against whom the jury returned a verdict, finding him guilty of voluntary manslaughter and fixing his punishment at confinement in the penitentiary for fourteen years. His motion for a new trial was overruled by the lower court, and by this appeal he seeks a reversal of the judgment of conviction.

The material facts of the homicide were as follows: There had been a bad state of feeling between Maxfield and the Wheelers and Kellys for some years. According to the evidence Maxfield was a violent, quarrelsome and dangerous man. His enmity toward the Wheelers and Kellys seemed to be open and notorious; on one occasion some years before his death he attacked Lucien Wheeler; on another, W. P. Kelly, and on two or more occasions he made assaults upon appellant, C. H. Wheeler. Appellant lived on a farm with his father. On an adjoining farm, and in sight of the home of the Wheelers, lived the Kellys, father and son. Maxfield lived on a farm in sight of, but not adjoining, that of the Wheelers.

On the day of the homicide Maxfield was hauling lumber. One Cumingore was driving the wagon, and with them was a small boy named Willie Chappel. In hauling the lumber Maxfield, his wagon and driver and the boy, Chappel, passed over a road leading down a branch in part over the land of Lucien Wheeler and between the farms of Wheeler and Maxfield. When Cumingore started with the wagon that morning for the first load he went by Wheeler's house, through his stable yard, and in doing so stopped and went into Wheeler's house, but for what purpose it does not appear, then went to the mill where he met Maxfield, and after loading the wagon with lumber they returned by the road mentioned. When at the barn site they could be seen from the house of Wheeler. Upon returning from the mill over the same road with the second load Maxfield, Cumingore and the boy met the Kellys and Wheelers in the branch. The Wheelers were armed with double-barrel shotguns, the elder Kelly with a double-barrel shotgun, and the younger with a Marlin rifle. The shotguns were loaded, one barrel each with squirrel shot and the other with what the appellant called "ground hog" shot, the rifle with bullets.

At the time of the meeting of the parties Cumingore was driving the horses attached to the wagon, Maxfield was walking by the side of the wagon and the Chappel boy in front. When the wagon got to the Kellys and Wheelers, Lucien Wheeler inquired of Cumingore who had cut the wire across the mouth of the branch road where it entered the main road. Maxfield thereupon replied, "by God, I did," immediately drew his pistol and began to shoot at the Wheelers and Kellys, firing two shots, but hitting none of them. When he drew his pistol, and about the time, or soon after he fired, the Wheelers and Kellys commenced to shoot at him, inflicting upon him not less than fifty wounds, one or more of the shot or balls entering his heart. Maxfield was instantly killed. After the shooting one of his

slayers took possession of his pistol, wrote on paper the number of it, and carried it away.

In explanation of their meeting with Maxfield appellant, his father and the two Kellys testified in substance that they did not know Maxfield was hauling lumber, or expect to meet him; that morning the elder Kelly was plowing in his field, his son, Maurice, was at work on his grape arbor, and appellant, C. H. Wheeler, and his father were hauling to their barn a stack of oats. At 9 o'clock the elder Kelly took his horses from the plow and hitched them, his son quit work upon his grape arbor, and both father and son went to the house and got their guns. The Wheelers left oats on their wagon unloaded, took the horses from the wagon and put them in the stable, got their guns, and they and the Kellys met near the road traveled by Maxfield to hunt squirrels. Upon reaching the hunting ground, and failing to find any squirrels, they concluded to go down on the branch and see if they could find and shoot ground hogs. Not finding any ground hogs, they returned up the branch to where they met Maxfield and killed him.

On the day of the homicide, and when the appellant, Wheeler, and his father went to the house of the latter to get their guns, they found a Mrs. Wood and her sister, Miss Penington, who had come to spend the day. Both Mrs. Wood and her sister testified on the trial that when the Wheelers came to the house appellant went in the direction of the home of the Kellys, but soon returned, and when he and his father got their guns, appellant remarked "they were going down to kill Jack Maxfield, the son of ———." These two witnesses further testified that they also saw the Kellys go by with their guns, and that when the Wheelers returned home the mother of appellant asked him what he had done, and he remarked "that is a hell of a question to ask," but upon being pressed by his mother for an answer, he finally said "they had killed Maxfield."

Mrs. Wood also testified that appellant, before the trial, tried to bribe her not to tell what she heard him say to his mother. It appears from the record that Cumingore and the boy, Chappel, were witnesses for the Commonwealth at the examining trial, and that they then gave testimony favorable to the prosecution, but in giving their depositions later in the State of Indiana, to which State they had removed, they fully corroborated the testimony of appellant, his father and the two Kellys as to what occurred at the time Maxfield was killed. It was also in proof that the use of the passway on the land of Lucien Wheeler by Maxfield for hauling the lumber had been forbidden by Wheeler; in fact the latter had put a wire fence or obstruction across the passway to prevent its use by any one. This wire fence was cut, or removed, by Maxfield on the morning of the day he was killed, and he then knew that his use of the passway was objected to. Repeated threats were made by Maxfield against appellant, Lucien Wheeler and the Kellys, many of which had been communicated, or were heard by them.

Appellant and his mother denied that the former on the day of the homicide, in the presence of Mrs. Wood and her sister, or otherwise, said they were going to kill Maxfield, or that they had done so. It was urged in the grounds for a new trial, and is now insisted, that the lower court erred in refusing to permit the witnesses, J. M. Blakemore, W. H. Garrett and I. O.

Cumingore, to testify as to certain threats made by Maxfield previous to his death. To the two former he made threats against the life of W. P. Kelly, and the latter, by oaths and demonstrations of violence, he compelled to do the hauling over the passway of Lucien Wheeler, notwithstanding his unwillingness to do so because of the opposition of Lucien Wheeler. The trial court also excluded from the consideration of the jury the testimony of Cumingore as to a threat made by Maxfield against Lucien Wheeler a few days before his (Maxfield's) death, in a conversation with William Chappel, Sr., to whom he said, in the presence and hearing of Cumingore, "he would just give the d—d son of a — (Lucien Wheeler), a ten dollar bill to come down and say one word; when he got done with him nobody else would know the son of a b—."

We think the excluded threats to which the witnesses named would have testified were clearly competent. Though not against appellant, they were made against those associated with him in the killing of Maxfield. What would have justified the exercise of the right of self-defense upon their part would have justified appellant in acting in their defense in taking the life of Maxfield. It is true that the testimony as to these threats did not go to the extent of showing that they were communicated to appellant before the killing of Maxfield, but it was shown by other evidence that he knew the character of deceased for violence, his well known enmity to appellant, his father and W. P. Kelly, and that he had on other occasions not only threatened, but assaulted each of them. Besides, the threats in question were admissible as bearing upon the question of whether Maxfield was himself the aggressor and assailant at the time of his death.

The conversation with Chappel, in the hearing of Cumingore, in which Maxfield made the threat against Lucien Wheeler, was in reference to the use of Wheeler's roadway for hauling the lumber, and his opposition thereto, and the threat then made by Maxfield as to what he would do to Lucien Wheeler was a declaration in advance that he intended to attack and kill or do him great bodily injury if he appeared on the road during the hauling of the lumber.

In *Hart v. Commonwealth*, 85 Ky., 77, it was held that "if the question is whether the deceased was the assailant, the fact that he declared beforehand that he meant to attack the defendant is material, nor on this issue is it necessary that the defendant should be proven to have had notice of such threats." (*Young v. Commonwealth*, 19 Ky. Law Rep., 629.)

It is likewise insisted for appellant that the instruction given by the court did not correctly present to the jury the law of the case. It is conceded that the instruction which defined murder, and advised the jury in what state of case they might find appellant guilty of that crime, was correctly expressed, but earnestly contended that the instruction as to voluntary manslaughter was incorrect and misleading. In that it failed to tell the jury that in order to convict the appellant of that crime they must have believed from the evidence, beyond a reasonable doubt, that he willfully or intentionally, as well as in sudden affray, or in sudden heat and passion, and not in his necessary, or apparently necessary, self-defense, or that of his codefendants, shot and killed deceased.

It is true that in order to constitute the crime of voluntary manslaughter

It is essential that the homicide be willfully and intentionally committed, or under such circumstances as to strike one at first blush as so reckless and wanton as to be felonious, though apparently not intended by the perpetrator. (*Montgomery v. Commonwealth*, 26 Ky. Law Rep., 356.) While it would have been better to use the word "willfully" in the connection indicated, we are unwilling, in view of the facts of this case, to say that its omission from the instruction was prejudicial to the appellant. The evidence did not authorize an instruction as to involuntary manslaughter, nor could there have been any claim that the homicide was accidental. If not murder or voluntary manslaughter, it was excusable upon the ground that appellant was lawfully acting in self-defense, or in defense of his father, or the Kellys, in other words, it was conceded by appellant and his codefendants that the homicide was both willful and intentional, the only issue was as to whether or not it was excusable, or if not excusable, whether it was committed with malice aforethought, or in sudden affray or in sudden heat and passion.

It is also contended by appellant that this instruction was erroneous, in that it authorized the jury to find appellant guilty of voluntary manslaughter as an aider or abettor in the homicide, though they might have believed from the evidence that he was only an accessory before the fact. To constitute one an aider and abettor in the commission of a crime he must be present when it is committed, aiding, advising or assisting therein. Upon the other hand, though he be not present when the crime is committed, if its commission nevertheless results from his advice or assistance or by his procurement, he is equally guilty with the perpetrator of the crime, but as an accessory before the fact. In addition to what is expressed in the instruction complained of it should have been so worded as to inform the jury that in order to find the appellant guilty as aider or abettor in the killing of Maxfield they must believe from the evidence, beyond a reasonable doubt, not only that the homicide was willfully and feloniously committed by his codefendants, or some of them, in a sudden affray, or in sudden heat and passion, without previous malice, and not in their necessary, or apparently necessary, self-defense, but also that appellant was at the time present aiding, abetting, advising or assisting them in the commission of the crime.

We are of the opinion, however, that the failure of the trial court to so instruct the jury was not prejudicial to appellant as he was present at the killing of deceased, and on the witness stand admitted his participation in the shooting, though claiming it was done in self-defense, and also in defense of his father. There was, therefore, no doubt about his presence at and participation in the killing of Maxfield, for which reason the jury could not have been misled by the failure of the court to instruct the jury as to the necessity of his being present at the time of the homicide in order to authorize them to find him guilty as an aider and abettor therein.

It is further contended by counsel for appellant that instruction No. 6 was improper, and highly prejudicial to him. That instruction was intended to advise the jury that the State of facts therein predicated, if found by them to exist, would not authorize the acquittal of appellant under the instruction setting forth the ground upon which he had the right to act in his own defense or that of his codefendants. Instruction No. 6 is as follows: "If you

believe from the evidence, beyond a reasonable doubt, that Wm. P. Kelly, Maurice Kelly and Lucien Wheeler, with the consent and acquiescence of, and aided and abetted by him, C. H. Wheeler, were armed with deadly weapons, and sought the deceased, Maxfield, with the intention of killing him, or doing him some other great bodily harm, or first attacked or assaulted him with such intent, then the defendant can not avail himself of his plea of self-defense."

We think the foregoing instruction radically wrong. It in effect advised the jury that if the appellant at any time aided or abetted his codefendants to seek deceased, armed and with the intention of killing him, he was thereby deprived of the right to defend himself or them from danger, real or apparent, at the hands of deceased, though neither appellant nor his codefendants may have made an attempt to carry out the intention of killing him, and were first attacked by him. Or, to put it in another way, this instruction permitted the conviction of appellant if at any time previous to the killing of Maxfield his codefendants, aided by him, had armed themselves with deadly weapons and sought Maxfield with the intention of killing him, or at any time theretofore attacked or assaulted him with such intent, though they may have had no such intention at the time he was killed, or were then first attacked by him.

On this point the court upon a retrial of the case should, in lieu of instruction 6, instruct the jury that if they believe from the evidence, beyond a reasonable doubt, that the appellant or his codefendants, or any of them, commenced the difficulty with Maxfield by making the first demonstration to shoot, or if he or they and Maxfield met armed, determined on a conflict, and on meeting the combat was engaged in by mutual consent, then, in either event, appellant could not rely on the right of self-defense, nor act in defense of his codefendants. (*Utterback v. Commonwealth*, 20 Ky. Law Rep., 1515.)

Another alleged error complained of by appellant is that the judge of the court during his trial, and while the closing argument of the Commonwealth's attorney was being made to the jury, vacated the bench, left the court room and absented himself about twenty minutes. The Constitution guarantees to the citizen the right of trial by jury, and the circuit court is the only tribunal in which such trial can take place. To constitute the court there must be a judge, possessed of certain constitutional qualifications, and he should be present at every stage of the trial in order that he may properly conduct the same and protect the rights of both the State and the accused. The judge, therefore, should not have absented himself at any stage of appellant's trial. It has been held by this court in two or more cases that the temporary absence of the regular judge from the court room during the trial did not authorize a reversal, but in each of the cases in which it was so held a special judge, by consent of the parties, was placed upon the bench to preside in the absence of the regular judge, and it was not affirmatively made to appear that the substantial rights of the accused were prejudiced by the absence of the regular judge.

It is, however, claimed that in this case the Commonwealth's attorney in argument to the jury; and in the absence of the judge, improperly read from the stenographic report of the appellant's testimony, given on the first trial

of the case, and that the former testimony was not introduced on the last trial. It does not sufficiently appear from the bill of exceptions whether the testimony in question had or not been introduced upon the last trial. In any event, it could only have been introduced for the purpose of contradicting the testimony of appellant on the last trial, and the jury should have been so admonished by the court. But no objection seems to have been interposed by appellant's counsel to the use made by the Commonwealth's attorney of the testimony on the former trial, either at the time of its use or upon the return of the judge, consequently the error complained of is one which this court is powerless to review. As there must be a retrial of the case because of the other errors referred to in the opinion, we do not pass upon the question as to whether or not the temporary absence of the judge during the trial is a reversible error.

Judgment reversed and case remanded for a new trial and further proceedings consistent with the opinion.

ADAMS EXPRESS CO. v. COMMONWEALTH.

(Filed June 17, 1905.)

Local option—C. O. D. shipments—Knowledge of carrier—Agreement to hold for consignee—Liability—The local option law being in force in Laurel county under a special act of the legislature known as the "Five Counties' Act," which provides that "all shipments of spirituous, vinous and malt liquors to be paid for on delivery, commonly called 'C. O. D. shipments,' into any county * * * where said act is in force shall be unlawful, and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered, the carrier or agent selling or delivering such goods shall be liable jointly with the vendor thereof," where a package containing four quart bottles of whisky was shipped from Cincinnati to Laurel county by the Adams Express Co., to be delivered to M., "C. O. D." and which was known to the agent of the company to contain whisky, and which agent of the company in Laurel county agreed to hold for a week until M. could pay for it, and then delivered it and received the price, the express company did not at the time of delivery sustain to that package, or to the consignor and consignee, the relation of common carrier, but merely that of a bailee or warehouseman, and for that reason could not claim protection in the transaction by the law of interstate commerce, but it was a sale wholly made in this State by the bailee after it was received from another State.

W. L. Brown and Geo. Brock for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Adams Express Co., a common carrier, was indicted, tried and convicted in the Laurel Circuit Court for the offense of unlawfully, willfully and knowingly shipping, procuring for, furnishing, selling and delivering spirituous liquor, by C. O. D. shipment, to one George Meece, at East Bernstadt, in Laurel county, the sale of such liquor being prohibited by certain statutes enacted by the legislature of Kentucky, approved April 4, 1894,

March 10, 1894, and March 11, 1902. These acts were then in force in the five counties of Laurel, Rockcastle, Jackson, Owsley and Clay. The trial jury fixed the punishment of appellant at a fine of \$60, on which judgment was duly entered, and the lower court having overruled its motion for a new trial, it prosecutes this appeal.

In *Crigler v. Commonwealth*, 27 Ky. Law Rep., 918, it was held by this court that what is known as the "Five Counties Act" of April 4, 1884 (Acts 1883-4, chapter 598, volume 1, page 1116), forbidding the sale of liquors in the five counties named therein, is in force in Laurel county as is the local option law of March 10, 1894, together with the amendment thereto of March 11, 1902 (section 2557, Kentucky Statutes), and that the two acts last mentioned must be construed as a part of the act of 1884, regulating and controlling the former as to procedure, the quantity of liquor sold to constitute an offense, and the punishment, that is, it was held that the local option act of 1894, as amended by that of 1902, is operative in Laurel county without the necessity of a vote by the people, and that of the existence of the act of 1884, and the operation of that of 1894, as amended in 1902, this court will take judicial notice. The fine inflicted against appellant was imposed under the act of 1894, as amended in 1902. (Section 2557, Kentucky Statutes.)

Subsection 4, section 2557, Kentucky Statutes, which is also a part of the general local option law as amended in 1902, provides: "All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town, district or precinct where said act is in force shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The offense of which appellant was convicted is the one denounced by the foregoing section, and it is insisted for it that the alleged sale of spirituous liquor, for which it was indicted and convicted under the statute, was a mere delivery of the liquor by it as a common carrier in the usual course of business, and the money paid its agent by the consignee was in satisfaction of the amount due the consignor therefor upon a sale thereof made in the State of Ohio, which appellant, as a common carrier, was under the contract of shipment compelled to collect and remit consignor upon delivery of the goods; and further, that the transaction was authorized and appellant protected, by the law and regulations of interstate commerce.

The case went to the jury upon the evidence of the Commonwealth alone, none having been introduced by the appellant. The undisputed facts established by the evidence were:

1st. That George Meece within a year before the finding of the indictment called at appellant's office in East Bernstadt, with his brother, who had ordered and was expecting from Cincinnati a package of whisky which he found awaiting him in appellant's office.

2d. While in the express office George Meece was informed by appellant's agent in charge that a package containing a gallon of whisky was then in the office for him, the charge upon which was \$3.85. He then informed appellant's agent that he had not ordered the whisky, was not expecting it, and had not the money with which to pay the charges thereon, but if satis-

factory to the agent, and the latter would hold the whisky for him until the following Saturday, a week later, he would call at the express office, pay for the whisky and take it away, to all of which the agent readily assented, and on the following Saturday Meece called at the express office, paid the agent \$3.85 for the gallon of whisky, received and took it away.

3d. The agent knew that the package contained a gallon of whisky, i. e., four quart bottles), and that it was shipped by Crigler & Crigler, of Cincinnati, but did not advise Meece of the name of the consignors, though informed by Meece that he had not ordered the whisky.

4th. The agent also knew the business of Crigler & Crigler, and that they were in the habit of shipping almost daily by express, C. O. D., to appellant's East Bernstadt office packages of both whisky and brandy, consigned to persons of that community. In view of the foregoing facts it becomes necessary to determine whether, in holding the whisky a week at Meece's request, and until the latter again called at the office, paid the necessary charges and took it, the appellant continued in the relation of carrier to the goods; or did it, by the transaction in question, cease to be a common carrier and become a mere bailee or warehouseman.

On this point Hutchinson on Carriers, 2d edition, section 354, states the general rule as follows: "The law upon this subject may, therefore, be stated to be that, so long as, the carrier continues in the relation of carrier to the goods, he is under an absolute engagement that they shall be delivered only to the person to whom they are consigned; but that when from any cause he ceases to hold them as carrier, and becomes a mere warehouseman or bailee, the degree of responsibility resting on him becomes changed, and from that moment, if the goods are lost by misdelivery or otherwise, it becomes a question of fact whether he has exercised reasonable care and diligence."

In section 356 of the same book it is said: "It, therefore, frequently becomes a question of importance as well as of difficulty to determine when and under what circumstances the relation of carrier to the goods has ceased and their custody has become a bailment. It may be stated, as a general rule, that when the carrier has done all the law requires him to do towards delivery, and from any cause he fails to effect it, and the goods are continued in his possession, he from that time becomes responsible only as depository."

In further elaboration of this doctrine the author in section 385 tells us: "But it has been held that if the carrier is instructed not to deliver the goods until they are paid for, and the consignee, instead of refusing to take them, promises to pay for them and take them in a few days, and request the carrier to keep them until he is ready to pay for them, the carrier becomes a warehouseman of the goods, and if they are lost or destroyed while so held, without any fault or negligence of his, he will not be liable, although he has given no notice of the fact to the consignor."

A similar view of the doctrine, *supra*, was announced by this court in *Wald & Co. v. Louisville & Evansville and St. Louis R. R. Co.*, 92 Ky., 645. So we may accept it as the law of this State. When a package marked "C. O. D." (collect on delivery) is received by an express company for shipment, it is manifestly upon the conditions that such company, as a common

carrier, shall promptly deliver it to the consignee, collect of the latter a specified sum therefor, and with equal promptness return it to the consignor. Express companies do not more surely deliver goods entrusted to them than do ordinary freight trains, but they undertake a quicker delivery, and by reason of such undertaking are permitted to charge, and are paid, more for the transportation of goods than are railroad companies. A failure, therefore, upon their part to immediately, that is, in a reasonable and customary time, deliver goods shipped in their charge, or their holding of such goods, an unreasonable or unusual time, changes their relations at once from a common carrier to that of ordinary warehouseman.

In view of this rule, and under the facts of the case at bar, we must conclude that at the time of delivering to Meece the whisky in question, and in receiving the price paid by the latter therefor, appellant did not sustain to that article of merchandise, or to the consignor or consignee, the relation of common carrier, but merely that of a bailee or warehouseman, for which reason we are unable to see how it was, or could have been, protected in the transaction by the law of interstate commerce. We are aware that section 5368, Revised Statutes of the United States, confers upon railroad and express companies authority to carry freight from one State to another free from interference on the part of the States, and that the Supreme Court of the United States, construing this statute and defining the power of congress with reference to its right "to regulate commerce with foreign nations, among the several States and with the Indian tribes," has repeatedly held, "that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon, the exclusive power of congress."

It has also been held by the same court that when intoxicating liquors are shipped from one State to another by express C. O. D., upon an order or instructions from the purchaser residing in such other State, the contract of sale is to be regarded as completed in the State from which the shipment is made, upon the vendors there delivering the goods to a common carrier, although with the direction to collect the price from the consignee before its delivery to him, and that the right of the importer to thus sell and ship liquors in unbroken packages in another State exists regardless of the local laws of such State prohibiting such sales and shipments, and notwithstanding the provisions of the act of congress, known as the "Wilson Bill," which was intended to enable the several States, under the exercise of the police power, to enact such legislation as would give them the same control over intoxicating liquors shipped therein from other States after their arrival, whether in original packages or otherwise, as they might exercise over those of home manufacture or production.

But in the case at bar the conviction of appellant was not violation of any regulation of the laws of interstate commerce. It sold and delivered to Meece a gallon of whisky and received of him \$3.65 as the price of such sale, all with full knowledge of the fact that it had not been ordered by him. Furthermore, though appellant may have originally received the package of whisky as a common carrier, at the time of its sale it, as before stated, did not sustain to the package of whisky, or to the consignor or consignee, the relation of carrier, but that of bailee or warehouseman. In other words,

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the sale was not made in another State, or by a shipper therein, but by appellant at East Bernstadt, in Laurel county, Kentucky, and in violation of the laws of the State which, by subsection 4 of section 2557, Kentucky Statutes, makes such sale a misdemeanor.

Whatever ground may be urged for holding that this statute is inoperative as to a shipment of spirituous liquors into this State from another State made by the vendor, upon an order received in such other State from the purchaser in this State, it certainly can not be void as to a sale wholly made and consummated in this State by a bailee after the whisky was received from another State.

Being of opinion that appellant's conviction was proper, the judgment is affirmed.

THE LUCILE MINING CO. v. FAIRBANKS, MORSE & CO.

(Filed June 1, 1905—Not to be reported.)

1. Pleading—Amendments—Under section 134, Civil Code, the court may at any time, in furtherance of justice and on such terms as may be proper, permit a pleading or proceedings to be amended by inserting other allegations material to the case.

2. Actions—Guaranty—Knowledge of parties—In an action for damages on a guaranty in the sale of machinery to be operated by appellant's boiler the appellant was bound to know the capacity of its boiler and the power it would furnish to operate the machinery.

3. Agent—Authority—Averments—Where there are no averments in the answer to the effect that the agent who sold the machinery had authority to make any guaranty of it, it was not shown to be within the apparent scope of his authority to make such guaranty.

4. Injury pending action—Notice—In an action on an alleged guaranty of machinery sold, an amended answer alleging the breaking of a cylinder by reason of defective material, occurring pending the action, no action would lie unless notice was given and a reasonable time to repair the defects.

A. C. Moore for appellant.

L. H. James and O. M. James for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Paynter.

The appellee, by a written contract through its agent, sold the appellant certain supplies and machinery, including a pump. This was an action to recover the contract price, less the value of certain parts purchased which were returned. The plaintiff failed to aver in the petition that it was a corporation. In fact it was not stated in the petition whether it was a partnership or corporation. A special demurrer was sustained, but the court permitted an amended petition to be filed in which it was averred that the plaintiff was a corporation. Under section 134 of the Civil Code of Practice the court may at any time, in furtherance of justice and on such terms as may be proper, permit a pleading or proceedings to be amended by inserting other allegations material to the case. The amendment did not change the cause of action, nor did it purport to substitute one plaintiff for another, but simply showed the character in which the plaintiff was suing.

The appellant filed an answer and counterclaim in which it sought to recover damages, amounting to about \$900, for alleged violation of the contract in the sale of the machinery and supplies to it. It claimed, first, that the agent of the appellee agreed to have the machinery shipped promptly to it, and that it failed to do so; that part of the machinery did not arrive until thirty days after the contract, on account of which failure it was compelled to pay salaries of officers, agents and employes in the sum of \$150; second, that the agent of the appellee guaranteed that the boiler which appellant then owned and was using at its plant would furnish power sufficient to run the machinery then in use and operate the pump which the appellee sold appellant, so as to make it throw 150 gallons of water per minute from the mines, and that the boiler proved insufficient to run the machinery and pump and thereby damaged appellant \$250; third, that the appellant was delayed in getting the new boiler, and which delay caused it a loss of the profits of ten loads of flint spar, which it had sold, and which order was cancelled, thus damaging appellant \$500.

Three members of the court are of the opinion that when the appellant accepted the machinery, although delivered after the day which the contract required it should be delivered, did so as a compliance with the terms of the contract, and that it thereby waived any cause of action which it might have had had it declined to accept the machinery and sued for a breach of the contract, and the other three members of the court are of the opinion that it could accept the machinery and supplies and maintain an action for the failure to deliver at the time required by the contract. The court agrees in the other conclusions herein announced.

The appellee had nothing to do with the sale of the boiler to the appellant. It was owned and used by the appellant at the time the pump was sold to it. The appellant was bound to know the capacity of its boiler and the power it would furnish to operate machinery. There are no averments in the answer to the effect that the agent of appellee had any authority to make any guarantee of machinery owned by the appellant. It certainly was not within the apparent scope of his authority to give such a guaranty, hence we do not think the answer contained any averments which showed that the appellant had any cause of action against the appellee by reason of the alleged guaranty of its agent.

It is urged by counsel for appellant in his argument that the appellant is entitled to recover the loss of profits on the sale of the flint spar occasioned by the delay in the removal of the small boiler and the substitution of the larger one. This claim for damages is based upon the alleged guaranty that the boiler in use was sufficient to operate the machinery and pump. We have just stated our conclusion that no cause of action existed upon the alleged guaranty, therefore, it follows that no claim for damages existed in law for the failure to make the profits on the flint spar, the sale of which was lost by reason of the delay in the substitution of the large for the small boiler.

The appellant also sought to recover damages on account of defective machinery which appellee sold it. The guaranty with reference to the machinery sold is as follows: "We will guarantee the within-mentioned pump and materials to be built of good material and in good workmanlike man-

ner, and if any breaks occur from defect in material or workmanship, then we are to make same good by furnishing new parts free of charge for the term of one year. And we also guarantee that the above-mentioned pump when working will throw or pump 150 gallons of water per minute with fair usage and handling."

By the amended answer the appellant sought to recover damages because the water cylinder broke by reason of defective material. This break occurred pending the action. No notice was given appellee of the break, so that it could comply with its guaranty and supply a new cylinder. If a notice had been given, under the guaranty it had a reasonable time in which to supply the defective part of the machinery, and no cause of action would lie unless such notice was given and there was a failure to supply the defective part within a reasonable time after it was so notified. (J. L. Case Threshing Machine Co. v. Gardner, 24 Ky. Law Rep., 66.) The appellant seeks to avoid the necessity of giving the notice that the water cylinder was broken because on previous occasions, it is claimed, breaks occurred and notice was given and the appellee failed to supply the defective parts. The averments referred to are as follows: "That plaintiff has at all times failed and refused to make good said defective material, and have in violation of their said contract failed to furnish free of charge, or at all, new parts to take the place of said broken parts. The defendant heretofore notified plaintiff of other defective material and workmanship in some of the machinery and fixtures so sold defendant, and the plaintiff refused to make same good by furnishing new parts as it had agreed free of charge for the term of one year, and refused to furnish said defective fixtures at all, but, upon the contrary, filed this suit, endeavoring to collect its bill in full for said machinery, without keeping its said contract or making said material and fixtures good by furnishing new parts free of charge as it had agreed to do."

It is only inferentially averred that parts of the machinery were defective, and the appellee had been notified thereof. It is averred that the defendant notified plaintiff of other defective material and workmanship. That is not equivalent to averring that parts of the machinery were defective and notice thereof had been given. If the defendant desired to show that notice was not necessary by reason of disregard of previous notices by appellee, it should have averred expressly that the machinery was defective, and that due notice was given thereof and that appellee failed to supply the defective parts within a reasonable time. We think the appellant was not prejudiced because the court sustained the motions to strike out parts of the answer and the demurrer to the balance of it.

The judgment is affirmed.

Judge Cantrill not sitting.

ASHER, &c. v. KENTUCKY UNION CO.

(Filed June 9, 1905—Not to be reported.)

1. Land—Title—Conflicting evidence—Finding of chancellor—In an action involving title to land, which was tried by the chancellor, where there was a missing deed necessary to make out a chain of title, the evidence of the existence of which deed was conflicting, we must give some weight to the

finding of the chancellor. Our rule is not to disturb the chancellor's finding on a disputed question of fact where the evidence is conflicting and leaves the mind in doubt as to the truth.

2. Evidence—Errors not excepted to—Where a deed made by the appellee company was read on the trial without objection or exception, an objection that it does not show that it was acknowledged by the officers of the company can not be taken for the first time in this court.

E. E. Hogg and J. J. C. Bach for appellants.

B. P. Wootton, Jesse Morgan and Greene & VanWinkle for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Chief Justice Hobson.

On October 29, 1855, a patent was issued by the Commonwealth to Jonathan P. Smith on a survey bearing date February 3, 1845, for a tract of land in Perry county. Both parties to this litigation claim under Smith. The defendants claim under a deed made by Smith to Stephen Horn on April 3, 1901. The plaintiffs claim that Smith conveyed the land to J. A. Metcalfe October 7, 1854. They produce a deed made by Metcalfe and wife to Joseph Wilson and Jackson Cornett on November 9, 1882; also a deed from Cornett and Wilson to J. M. Thomas, of date December 28, 1882; a deed from Thomas to the Kentucky Union Railway Co., of date April 12, 1883; a deed from the Kentucky Union Railway Co. to J. M. Thomas, of date November 3, 1883; a deed from Thomas to the Central Kentucky Lumber, Mining, Manufacturing and Transportation Co., of date November 3, 1883. By an act of the Kentucky Legislature the name of the Central Kentucky Lumber, Mining, Manufacturing and Transportation Co. was changed to the Kentucky Union Land Co. (Volume 2, acts 1889-90, page 418.) The Kentucky Union Land Co. failed. Its property was sold in an equity proceeding in the United States Circuit Court for the district of Kentucky and was bought by the Kentucky Union Co., and a deed was made to it for the property on July 30, 1896. All the deeds constituting the plaintiff's chain of title are produced except the deed from J. P. Smith to J. A. Metcalfe, and the defendants deny that there was any such deed. On this question the circuit court adjudged in favor of the plaintiff, and the defendants appeal.

While the evidence as to the existence of this deed is conflicting, we must give some weight to the chancellor's finding. Our rule is not to disturb the chancellor's finding on a disputed question of fact where the evidence is conflicting and leaves the mind in doubt as to the truth. The evidence shows pretty clearly that after the year 1882 the Kentucky Union Co. and those it claims under paid the taxes on this land and claimed to own it. Their claim to the land seems not to have been disputed seriously until about the time the deed was made by J. P. Smith to Stephen Horn. Smith lived in the neighborhood of the land, and had lived there since 1850. He was a merchant, and had litigated the title to other land in the neighborhood of this. When he made the deed to Horn the land was worth \$10 an acre, and there were 212 acres in the tract. Yet he deeded it to Horn in consideration of \$1 cash in hand paid and Horn's note for \$200. The proof shows that he paid back to Horn the \$1 as soon as it was handed to him as a matter of form, and we are also satisfied from the proof that the agree-

ment between him and Horn was that he was not to collect Horn's note unless Horn got the land.

E. R. Whittaker, who bought from John A. Metcalfe a part of the land which he owned and had bought from Smith, testifies to seeing the deed from Smith to Metcalfe on file in the office of the clerk of the Perry County Court, and that it included the land now in controversy. The deed is now lost and can not be found. The defendants introduced what they claim is the deed, but the boundary given in this paper would not include the land in dispute. The testimony of Whittaker is confirmed by the testimony of Metcalfe, T. H. Whittaker and the inconsiderable consideration which Horn paid for the land, or agreed to pay for it, as well as the conduct of his vendor, J. P. Smith. The paper introduced by the defendants as the original deed is on its face suspicious and is not accounted for, that is, there is no proof that it is the paper which was filed in the office of the Perry county clerk.

While the petition as originally drawn was an action to enjoin repeated trespasses, the issue as finally formed by the parties was as to the ownership of the 212 acres of land. It is objected that the deed from the Kentucky Union Co. to J. M. Thomas does not show that it was acknowledged by the officers of the company. But no exception was taken to the reading of the deed in the circuit court, and this objection can not be made for the first time in this court. If there was any defect in the issue as formed by the original petition, the answer and reply, it was cured by the amended petition and the defendant's answer thereto, which set out fully the facts and brought the merits of the controversy before the court. The proof leaves no doubt that Horn bought with full notice of the plaintiffs' rights.

Judgment affirmed.

HENDERSON BRIDGE CO. v. COMMONWEALTH, FOR USE, &c.

(Filed June 9, 1905.)

1. Taxation—Tangible and intangible—Construction of statutes—Interest and damages—Kentucky Statutes, sections 1882, 1883, 1885, 4143, 4077, 4083 and 4091, when considered together are construed as follows: Sections 1882, 1883 and 1885 apply to county taxation on tangible property and not to taxation of franchises of corporations assessed by the State Board of Assessment and Valuation.

2. Same—State revenue—Counties and municipalities—Assessment by State board—The provisions of section 4091, in so far as damages and interest are concerned, by the force of its own terms applies alone to State revenue, and not to that of counties or municipalities, and as section 1885 has reference alone to the taxes regulated by sections 1882 and 1883 and not to those provided for by section 4091 it follows that the judgment imposing a penalty of 10 per cent. in damages and interest at the rate of 10 per cent. per annum on the taxes due to the county of Henderson by the Henderson Bridge Co. upon its franchise assessed by the State Board of Valuation and Assessment for the years 1893, 1894, 1895 and 1896 is erroneous.

Helm, Bruce & Helm and Yeaman & Yeaman for appellant.

Montgomery Merritt and N. Powell Taylor, for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted against the Henderson Bridge Co. by the county of Henderson to recover taxes due for the years 1893, 1894, 1895 and 1896, upon its franchise as assessed by the State Board of Valuation and Assessment for the years named. The corporation pleaded a former judgment in bar of the recovery sought. This plea was sustained by the trial court, and the petition of the county dismissed, whereupon it appealed to this court, and the judgment was reversed in *County of Henderson v. Henderson Bridge Co.*, 25 Ky. Law Rep., 421, and the case sent back for a trial on the merits. After the return to the court below, upon final hearing, a judgment was entered as prayed for in the petition, bearing interest at the rate of 10 per centum per annum until paid, and in addition a penalty of 10 per cent. upon the taxes ascertained to be due. From this judgment the bridge company has appealed.

In their brief counsel for appellant concede that all their contention, except the matter of 10 per cent. damages and interest at the rate of 10 per cent. per annum, is untenable since the decision by the Supreme Court of the United States of the case of *Coulter, Auditor v. Louisville & Nashville R. R. Co.*, 196 U. S., 599, and we shall, therefore, consider the judgment only as to the question still contested.

Section 1882 of the Kentucky Statutes is as follows: "That the court of claims or levy, or fiscal court, of each county in this Commonwealth is hereby authorized to levy and collect a poll and ad valorem tax to pay off the existing current indebtedness, and to defray the current and necessary expenses of the respective counties of the Commonwealth of Kentucky. But this act shall not be construed so as to authorize the court of claims or fiscal court of any county to levy a tax to pay any railroad bonded indebtedness, or any interest on any such indebtedness; that the poll tax shall not exceed \$1.50 on each male person of the age of twenty-one years or more residing in the county. The ad valorem tax shall not exceed 50 cents on the one hundred dollar's worth of taxable property assessed in the county.

"Section 1883. That assessments made for State purposes, when supervised as required by law, shall be the basis for the levy and collection of the ad valorem tax authorized in the preceding section, and the officer who may collect the State revenue in each county shall also collect the aforesaid poll and ad valorem taxes.

"Section 1885. Said taxes shall be due at such times as the State revenue is, and any one owing same who shall fail or refuse to pay the same when due, shall be subject to the same penalties prescribed by law for the non-payment of the State revenue, to be enforced by the same proceedings."

Section 4077 provides for the valuation and assessment of the franchises of certain corporations, of which appellant is one, for State, county and municipal taxation, by the State board organized for the purpose.

Section 4091, as applicable to the taxes involved in this action (since amended), is as follows: "All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to

said corporation, company or association by the auditor; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of 10 per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined \$50 for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction."

It is insisted by appellee that section 1885 supports its claim to 10 per cent. interest and damages, it being clear that, as section 4091 provides for 10 per cent. damages and 10 per cent. interest on State taxes, therefore, it is said the same rule is applicable to county taxes by the language of the section in question. This view is erroneous, as is apparent by an examination of section 1885. "Said taxes," as there used, clearly refers to those taxes authorized by sections 1882 and 1883, and which fall due at the same time as the State revenue; in other words, the general ad valorem revenue of the State.

This is made plain by an examination of section 4143, which provides that "all State, county and district taxes, except as otherwise specifically provided, shall be due and payable on and after the first day of March after the assessment. * * * Any person or persons failing to pay their taxes by the 1st day of December in the year following the assessment for such taxes, shall pay 6 per centum additional on the tax so due and unpaid." The expression, "said taxes," used in section 1885, as said before, refers to the taxes authorized to be levied by sections 1882 and 1883. The taxes provided for by section 1882 are limited to a poll tax and to an ad valorem tax not to exceed 50 cents on the one hundred dollars' worth of taxable property "assessed" in the county. The property, for the purpose of taxing the franchise, is not assessed in the county, but by the State board at Frankfort. The taxes to which section 1883 applies are those collected from assessments made for State purposes "when supervised as required by law." The assessment by the State board is not supervised at all, but it is useless to multiply argument to establish what is plain, that sections 1882, 1883 and 1885 apply to county taxation on tangible property, and not to taxation of franchises of corporations assessed by the State board. The lower court correctly so held.

That the provision for the imposition of the 10 per cent. damage and 10 per cent. interest for the nonpayment of the taxes authorized by section 4091 applies alone to State revenue has been decided several times by this court.

In the case of Owensboro Waterworks Co. v. City of Owensboro, 24 Ky. Law Rep., 2532, it is said: "By section 4083 it is the duty of the auditor, immediately after the value of the franchise is fixed by the board, to notify the corporation of the fact, and it is then allowed thirty days from the time of receiving the notice to go before the board and ask a change in the valuation. After the expiration of thirty days, by section 4084, it is the duty of the auditor to certify to the county clerks the amount liable for county, city, town or district tax. The notice by the auditor to the corporation referred to in section 4091 can not be the notice named in section 4083, for after that notice is given the corporation is allowed thirty days to go before the board

for a rehearing. The notice referred to in section 4091 seems to be a notice by the auditor to the corporation of the amount of its tax, which is payable to the State treasury, with a view to its payment, for the corporation is made delinquent if it fails to pay after receiving thirty days' notice, and the Franklin Circuit Court is given jurisdiction. The auditor has nothing to do with the collection of county or city taxes, and the Franklin Circuit Court is the fiscal court of the State. The same legislature which passed this act also passed the act for the government of the cities of the third class, and by section 8400, which is part of the act for the government of these cities, 'all taxes shall bear interest at the rate of 8 per centum per annum from the first of October of each year.' The rule is that the acts of the same legislature are to be read together, and under this rule section 4091 must be held not to apply to cities of the third class. We, therefore, conclude that interest should be allowed on the taxes from the first of October of each year at 8 per cent., and that no penalty beyond this should be charged."

In the case of *City of Louisville v. Louisville Ry. Co.*, 26 Ky. Law Rep., 378, the opinion of the chancellor following the *Owensboro Waterworks Co.*, supra, and refusing to impose the 10 per cent. damage and 10 per cent. interest, was approved, although the case was reversed on another point. This is emphasized in the response to the petition for rehearing and modification of opinion (27 Ky. Law Rep., 141), in which we said: "The tax bills involved in this action bear interest from the time and in the manner that other taxes bear interest under the provisions of the charter of cities of the first class."

It is, therefore, clear that section 4091, in so far as damages and interest are concerned, by the force of its own terms, applies alone to State revenue and not to that of counties or municipalities; and, as we have seen, section 1885 had reference alone to the taxes regulated by sections 1882 and 1883, and not those provided for by section 4091, it follows that the judgment imposing a penalty of 10 per cent. in damages, and interest at the rate of 10 per cent. per annum on the taxes due, is to that extent erroneous, and for that reason alone is reversed for proceedings consistent herewith.

SMITH v. THE SISTERS OF THE GOOD SHEPHERD, OF LOUISVILLE, KY., &c.

(Filed June 9, 1905—Not to be reported.)

1. Action for damages—Unlawful restraint—Forced servitude—In an action for damages against a Catholic Convent for false imprisonment by a woman who had been sent there by reason of moral depravity and stayed for fifteen years, and who at all times had opportunities to escape, the court properly reduced the issue upon the merits of the case to the question as to whether her stay in the institution was voluntary or involuntary, and upon proper instructions submitted this question to the jury.

2. Trial—Jury—Religious bias—Disqualification—The fact that some of the jury panel were of the Catholic faith did not exclude them from service on the jury on the trial of the action.

3. Evidence—Competency—Evidence of the beating by appellees of other persons then appellant was properly excluded by the court on the trial.

4. Same—Evidence of the previous depraved character of appellant was admissible as explanatory of her being in a reformatory for fallen women, and as furnishing a motive for her being willing to stay there.

W. T. Burch and D. T. Smith for appellant.

Kinney & Fitzgerald for appellees.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Barker.

Hattie Smith was born in Hardin county, Kentucky, and the earliest annals of her history, as shown by this record, introduce her as an inmate, with her mother and sister, of the poorhouse of her native county. At about twelve or fourteen years of age she was placed in the home of a family in Bullitt county, Kentucky. At fifteen she had been married and abandoned by her husband, after which she returned to the poorhouse of Hardin county, covered with syphilitic sores, and where she soon demonstrated by her conduct that her character was as depraved as her body was diseased.

At the suggestion of a Catholic priest, desirous of relieving the county officials of the embarrassment they endured between the duty they owed the public, of turning out of its eleemosynary institution for the virtuous indigent one so wantonly wicked as appellant, and the distress they suffered at the thought of casting an unfortunate and helpless child homeless into the world, the county judge and the sheriff sent her, in charge of the latter, to the house of the appellee in Louisville, Ky.

The Sisters of the Good Shepherd is a religious, charitable corporation, composed, as its name indicates, of consecrated women of the Catholic faith, who devote their lives to relieving the necessities and uplifting the character, so far as that is possible, of fallen women. If the inmate gives such evidence of reform as warrants the Sisters in trusting her again into the temptations of the world, they try to get her a home; if not, they permit her to stay, she in common with them doing such work as is found for her in the maintenance of the institution.

Without seeking absolute accuracy of statement, appellant resided with the Sisters fifteen years, when she left, and within a year thereafter instituted this action for \$25,000 in damages for false imprisonment and cruel treatment. Without unnecessary prolixity, it may be said the petition states a cause of action, and the answer places all of its material averments in issue. A trial resulted in a verdict for the defendants, and from the judgment predicated thereon this appeal is prosecuted. Before the day of trial appellant entered a motion for a change of venue, and filed certain affidavits in support thereof, in which it is substantially stated that one-fourth of the population of Jefferson county are Catholics in faith, and the influence of the church such that appellant could not obtain a fair and impartial trial. Counter affidavits were filed, and the court overruled the motion. It has always been the rule in this court to repose great confidence in the judgment of the trial judge in the matter of change of venue, and we see no reason in this case to deviate from this rule.

Upon the calling of the case for trial a panel of eighteen jurymen was drawn from the box, and it developed, upon interrogation by appellant,

That six of the eighteen were members of the Catholic Church, and that several of them contributed to its charities. Thereupon appellant moved the court to peremptorily discharge the six Catholics, which was overruled. This action by the court is assigned for error. The ruling was correct. If the six Catholics were to be discharged because they held the same faith as appellee, the latter could, with equal right, demand the peremptory discharge of the remaining twelve because they were of the same faith as appellant.

Omitting a comparatively small population of Jews, the people of Kentucky may be roughly divided, religiously, as Protestants and Catholics; if, then, where a Catholic and a Protestant are opposed in a law suit, the Catholic may object to the presence of Protestants on the jury, and the Protestants to the presence of Catholics, no trial at all can be had. No complaint is made that the jury was irregularly or unlawfully drawn; or that Catholics had been placed on the jury because they were Catholics; or that those on the panel had any other interest in the litigation than that they were members of the Catholic faith. It seems to us the objection was frivolous. The trial judge correctly excluded the evidence tendered of the beating by appellees of other persons than appellant. This was clearly foreign to the litigation being tried, and its truth or falsity shed no light upon the issues joined. The evidence of the previous depraved character of appellant was admissible as explanatory of her being in a reformatory for fallen women, and as furnishing a motive for her being willing to stay there. Upon the merits of the case the court properly reduced the issue to the question of whether the stay of appellant in appellees' institution was voluntary or involuntary; whether the institution was a haven of refuge or a prison house for appellant. If the first, the law was for defendant; if the latter, it was for the plaintiff. The instructions submitted this question fairly and lucidly, and the jury found for the defendant.

This record shows that the appellant had a fair and impartial trial at the hands of both the court and the jury, and that no error was committed prejudicial to her substantial rights. We believe, further, that the verdict of the jury was in accord with the weight of the evidence; that the poverty and depravity of appellant were such as should have made this refuge from the scorn of the world and the vicissitudes of an adverse fate desirable to her is not denied; that she had the same means of escape, of which she finally availed herself, during the whole of her stay in appellees' institution is practically conceded. The conclusion is irresistible that she remained with appellee because it was to her interest to stay. Pending this action she has again married. It may be that to this new relationship she brings a penitent, if not an innocent heart; that she assumes its duties with a commendable resolution to atone for a sinful past by the purity of an exemplary future. If so be, and in this consummation we indulge a hope, she owes all that is good which may yet come to her in this life to the patient teaching, the watchful oversight, the christian example of the pious women whose good name and usefulness she sought to destroy by this litigation.

Judgment affirmed.

JACKSON v. HARDIN.

(Filed June 9, 1905—Not to be reported.)

1. Sale of timber—Removal—Time—The rule is that a sale of timber on a certain tract of land, to be removed in a given length of time, is only a sale of so much as is removed within the time.

2. Written contract—Subject-matter—Identification—Parol evidence—While parol evidence is not competent to vary a writing it is competent to identify the subject-matter of the contract and to show what objects were at the time known by the terms used.

3. Same—Where by a written contract certain oak timber was sold on the Levi Jackson home place, parol evidence is competent to prove that when the parties in the contract designated the land as the "Levi Jackson home place" they did not understand that either the Walden, State Hill or Edwards tracts were included in the sale, and that the meaning of the contract is that all the land within the exterior bounds given, which was then known as the Levi Jackson home place, was included in the contract.

F. C. Newman for appellant.

Sam C. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Hobson.

G. D. Jackson, Miss Lucy Jackson and Ella Jackson owned a tract of land jointly in Laurel county, known as the "Levi Jackson Home Place," containing 800 acres, more or less, and on June 9, 1902, entered into the following contract with the Bauer Cooperage Co.:

"This contract, made and entered into this the 9th day of June, 1902, between D. G. Jackson, Miss Lucy Jackson and Ella Jackson of the first part, and the Bauer Cooperage Co. of the second part:

"Witnesseth, that the parties of the first part, for and in consideration of the sum of \$2,250 cash in hand paid, the receipt of which is hereby acknowledged, have this day sold to the party of the second part all the white oak timber and its species, known as burr oak and by some overcup oak, which measures twelve inches in diameter and over at a point fourteen inches from the ground, on the following boundary of land supposed to contain 800 acres, more or less, situated in Laurel county, on the Barbourville road, and the waters of Big and Little Laurel river, and known as the Levi Jackson home place, bounded as follows: On the west by the lands of Samuel Mori, Beverly Watkins and W. B. Catching, George Chapman, on the north by the lands of Henry Yaden, William Waldon, Joe Yaden and Jarvis Moore; on the east by the lands of Rebecca Goins, Grant Evans' heirs and H. Walden; on the south by the lands known as the Sam Black farm and Samuel Mori.

"It is agreed between the parties to this contract that the party of the second part, the Bauer Cooperage Co., is to have eighteen months from this date for the purpose of cutting, hauling and removing the timber herein mentioned, and in the event by accident or misfortune that unexpectedly occurs, that may delay the said Bauer Cooperage Co. in its efforts to cut, haul, remove and work up said timber that is unavoidable on the part of said party of the second part, it is to have, in addition to the said eighteen

months a reasonable time, for the purpose of cutting, working up, hauling and removing from said land. It is further agreed between the parties that the party of the second part is to have the right of egress and ingress into and over the land aforesaid, except the farming lands fenced agreed upon around the residence, to cut, fall, work, haul and remove said timber, and the right to make necessary roads into and over said lands for the purpose of hauling and removing said timber so as not to interfere with any growing crop or lands in cultivation. The said Bauer Cooperage Co. agrees to remove said timber as speedily as possible, and to use reasonable care in cutting and falling of timber aforesaid so as not to damage any merchantable timber on said land, and the Bauer Cooperage Co. agrees to leave all the laps and waste of said timber on the land except what may be worked up into staves, lumber and cross ties.

"Given under our hands in testimony whereof and witness our signatures, this the 9th day of June, 1902.

"THE BAUER COOPERAGE CO.,

"By WM. JESSUP,

"G. D. JACKSON,

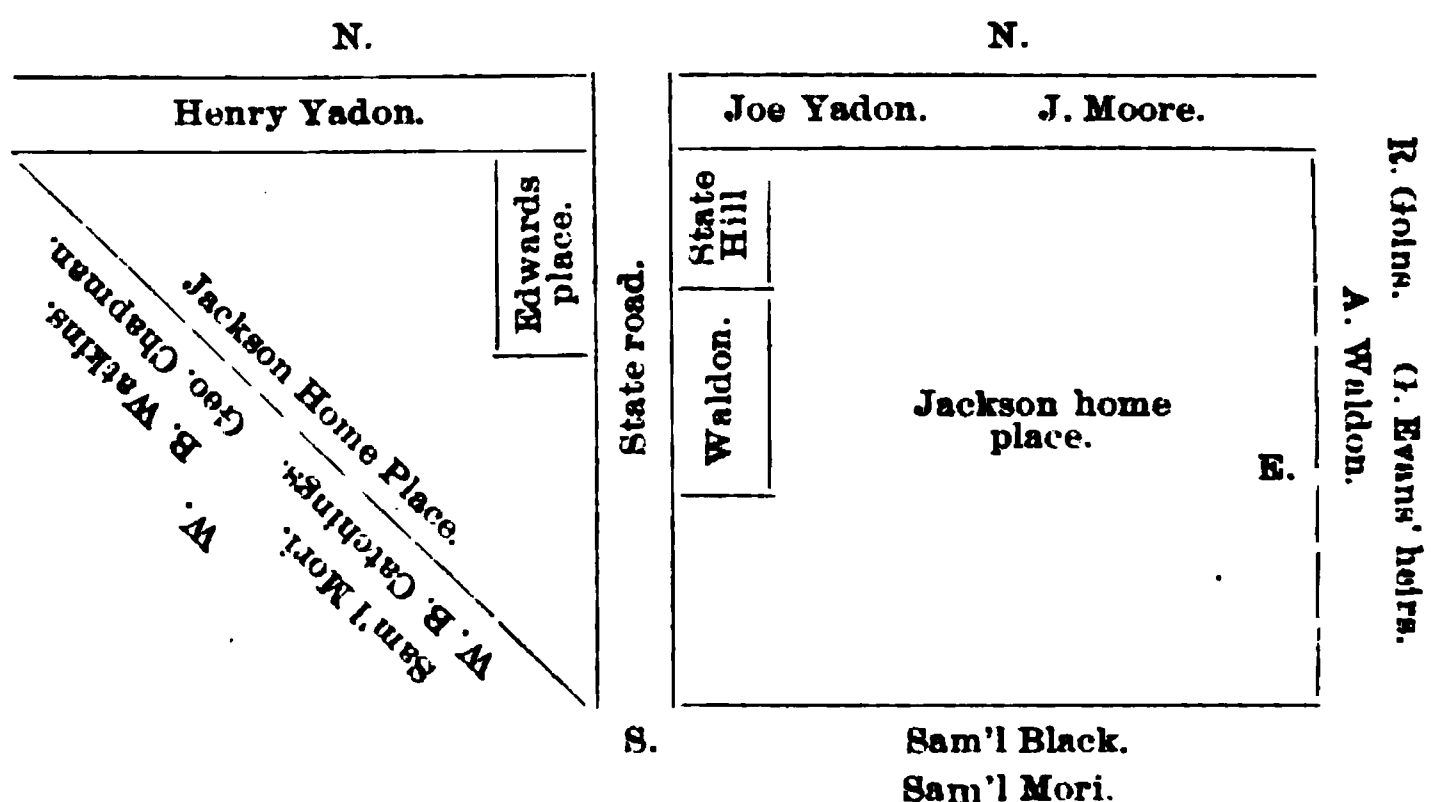
"LUCY A. JACKSON,

"ELLA JACKSON."

The Bauer Cooperage Co. commenced getting out the timber. In the spring of 1903 their hands began cutting on a tract known as the Edwards tract, which was the property of Ella Jackson. Thereupon notice was given that the timber on that tract of land had not been sold, and that the company must not cut it. This notice seems to have been respected by the company. It continued to cut on the Levi Jackson home place, and there was no trouble until about September, when it sold its contract to J. R. Hardin, and he then began cutting on the Edwards place. Miss Jackson stopped his hands from cutting there, and some considerable time was lost. Finally, in January, 1904, the Bauer Cooperage Co. formally assigned its contract to Hardin, and in February, 1904, he again began cutting timber both on the Levi Jackson place and on the Edwards place. Thereupon this suit was brought to enjoin him from cutting any of the timber on the ground that his contract had expired on December 9. He relied, among other things, on the clause of the contract providing that if by any accident or misfortune unexpectedly occurring the company was delayed in its efforts to cut and get out the timber it was to have a reasonable time for this purpose after the end of the eighteen months, insisting that but for their stopping his hands from cutting on the Edwards place, and the notices which they served upon him, he could have gotten all the timber out within the contract time. The proof does not show that any objection was made to his cutting on the Levi Jackson home place, or that he was in anywise hindered in cutting the timber on that tract, so that if he was hindered by the plaintiffs' acts from cutting the timber on the Edwards place that would be no excuse for his not getting out the timber on the Levi Jackson home place. The rule is that a sale of the timber on a certain tract of land, to be removed in a given length of time, is only a sale of so much timber as is removed within the time. (Chestnut v. Green, — Ky. Law Rep., —; Monroe v. Bowen, 26 Mich, 522; Kennedy v. Dawson, 96 Mich., 88; Saltonstall v. Little, 90

Penn., 422; Reed v. Merrifield, 10 Met., 155; Fletcher v. Livingston, 153 Mass., 388; King v. Merriman, 38 Minn., 47; Clark v. Guest, 54 Ohio State Rep., 298; Strong v. Eddy, 40 Vt., 547; Larson v. Cook, 85 Wis., 564.) Under this rule Hardin, on the fact shown, was not entitled to cut or remove any of the timber on the Levi Jackson home place after the expiration of the contract on December 9, 1903.

If the Edwards place was included in his contract, and he was prevented by the plaintiffs from cutting the timber on that tract during the time allowed by the contract, he should be allowed a reasonable time after the expiration of his contract to get off the timber from the Edwards tract. This brings us to the question whether the Edwards tract is included in the contract. The proof leaves no doubt that the Edwards tract was not intended to be included in the sale; but it is insisted that it is covered by the language of the contract. The situation is shown in the accompanying plat:



It will be observed that if we are governed by the exterior boundaries given in the contract alone the Edwards place and the tracts marked "Waldon" and "State Hill" will be included. But the vendors did not own either the Waldon or State Hill tracts, and the Edwards place was the individual property of Ella Jackson and had been owned by her individually for fifteen years. The Levi Jackson home place was owned by the three vendors jointly. While parol evidence is not competent to vary a writing, it is competent to identify the subject-matter of the contract and to show what objects were at the time known by the terms they used. For instance, if a tract of land is designated as Black Acre, or as Smith's home place, it is competent to show what land was so known at the time the contract was made. The proof satisfactorily shows that at the time this contract was made the Levi Jackson home place was not understood to include either the Waldon, State Hill or Edwards tracts, and that when the parties in the contract designated the land as the Levi Jackson home place they did not understand that either of these three tracts were included. The contract gives the exterior boundaries of the Levi Jackson home place, but it does not follow that all the land within these exterior bounds is covered by the contract, for we must give some force to all the words of the contract, and,

taking it all together, we are satisfied that only the timber on the Levi Jackson home place was sold, and that the meaning of the contract is that all the land within the exterior bounds given, which was then known as the Levi Jackson home place, was included in the contract.

There was no need that the plaintiffs should attack the contract on the ground of fraud or mistake, charging that the description of the property as given in the contract was given by mistake, for the ambiguity here is latent. The difficulty does not arise on the face of the contract, but is raised by parol evidence, and the ambiguity which is thus raised by parol evidence may be removed by parol evidence showing what land at the time the contract was made was known and designated as the Levi Jackson home place. We, therefore, conclude that the vendee under the contract had no right to the timber on the Edwards place, and having no right, it can not complain that he was estopped when he undertook to cut it.

While the plaintiffs did not set out their case as aptly as they might have done, still they did in their amended pleadings set it all out, and issue having been joined on these pleadings and the case tried without objection to the manner in which the issue was made, the case must now be tried on the merits.

Judgment reversed and cause remanded for a judgment in favor of the plaintiffs as above indicated.

LINN v. HAGAN'S ADM'R.

(Filed June 13, 1905—Not to be reported.)

Service of process upon nonresident—Where an administratrix living in another State was only brought before the court on an appeal in an action which had been instituted by her deceased husband, section 542, Civil Code, has no application, and service of process in such case was proper in this State. The appeal being in effect a proceeding to set aside a judgment against her testator, she was a proper party to the appeal.

Greene & VanWinkle and N. W. Halstead for appellant.

F. Hagan for appellee.

Appeal from Bullitt Circuit Court.

Chief Justice Hobson delivered the following opinion on motion to quash process:

On December 21, 1903, F. J. Hagan recovered judgment against J. H. Linn in the Bullitt Circuit Court. On March 21, 1905, Linn filed a transcript of the record in this court and filed with the record a statement of the parties to the appeal, from which it is shown that F. J. Hagan is dead and that Mary J. Hagan is the administratrix of his estate. Process was issued upon the appeal and served upon the administratrix in Bullitt county. She has entered a motion to quash the process and in support of the motion has filed an affidavit, in which she says that when the process was served upon her she was in Bullitt county as a witness for the Commonwealth to testify on the trial of one Barbour, indicted for the murder of her husband, F. J. Hagan; that she was ordered by the court to attend, and in obedience to the

order of the court came from her home near Montgomery, Ala., to testify on the trial. At the time of his death F. J. Hagan was a resident of Alabama. His will was probated there and appellee was appointed executrix in Alabama, and qualified there. She has not been appointed in Kentucky and has not qualified here. She is a resident of Alabama. Section 542 of the Civil Code is relied on: "A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning or attending, in obedience to a subpoena."

This section has no application. It refers only to the venue. While a witness may not be sued in a county in which he does not reside, by being served with a summons in that county while attending in obedience to a subpoena, he may be sued in his own county or in a county where the court would otherwise have jurisdiction, and may be served with a summons while attending under the subpoena. The purpose of the section is simply to prevent the courts of the county where a witness is in attendance under a subpoena from acquiring jurisdiction over him by the service of process in that county while he is there in obedience to the subpoena.

In *Lewis v. Miller*, 24 Ky. Law Rep., 2583, the heir at law under the will had come to Kentucky to testify as a witness in an appeal which she had taken from the order of the county court probating her ancestor's will, and while here was sued by a creditor of the estate. It was held, after an examination of the authorities, that she was not exempt from the service of process. The same conclusion was reached by the Maryland Court of Appeals in *Mullen v. Sanborn*, 25 L. R. A., 721. In a note to that case, at page 781, it is said: "A resident of another State or country, who has in good faith come into a State as a witness to give evidence in a cause, is exempt from service of process for the commencement of a civil action against him."

Many authorities are collected supporting the text, but this case does not come within the rule. The exemption of the witness, when allowed, is a personal one. In this case Mrs. Hagan is not sued personally. She is only sued as administratrix. No personal judgment can be rendered against her. This is a proceeding to set aside a judgment obtained by F. J. Hagan in his lifetime. It is an appeal in the same case in which the judgment was rendered. In the case of a nonresident plaintiff, who recovers judgment in the courts of this State and dies pending the appeal, the action may of necessity be revived against the foreign administrator, for if an administrator is appointed in this State, he would have no assets and no means to employ counsel, and the estate should be represented on the appeal by the real party in interest. Were the other rule followed great injustice might be done to this class of litigants. We, therefore, conclude that the foreign administrator was a proper party to the appeal, as the appeal is in effect simply a proceeding to set aside a judgment in favor of her testator against appellant. When she was in the State and was personally served the service simply brought her before the court as personal representative. No advantage was taken of her presence in the State to sue her in the courts of the State by reason of her presence here as a witness. She has simply been brought before the court on an appeal in an action which her intestate instituted.

The former opinion, delivered on May 30, is withdrawn, as it was based upon a misunderstanding of the facts.

Motion overruled.

(Filed June 18, 1905—Not to be reported.)

Lands—Sale of—Branded timber—In an action to recover balance of purchase money for a tract of land, the defense being that the purchasers bought the land and all that was on it, and the seller pleading in a reply that some of the timber had been branded as sold timber, and that while it was by mistake omitted from the deed, still the purchasers were aware of the fact, that it had been sold and that the deed of sale was of record, the facts of the sale being such as to prevent a court of equity from enforcing the sale, it will be rescinded, and the purchasers will be adjudged a lien for the purchase money and interest and be charged reasonable rent for the land while they held it.

Hazelrigg & Hazelrigg and F. J. Kilgore for appellants.

Appeal from Knott Circuit Court.

Opinion of the court by Chief Justice Hobson.

On March 10, 1900, Felix Begley and wife sold to Laura Combs a tract of land belonging to Mrs. Begley for \$500, of which \$300 was paid down and a note executed for \$200, they executing to her a title bond by which they bound themselves to make her a good title to the property. She failed to pay the note, and they filed this suit to recover on the note and enforce a lien on the land. The defendants pleaded that they bought the land with all that was on it, and that one John W. Combs owned certain of the timber on the land, and that his title to the timber was superior to theirs; that it was agreed at the time of the trade that if the plaintiffs could not make a good title to this timber the \$300 was to be a full payment for the land. The plaintiffs pleaded that the timber had been sold for the debts of Mrs. Begley's father, who had given her the land; that she did not own the timber and that the purchasers well knew this when the trade was made, the timber having been branded and the deed, therefore, being of record; that it was expressly agreed that all the branded timber belonged to a third person, and that by oversight or mistake the timber was not excepted from the bond. Proof was taken and on final hearing the court dismissed the plaintiffs petition, and they appeal.

The proof shows that the timber was of value \$200. It also shows that the purchasers knew that the timber had been branded and sold to a third person under an order of the court for the payment of the debts of Mrs. Begley's father. The contract of sale was made by Mrs. Begley's son, Samuel Begley. His testimony tends to sustain the allegations of her pleadings. On the other hand, the testimony of the defendant, Robert Combs, and that of several other witnesses tends to sustain the statements of the answer.

The bond calling for the land necessarily embraced everything upon it in the absence of proof of fraud or mistake. When the plaintiffs attacked the bond for fraud or mistake in not excepting the branded timber out of the sale the burden of proof was upon them. The note which the defendants executed is an absolute promise to pay, and they can not attack it without proof of fraud or mistake, by showing a parol agreement to the effect that their promise was conditional and that they were not to pay the note unless they got the branded timber. (Dale v. Pope, 4 Litt., 467.) In other words,

Upon the face of the papers the defendants must pay Mrs. Begley \$200, and upon the face of the papers she must convey to them the tract of land described in the bond with all that is on it; but she has no title to convey to them the branded timber, and to this extent her title fails. The proof leaves no doubt that the purchasers knew that the branded timber did not belong to Mrs. Begley, and although it shows that Samuel Begley said that the sale of the branded timber was void, they were bound to know that if the sale was not void they would get no title to the timber. It also shows that Samuel Begley had only authority to sell the property which his mother owned. He had no authority to sell what she did not own. The purchaser knew he was only authorized to sell his mother's property. We can not enforce the contract of sale because to do this would be either to make the purchasers pay for what they did not get or to make Mrs. Begley responsible for what she did not authorize her son to sell. In equity, therefore, the contract must be rescinded. The purchasers will be adjudged a lien on the land for their purchase money, with interest; also for the enhancement of the land by reason of their improvements, and they will be charged a reasonable rent for the land while they have held it.

Judgment reversed and cause remanded for a judgment as above indicated.

COMMONWEALTH v. STANDARD OIL CO. (Case No. 7.)

(Filed June 13, 1905—Not to be reported.)

Penal action—Retailers of oil—Wagon—Unit of taxation—Section 4224, Kentucky Statutes, provides a different class of retailers of oil from peddlers, of which it has been held that "the unit of taxation is the wagon used in the business of transporting oil for sale." and in a penal action by the Commonwealth, under section 11 of the Criminal Code, to recover of the Standard Oil Co. a penalty for retailing oil without a license so to do, where the language shows that it was brought under section 4224, Kentucky Statutes, a demurrer thereto should have been overruled.

N. B. Hays, Chas. H. Morris and J. R. Layman for appellant.

Humphrey, Hines & Humphrey and C. B. Blakey for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Barker.

The Commonwealth instituted this penal action under section 11 of the Criminal Code to recover of the Standard Oil Co. a penalty for retailing oil without a license so to do. A general demurrer was interposed to the petition, and sustained by the court. From the judgment dismissing the petition this appeal is prosecuted.

No reason is given in the record for the ruling of the court, but it is said in appellee's brief that it was based on the fact that the allegations of the pleading were not sufficiently definite for the court to determine whether the action was to recover the penalty for doing the business of a peddler without license, or for that denounced against those doing the business of retailing oils without the license required by section 4224, Kentucky Statutes. It is conceded by appellee in its brief that if the action is under the

latter statute the demurrer should have been overruled. Appellee was not proceeded against as a peddler. There is no allusion in the pleading to that class of itinerant venders. The word "peddler" is a well-known common-law term, and the statute provides a license for this class of retail venders by name. Section 4224 provides for a different class of retailers of oil from peddlers, of which, as said in *Standard Oil Co. v. Commonwealth*, 26 Ky. Law Rep., 927, "the unit of taxation is the wagon used in the business of transporting oil for sale." The language of the petition clearly shows that the proceeding is under section 4224. It is in substance the same as the indictments in the various cases between the same parties this day decided, and is subject to the same principle of recovery. The difference is only as to the form of action adopted.

The demurrer should have been overruled and the judgment is, therefore, reversed for proceedings consistent herewith.

STRAIGHT CREEK COAL CO. v. HANEY'S ADM'R.

(Filed June 13, 1905—Not to be reported.)

1. Damages—Instructions—In an action against a coal mining company by an administrator for the killing of his intestate by a falling "stump," an instruction upon contributory negligence should have been given. The work of taking out "stumps" in a coal mine is hazardous, only experienced men are put at such work, and they must exercise precaution; and whether the deceased used proper care was a question for the jury, which they might determine from the circumstances of the falling of the roof as well as the testimony of the witnesses.

2. Same—An instruction that assumed that the mine was in a dangerous condition was objectionable.

3. Same—Evidence—Statements of the section boss made upon the day of the accident were not competent as substantive evidence against appellant, but were only admissible to impeach him, and when admitted for such purpose the jury should be instructed that they should only be considered for the purpose of contradicting the witness.

Prewitt & Serff, Theobald & Theobald, E. B. Wilhoit and Hazelrigg & Hazelrigg for appellant.

James Andrew Scott and Prater & Waugh for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Hobson.

Appellee's intestate was a miner in appellant's employ. While he was employed in the coal mine in taking out what is called a stump, a slate fell from overhead upon him and killed him. This action was brought to recover for his death on the ground that the fall of the slate was due to the negligence of the company in failing to sufficiently prop up the roof of the mine at a point where it was incumbent upon it to maintain props, which were necessary for his safety in the taking out of the stump, and that he did not know that the props had not been put up by appellant, or know of the dangerous condition of the mine. The defendant denied the allegations

of the petition as to negligence and pleaded contributory negligence on the part of the intestate. The jury found for the plaintiff in the sum of \$10,000, and the defendant appeals. The court instructed the jury as follows:

"1st. The court instructs the jury that it was the duty of the defendant to exercise reasonable care to provide the deceased, William Haney, with a reasonably safe place to work, considering the nature of his employment, and if the jury believe from the evidence that under the custom of miners engaged in drawing stumps in defendant's mine at the place where deceased was killed it was the duty of defendant to put up posts in the neck of the old rooms, and shall further believe from the evidence that the defendant negligently failed to set up said posts, and by reason of said failure slate was caused to fall from the roof of said mine upon deceased and kill him, and that defendant's agents, whose duty it was to look after the safety of said mine at the place where deceased was killed, knew, or by the exercise of reasonable care could have known, of the dangerous condition of said mine in time to have prevented the death of deceased, they will find for plaintiff and fix the damages as in instruction No. 2.

"3d. The court instructs the jury that the deceased, William Haney, in undertaking to work for defendant at the point where he was killed, assumed all the risks ordinarily attending the performance of such work, and that it was his duty to exercise reasonable care to protect himself from the dangers ordinarily incident to such employment; and although the jury may believe from the evidence that the defendant or its agents were negligent as in instruction No. 1, yet if they shall further believe from the evidence that the deceased, William Haney, knew, or by the exercise of reasonable care could have known, of the dangerous condition of the roof of said mine in time to have prevented the slate from falling upon him, and with such knowledge, or means of knowledge, continued to work at the place where he was killed, and was so at work when killed, the law is for the defendant, and the jury will so find."

But the court did not give the jury any instruction on contributory negligence. This it should have done. The work of taking out the stumps in a coal mine is peculiarly hazardous for the reason that the stump holds up the roof of the mine, and when it is taken out the roof is liable to fall unless properly secured. Only experienced men are put at the work, and they, in doing work so dangerous, must necessarily exercise precaution. Whether the deceased used proper care in taking out the stump was a question which the jury might determine, not only from the direct evidence of the witness, but from the circumstances attending the falling of the roof. Instruction 8 submitted to the jury the question whether the deceased assumed the risk, and whether he knew, or by the exercise of reasonable care could have known, of the dangerous condition of the mine; but it did not submit to the jury the question whether, although he did not know of the dangerous condition of the roof and could not have known of it by ordinary care, he used such care as might be reasonably expected of him under the circumstances, and but for this would not have been killed. The defendant asked the court to give the jury such an instruction, which was refused.

The evidence tends to show that he was engaged at the time in taking down the last part of the stump; that the bank boss had directed him to

leave a sprag at stumps, and they had left them at eight or more places to keep the roof from falling; that he had left no sprag, and if the prop had been put up he would not have been hurt. It was also shown that the stumps had been drawn ahead of the place where the decedent was at work on the opposite side of the entry; that this made the work more dangerous, throwing the weight on his side and that the fall would not likely have occurred if this had not been done. Before the fall occurred the bottom part of the entry had heaved up about a foot, indicating that some change was going on. The jury might have inferred that the fall would not have occurred if the intestate had put up the posts or if the coal further out in the entry had not first been taken out. The break occurred where the intestate was at work, and under all the proof it is the duty of the miner to post the roof where he is taking out the coal. The intestate had not left a sprag as the mine boss directed him to do. While the evidence did not conclusively establish these facts, there was evidence tending to show them, and from which the jury might have inferred them. The court should have instructed the jury that if the death of the intestate was due to his disobedience of the order of the boss as to leaving a sprag, and to his failure properly to prop the roof of the mine when he removed the coal under it, or if he failed to exercise ordinary care for his own safety and but for this would not have been hurt, they should find for the defendant.

In the first instruction the words "under the custom of miners engaged in drawing stumps," should have been omitted and in lieu thereof these words should be substituted, "in the ordinary course of the business." The instruction is also objectionable in that it assumes that the mine was in a dangerous condition, and after the words "and kill him" this should be inserted, "and that said mine at the time was not in a reasonably safe condition."

The statements of the section boss made on the day after the occurrence were not competent as substantive evidence against appellant. They were only admissible to impeach him, and when admitted for this purpose the court should instruct the jury that they are not to be considered as substantive evidence, but only to contradict the witness. On another trial in lieu of the words in instruction 3, "by the exercise of reasonable care could have known," the court will insert these words "by the exercise of ordinary care in the discharge of his duty could have known;" and in lieu of the words "with such knowledge or means of knowledge," he will insert the words "with such knowledge of the danger or with such reason to know it." (East Jellico Coal Co. v. Golden, 25 Ky. Law Rep., 2036.)

Judgment reversed and cause remanded for a new trial.

Judge Nunn dissenting.

ANDREWS v. ANDREWS' COMMITTEE.

(Filed June 13, 1905.)

Husband and wife—Divorce—Five years' separation—Subsequent insanity of wife—Effect—In an action by the husband against his wife for a divorce on the ground of "living separate and apart without any cohabitation for five consecutive years next before the application," an allegation in the

petition that the wife "had been previously adjudged a lunatic, and is now an incurable lunatic and confined in a sanitarium in New York, where she now resides, and that for five consecutive years next before she was adjudged a lunatic they lived separate and apart and without any cohabitation, and since that time they have continued to live separate and apart and without any cohabitation." Held—That if while she was sane she and her husband lived apart without any cohabitation for five consecutive years, a cause of action for divorce accrued to him, and this cause of action is not destroyed by the fact that she subsequently became insane.

2. Allegations must be proved—Defense by wife's committee—Under our statute the allegations of the petition are not to be taken as true, but must be proved, and the wife's committee may make for her any defense which she could make for herself.

R. W. Nelson, L. J. Crawford and Hazelrigg & Hazelrigg for appellant.

Brent Spence and Thos. P. Carothers for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Hobson.

By section 2117, Kentucky Statutes, the following is made a ground for divorce to both husband and wife: "Living apart without any cohabitation for five consecutive years next before the application."

This is an action for divorce brought by the husband under the statute. He states in his petition that he and the defendant, Lucassia B. Andrews, were married on March 4, 1865; that on February 16, 1902, she was adjudged to be of unsound mind; that for more than five years next before that date they had lived separate and apart without any cohabitation, and that since that time they have continued to live separate and apart and without any cohabitation; that the cause for divorce occurred within five years next before January 16, 1902, and within five years next before the commencement of the action; that the defendant, Lucassia B. Andrews, is an incurable lunatic, and about February 13, 1903, was placed by her committee in a sanitarium at White Plains, in the State of New York, where she now resides.

The petition was filed on October 5, 1904. The committee of the lunatic was made a defendant to the action and a warning order was made against the lunatic. The committee and the warning order attorney filed a general demurrer to the petition which the court sustained, and the plaintiff failing to plead further, dismissed the action.

In *Pile v. Pile*, 94 Ky., 808, it was held that it is no ground of divorce under the statute above quoted that the husband and wife have lived apart without any cohabitation for five consecutive years by reason of the lunacy of the wife and her being confined in a lunatic asylum, with no hope of recovery. The court said: "This man, when he took the unfortunate woman to be his wife, vowed at the altar to love, cherish and protect her in sickness and in health, and whether the wife is diseased in mind or body, his marriage vow should and must be observed. The more helpless she becomes, the greater his duty to love and protect her. The wife has never abandoned the husband, but is now confined in the asylum for lunatics by his consent and direction. The chancellor did right in dismissing his petition."

We adhere to the rule thus laid down, but the allegations of the petition

do not bring this case within it. A person is presumed sane until the contrary appears. It is presumed that Mrs. Andrews was sane when she was married, and that she continued sane until she was adjudged a lunatic. The judgment is conclusive that she was a lunatic at that time, and it is prima facie evidence of her lunacy at a subsequent period, but it raises no presumption that she was a lunatic at any previous time. If while she was sane she and her husband lived apart without any cohabitation for five consecutive years a cause of action for divorce accrued to him, and this cause of action is not destroyed by the fact that she subsequently became insane. In 2 Bishop on Marriage and Divorce, section 518, the rule is thus stated: "Divorce being a civil proceeding, and it being established practice in the civil department of our law to maintain suits against insane parties the same as against sane ones, there can be no just ground for excepting divorce causes. Both in reason and in authority insanity may excuse an act otherwise unlawful, but where it does not it is no defense against the injured person's claim for redress. To deny the law's justice to the sane one would be to cast in part on the former the burden which God had laid wholly on the latter. Divorce, where there is a cause for it, is the plaintiff's right. If the defendant were sane, he could not prevent it; he has no election. Therefore, it is not otherwise when he is insane."

After showing that in England the practice was to continue the case as long as there was hope of the defendant's recovery, in section 522 the author says: "The practice of continuing the case against an insane defendant while hope of his recovery remains has been approved, but the doctrine of reason, which in the absence of a controlling statute permits the cause to proceed when such hope has fled, appears to be sufficiently sustained by our American authorities." A number of cases are collected in the notes. (Douglas v. Douglas, 81 Iowa, 421; Stratford v. Stratford, 91 N. C., 297; Harrigan v. Harrigan, 135 Cal., 397.)

If the plaintiff had a cause of action for divorce before his wife became insane and this cause of action accrued within five years before the institution of the action, the action may be maintained unless he has in some way lost the right of action which he then had. It is true the ground of divorce, as stated in the statute, is "living apart without any cohabitation for five consecutive years next before the application." If since his cause of action accrued the plaintiff has continued to live apart from his wife without any cohabitation, he has not lost his cause of action which he then had by reason of the fact that during this time, or a part of it, she has been a lunatic and in an asylum. The meaning of the statute is that living apart without any cohabitation for five consecutive years shall not be ground for divorce, unless it is continued up to the time of the application. The fact that the husband did not bring his action until it was shown that the wife's lunacy was permanent did not affect his rights. In fact, in so waiting, he conformed to the old rule of equity, which is both wise and just. The time elapsing since the wife became a lunatic can not be counted as any part of the five years required by the statute, but if they lived apart without cohabitation for five years before she became a lunatic, and have since continued to live apart, the divorce may be granted.

Under our statute the allegations of the petition are not to be taken as:

mon carrier, and on the question of negligence, the jury found for the defendant. The plaintiffs appeal.

The only question which need be considered on the appeal is whether there was sufficient evidence to go to the jury on the question whether the defendant was a common carrier. The proof on this subject is as follows: J. L. Dent testified as follows:

"I requested plaintiffs to ship their stuff from Evansville to Rochester with defendant because I had done considerable shipping with them on Green river, and the defendant had requested me to get the company any business I could. * * *

"I did considerable shipping with the defendant on the Hook and Wilford and other boats on Green river. At the time I represented a fertilizer company. I shipped my fertilizers on their boats at so much per ton, to be delivered at different points on Green river, freight being paid by the parties receiving it in some cases and by me in some cases. I have known the defendant's boat to carry passengers, flour, chickens, eggs, oil and other goods and merchandize for merchants doing business along the river."

Noah Daughety made these statements:

"I am wharfmaster at Morgantown ferry. The defendant operated tow boats on Green river up to the time they went out of the river. They did the business of common carriers. They brought freight to my wharf and took freight from there. They did this in 1900 and 1901. The boats were the Hook and Carson.

Cross-examined: "Witness said they had no regular time for coming and going; no fixed terminals. Their chief business was towing ties and coal. Most of freight brought by defendants was in empties returning from towing coal to Bowling Green."

W. H. Fuller testifies as follows:

"I was wharfmaster at Morgantown wharf from — till —, 19—. I know the defendant company. They were doing business on Green river, between Evansville and Bowling Green, and operated tow boats. The I. N. Hook and J. T. Carson were common carriers. They brought freight to my wharf from Bowling Green and Evansville, Ind. They received all the freight offered to them at my wharf."

Cross-examined: * * * "I remember they brought some drummer's trunks on a barge. They brought some brick for the town and charged no freight for same. They would not land and take on freight and passengers regularly like other boats, but only occasionally. Their chief business was towing ties."

In appellee's letter head was this, "Towing a specialty," and in letter to appellants it said: "This rate we gave you is confidential and we would not like to hear it spoken of by outsiders."

The proof for defendant by J. D. Render was as follows:

"I am secretary and treasurer of the Aberdeen Coal and Mining Co. We owned the Hook and Carson. They were tow boats and operated on Green and Barren rivers. We did a general towing business. We only took freight by contract and carried it on barges; we did not hold ourselves out to the public to take freight for all who wanted to ship, but only by private contract. George Fletcher applied to me to tow the freight sued for. He talked

to me by telephone from Rochester. I offered to do it for \$160, he to be responsible for barge and cargo. The contract was finally settled through Mr. Walker, my bookkeeper. I told him he was to be responsible for cargo and barge, and he, Fletcher, wanted to know if that was customary. I told him it was. Fletcher said he would let me know about it. I never talked to Fletcher at Leitchfield. I told Mr. T. F. Walker about it and went West, and Mr. Walker closed the trade. When I came home I learned the barge and material had been sunk. My company is not a common carrier. At the time the contract was made with plaintiff we were under contract with the Evansville Grain Co. to do all their towing, and were then engaged in towing their ties from Green and Barren rivers to Evansville, Ind. We had no fixed termini or time of arrival and departure. We did all towing by private contract. When not rushed by said grain company we would sometimes bring some freight from Evansville in empties. We had no regular stopping places, but went direct to tie yards and there loaded our barges * * * We did carry some fertilizers in barges to upper Green river for Mr. Dent. We carried same in empties and in large quantities. We brought some trunks from Woodburg to Morgantown to accommodate some drummers." * * *

Cross-examined: "I have carried freight to Morgantown on several occasions with these boats along about the time the barge was sunk. I carried chickens and eggs from Millshed, Threlkel, Edgars and Lock No. 5; all these landings and took freight to them the same summer that the barge was sunk, and had done so before. I carried fertilizer for — — before the barge was sunk by my boat."

Grace Davis, the pilot, testified as follows:

"Occasionally she would tow a barge of stuff for others in order to fill out her tow; and on this occasion she was towing a barge of brick; this occurred only a few times."

Several other witnesses on behalf of the defendant gave in substance the same evidence, stating that the boats only carried occasionally a barge of stuff to fill out their tow; and that they were engaged by the Evansville Grain Co. altogether.

In *Varble v. Bigley*, 77 Ky., 698, it was held that a tow boat is not a common carrier, but in that case the boat which was sought to be held liable had been simply hired to move some coal barges belonging to the plaintiff. The boat was simply furnishing the motive power. In the case before us the barge belonged to the defendant. It is not easy to see why there should be a distinction between freight put on the steamboat Hook and freight put on the barge which it propelled, both being the property of the defendant and controlled by it. Whether it would carry the freight on the steamboat or on the barge was for it to determine, and its liability in either case will depend upon whether it was acting as a common carrier or a private carrier for hire. In the case referred to the court, after examining the authorities thus laid down the rule for determining whether a person is chargeable as a common carrier: "When a person has assumed the character of a common carrier, either by expressly offering his services to all who will hire him, or by so conducting his business as to justify the belief on the part of the public that he meant to become the servant of the public, and to carry for

all, he may be safely presumed to have intended to assume the liabilities of a common carrier, for he was bound to know that the law would so charge him, and knowing, must have intended it. But in order to impress upon him the character, and impose upon him the liabilities, of a common carrier his conduct must amount to a public offer to carry for all who tender him such goods as he is accustomed to carry. When this is the case, then those who tender him goods to carry accept his offer, and he becomes bound to carry them; and if he refuses to do so, 'having convenience,' and being tendered satisfaction for the carriage, he is liable to an action, unless he has reasonable excuse for his refusal.' . . .

After elaborating on this the court thus summed up the matter: "Our conclusion then is, that a carrier of goods is not liable as a common carrier, unless he was under a legal obligation to accept the goods and carry them, and would have been liable to an action if, without reasonable excuse, he had refused to receive them; and that he could not be liable to such an action unless he had expressly and publicly offered to carry for all persons indifferently, or had, by his conduct and the manner of conducting his business, held himself out as ready to carry for all. We are aware that the rule has not always, and perhaps not generally, been thus restricted. But as we have already said, the law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it." This case is in accord with the great weight of authority. (Hutchinson on Carriers, sections 47-57.)

Appellants rely upon *Gordon v. Hutcherson*, 87 Am. Dec., 464; *Chevallier v. Strahan*, 47 Am. Dec., 639, and the cases therein cited. But these cases are exceptional and not in keeping with the general current of authority (Hutchinson on Carriers, sections 49, 52), and are the authorities referred to by the court in *Varble v. Bigley* when it said: "We are aware that the rule has not always, and perhaps not generally, been thus restricted." We regard this case as settling the rule in this State. The case of *Robertson v. Kennedy*, 2 Dana, 430, is not in conflict with it, for in that case the plaintiff introduced proof showing that the defendant was in the habit of hauling for hire for all who applied to him. The same is true of the case of *Farley v. Lavary*, 107 Ky., 528. After collecting a large number of cases Hutchinson on Carriers, section 55, thus states the rule: "These cases undoubtedly state the law as it is settled in England and generally understood in this country; and it would seem clear that no one should be treated as a common carrier unless he has in some way held himself out to the public as a carrier, in such manner as to render himself liable to an action if he should refuse to carry for any one who wished to employ him in the particular kind of service which he thus proposes to undertake. Otherwise he does not come within the description, nor can he be subjected to the liability of the common carrier when the goods have been lost without negligence."

The question we are to determine is whether under this rule there was any evidence that the defendant held itself out to the public as a carrier in such a manner as to render it liable to an action if it had refused to carry the plaintiff's brick when applied to for that purpose. While one of the wit-

nesses states that the boats did the business of common carriers and another states that they were common carriers; this seems a mere expression of an opinion of law. The witnesses may have used the words in their popular sense, meaning that the boats carried for the public generally or without distinction; but, however this may be, the court must determine the law from the facts stated. The proof for the plaintiffs shows that the defendant's boats carried passengers, produce and merchandise; also that they received all the freight offered them at Morgantown, most of the freight being brought in empties as they returned from towing coal. On the other hand, the proof for the defendant is to the effect that the boats had no terminus or times of arrival or departure; that they did all towing by private contract, and only worked for others when they had no work to do for the Evansville Grain Co., and only did such work as they saw fit to take. Although the boats were not common carriers at all times, still if on certain trips, when they had not towing to do, they held themselves out as ready to carry for all, they would be common carriers for the time being. The rule is thus stated in 6 Cyc., 366: "A common carrier is one who holds himself out as ready to engage in the transportation of goods for hire as a public employment, and not as a casual occupation. It is sometimes said that one who undertakes for a single occasion only to carry goods for any person who desires to employ him for that occasion is a common carrier for that transportation. But the cases of this kind will be found to be those in which, whilst the business of carriage is not the exclusive or perhaps the principal business of the one sought to be charged as a carrier, it is incidentally his business for the time being. In general the liability of carrier does not attach to one who does not hold himself out as pursuing that business but in the particular case, and in each particular case, acts only in consequence of a special employment."

Under the rule that if there is a scintilla of evidence the question is for the jury, we conclude that under the evidence the jury should have been left to determine whether the defendant had assumed the character of a common carrier. There was evidence on the part of the plaintiffs, in view of the amount of carrying which it was shown the defendant did, from which the jury might have inferred that it held itself out as offering to carry for the public or as ready to carry for all. The barges were brought down the river loaded with ties, and would be returned empty unless loaded with freight. The fact that the defendant requested the witness, Dent, to get the company any business he could must be taken in connection with the last head, "Towing a specialty." Although the defendant did not hold itself out at all times as a common carrier, there was some evidence from which the jury might have found that such was its business for the time being (Robertson v. Kennedy, 2 Dana, 430; Farley v. Lavary, 107 Ky., 521.)

The court should have instructed the jury that if the defendant had expressly and publicly offered to carry for all persons indifferently, or had by its conduct and the manner of conducting its business held itself out as ready to carry for all on such trips as the boat was then making, then it was a common carrier and they should find for the plaintiffs, although there was no negligence on the part of the defendant in the loss of the brick; but if it had not offered to carry for all persons indifferently, or by its conduct

or the manner of conducting its business held itself out as ready to carry for all, but only in each case acted in consequence of a special employment, it was not a common carrier, and was not liable unless the bricks were lost by its negligence.

Judgment reversed and cause remanded for a new trial and further proceedings consistent herewith.

LANCASTER v. LANCASTER'S EX'OR, &c.

(Filed June 17, 1905—Not to be reported.)

1. Wills—Contest of—Evidence—Instructions—Upon the trial of this case, which involved the validity of the will of Samuel Lancaster, deceased, the evidence establishing the fact that for several years prior to his death the testator claimed that his brother, Robert, had robbed him of large sums of money in matters growing out of his assigned estate, and that testator had made statements showing a determination not to leave him anything by his will, the judge should have instructed the jury that if the deceased at the time of the execution of the paper in contest was under an insane delusion that his brother, Robert, had grossly wronged him; was of unsound mind on this subject, and by reason of such mental unsoundness made a different disposition of his property than he otherwise would have made, they should find the paper not to be his last will, although his mental capacity was sound on other subjects.

2. Same—An instruction relating to the "objects of his bounty" should be modified by prefixing the word "natural" before such expression.

3. Same—Statement by expert witness—Where a witness was testifying as an expert on the subject of testator's mental condition, it was incompetent for him to state the relative merits of the testimony of other witnesses.

4. Same—The testimony of Willett, a witness to the will, should not have been admitted over appellant's objection, the purport of it being to detail a conversation had with one then deceased, who had been testator's attorney and confidential adviser, the effect of this being to introduce hearsay evidence upon an important question to appellant, and for this reason incompetent.

McDermott & Ray, Fulton & Fulton, John S. Kelley and E. E. McKay for appellant.

Fairleigh, Straus & Fairleigh, Nat W. Halstead, Morgan Yewell, Eli H. Brown, Jr., John D. Wickliffe, W. S. Pryor, John W. Lewis and Robert L. Greene for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Barker.

Samuel P. Lancaster died testate at his home in Nelson county, Kentucky, on the 8th day of May, 1902. The record involves the validity of his will, admitted to probate by the Nelson County Court, and sustained by a verdict of the jury on appeal to the Nelson Circuit Court.

The testator and his brother, James M. Lancaster, prior to 1879 were farmers on a very large scale. They bred, trained and raced thoroughbred horses, and, in addition, owned and operated several distillery plants. In 1879 they were indebted in an amount approximating \$150,000, and being unable to pay in full, made a general assignment to Stephen E. Jones for

will is assailed on two grounds: First, that the testator was without testamentary capacity; and, second, that it was procured by undue influence.

The evidence, without contradiction, established the fact that for several years prior to his death the testator claimed that his brother, Robert, had robbed him of large sums of money in the matters growing out of the assigned estate, and that he made statements to many witnesses which showed an aversion to his brother, and a determination not to leave him anything in his will. There are two theories as to this aversion. That held by the propounders is that it had a substantial basis in fact, and whether entirely justifiable or not, constituted a rational motive for the testator's state of mind, and his final action in pertermittting his brother in his last will and testament; that of the contestant is that R. B. Lancaster was his brother's benefactor; that he had purchased the assigned estate at great inconvenience to himself by a large outlay of money, actuated alone by fraternal love for his brothers; and having so made the purchase, he had left them in charge of it, nominally as his agents, practically as owners, thus protecting them from their creditors, and enabling them to live. And, finally, owing to a phenomenal rise in whisky he had secured a sale to the "whisky trust," which resulted in producing a competent fortune out of the wreck of bankruptcy; that after Samuel's discharge from his former indebtedness Robert actuated alone by fraternal love and a desire to please his brother, who was an old bachelor in declining health, conveyed to him from seventy-five to eighty thousand dollars' worth of property; that in return for all this generous kindness the decedent conceived an unnatural aversion to his brother, imagining that he had been swindled, instead of protected, and in order to wreak a posthumous revenge for fancied wrongs, had pretermitted his benefactor and only heir at law, accentuating the injury by devising the bulk of his estate to a negro housekeeper, who had no natural claim upon him for so large a bounty. We, of course, express no opinion as to the merits of these respective theories.

There are a number of propositions assigned for error in the large record before us, and it would extend this opinion to undue length to review them all. It will be sufficient to pass in silence those which we deem untenable, and notice only those wherein some substantial right of appellant has been invaded or withheld.

Upon the trial of the case the contestant, among others, requested the court to instruct the jury substantially that if they believed from the evidence that the testator, at the time of the execution of the propounded paper, had an insane aversion to his brother and only heir at law, Robert B. Lancaster, and that such aversion entered into the making of the will offered for probate, and that under the influence thereof the testator made a different disposition of his property than he would have made but for the delusion, then they should find the propounded paper not to be the will of the deceased. This was refused, and this ruling of the trial judge is now urged as error. This question arose in *Layer v. Layer*, 110 Ky., 542. There the testator, according to the contestant, conceived a violent and unnatural aversion to his son, whom he treated with great cruelty, saying that "he was no son of his—was not a Layer; that he was not his father." * * * On the other hand, the evidence for the propounders was very different from that of the

that these had not been revoked. There was evidence in the interest of the propounders that Sam thought Robert had injured him in the matter of J. M. Lancaster's property. It was also the theory, as said before, of the contestant that Robert was the benefactor of his brothers, and this evidence might militate against the first or substantiate the second theory.

The appellant should have been allowed to testify as to what he had said in the bankruptcy court on the subject of Samuel's mental capacity. There was evidence in the case that Samuel was offended by what Robert had sworn in the Federal court on this subject, and the appellant had the right to state what he had testified, and if he could, that Samuel had sworn to the same thing, for to deny him this was to deprive him of the right to show that his brother's indignation on this point was unfounded.

The witness, Willett, should not have been permitted, over the objection of appellant, to repeat to the jury a conversation he claimed to have had with Judge Thomas, who was then dead, but who had in his lifetime been the attorney and confidential adviser of the deceased. The effect of the repetition of this conversation was to introduce hearsay evidence on a question of vital importance to appellant, and was incompetent for this reason.

Appellant complains that the court permitted him to be asked on cross-examination whether or not he had requested Father O'Connell and Pius Whelan to use their influence with his brother, Samuel, to induce him to destroy the will he had made, and that these witnesses were permitted to contradict him on this subject. The record shows that no objection was made by appellant, either to the questions asked him on cross-examination or to the evidence in contradiction given by O'Connell and Whelan. It was, however, error to permit appellant to be asked whether or not he had, upon his return from the funeral of his brother, gone to the banking house of Wilson and Muir, and demanded of them that they deliver to him the unrecorded deed theretofore executed and delivered by him to his dead brother; and when he had answered this question in the negative, it was error to contradict him. The matter was entirely collateral, and tended to shed no light whatever upon the issues joined. It placed appellant in an unenviable position, and was suggestive that he desired to possess the deed for some sinister purpose. If, as we think, this was intended to impeach the credibility of the witness, it was in violation of section 497 of the Civil Code.

For the reasons indicated the judgment is reversed for proceedings consistent herewith.

STANDARD OIL CO. v. COMMONWEALTH (Case No. 18).

(Filed June 18, 1905—Not to be reported.)

Lubricating oils—Selling without license—Plea in bar—An indictment returned May 10, 1904, for a sale of lubricating oil made April 7, 1894, without having procured license to sell such oils from wagons, is not a bar to an indictment found September 28, 1904, for a sale made in June, 1904, and as the court upon the trial of the latter offense confined the inquiry of the jury to a sale occurring in June, 1904, this necessarily limited their scope of inquiry to a time not covered by the former indictment.

Humphrey, Hines & Humphrey and C. B. Blakey or appellant.

N. B. Hays, Chas. H. Morris and Chas. Sanford for appellee.

BAY STATE PETROLEUM CO., &c. v. PENN LUBRICATING CO.

BACKER, &c. v. SAME.

(Filed June 15, 1905.)

1. Land—Oil leases—Contract—Beginning work—Continuation—Abandonment—Effect—Under a lease of land for twenty years, with the privilege to bore for oil and other minerals, in which the lessor was to have a royalty of one-tenth of the product, the lessee agreeing to begin work within eighteen months, and a failure of lessee to complete one well to render the lease void, there was an implied condition that the lessee was not only to begin work, but to prosecute it with reasonable diligence after it was begun, and where the lessee began work within the eighteen months, and, failing to find oil, moved his machinery from the land, it was an abandonment of the contract, and the lease thereby became void.

2. Re-entry—Acquiescence of lessee—Estoppel—The fact that the lessee re-entered the land against the objection of the lessor and was permitted to bore the well deeper, and, finding no oil, again moved his machinery from the land, while the acquiescence of the lessor would estop him from complaining of the re-entry if the lessee had then found oil, but when the lessee again abandoned the property the lessor was not estopped to deny his right to return a second time.

Stone & Stone for appellants.

Jos. Bertram and O. H. Waddle for appellee.

Appeal from Wayne Circuit Court.

Opinion of the court by Chief Justice Hobson.

On January 25, 1895, Harvey Duncan and wife executed the following lease to A. M. Williams:

“Memorandum of agreement made January 25, 1895, by and between Harvey Duncan and wife, Mary, of the first part, and A. M. Williams, party of the second part. Considerations, mutual covenants and agreements herein contained. The first party has and does hereby grant to second party the exclusive right to operate for coal, oil, gas, salt, ores and all other minerals in 800 acres, more or less, in precinct No. —, Wayne county, State of Kentucky, being the property whereon the said Duncan now resides. (Here follows description of property.) Term of lease twenty years, or as long as oil, gas or any of the above substances are obtained in paying quantities. Second party agrees to give first parties the full equal one-tenth part of the petroleum and mineral produced and saved on the above-described premises, and should gas be found in sufficient quantities to justify the parties of the second part in marketing same, the consideration in full to the parties of the first part, instead of one-tenth royalty, shall be \$100 per annum for the gas from each well so long as it shall be sold therefrom, from the date hereof, allowing said Williams one year and six months in which to begin work. Said lease is given in consideration of the sum of \$1 in hand paid, the receipt of which is hereby acknowledged. Second parties to have the privilege of using sufficient water from the premises to run necessary engines, and to remove all machinery and fixtures placed on the premises by them, with the right of ingress and egress, and exclusive right to lay and operate pipe lines to convey oil, gas and other substances. A failure on part of second party to complete one well, or make any payments as above,

provided, renders this lease null and void. All conditions herein to extend to heirs, administrators, executors and assigns of both parties."

The lease was duly acknowledged and recorded in the office of the county clerk. Within eighteen months after the making of the lease Williams put down a well on the tract something like 375 feet deep. At that time the oil field in Wayne county was little developed, and what oil had been found in this vicinity had been found in the Beaver creek sand. When Williams passed through this sand and found nothing he stopped boring, and nothing more was done under the lease by him. On February 1, 1897, he sold an undivided four-fifths' interest in the lease to D. W. Wright & Co., who transferred it to Frank Haskell on February 8, 1900, and Haskell transferred it to appellee, the Penn Lubricating Co., on February 27, 1900.

On July 23, 1900, Williams also transferred to it his remaining one fifth interest in the lease. In the meantime oil had been found in Wayne county, in what is known as the Sunny Brook sand, which is some 500 feet below the Beaver creek sand. In June, 1902, appellee concluded to bore the well deeper into the Sunny Brook sand. Duncan said he had leased the land, and he objected as they had not done anything on it for years and had abandoned it. Appellee insisted upon going ahead, and Duncan made no further objection, the person to whom he had proposed to lease the land not claiming the trade with him. Appellee put the well down some 500 feet deeper, and getting nothing, after about six weeks tore down its derrick and moved everything it had off the land. It had leased something over 10,000 acres and had found oil in other parts of its territory. Its purpose was to follow the line of the oil, and come back to Duncan's tract when it had learned where the line of oil ran. The evidence is somewhat conflicting on this point, and it is insisted for appellants that appellee intended then to abandon the lease, but we think the weight of the evidence shows otherwise. In October of that year Duncan went to Mr. Booth, the president of appellee, and asked him if he was going to pay rent or work the lease. He said that drilling the well deeper would hold the lease. Duncan replied that he was going to lease the land again if appellee did not work, and was assured that appellee was going to work the lease after a while. About this time, or a little after, oil was struck on land adjoining Duncan's tract. On November 11, 1902, Duncan leased part of the land to George C. Backer. On December 20 he leased the remainder of the land to C. W. Locklin. They agreed to give him a royalty of one-tenth and also paid him \$550 in money, but they had full notice at the time of the prior lease. Locklin assigned his interest to the appellant, the Bay State Petroleum Co. In April, 1903, appellee went upon the land and began building a derrick on a part of the tract north of where the old well was and near the line of the tract on which oil had been struck. Appellant's men at night tore down the work which had been done on the derrick and threw it in the creek. Thereupon appellee filed suits against Duncan, the Bay State Petroleum Co. and George C. Backer to enjoin them from interfering in its operations on the land. The defendants filed answer and counterclaim, insisting that Williams had complied with the terms of the lease and had abandoned it, and that nothing passed to appellee under the assignment to it; also that appellee had abandoned the lease after it found no oil in 1902. Proof was taken by the parties.

which showed the facts above stated, and the court having adjudged appellee the relief sought, the defendants appeal.

The first question necessary to be considered is whether Williams lost his rights in the lease by abandonment. It will be observed that by the terms of the lease Duncan granted to Williams the exclusive right to operate for oil and other minerals in the land for twenty years, or as long as oil or other minerals were obtained in paying quantities, Duncan to receive one-tenth of the oil and minerals produced. Williams was allowed one year and six months in which to begin work, and on a failure on his part to complete one well the lease was void. Duncan was paid no rent for his land. He got nothing but his royalty. There are, therefore, necessarily some implied conditions not expressed in the lease. To illustrate, Williams could not, after beginning work in eighteen months, wait until the nineteenth year of his lease before completing the well, but was required not only to begin work, but to prosecute it with reasonable diligence after it was begun. If he found oil he could not plug up the well and draw off the oil from wells on adjoining land, thus sapping Duncan's property and cheating him of any royalty, but was required to use the well in a reasonable manner. His lease was for twenty years, or as long as oil or other minerals were obtained in paying quantities. He had the right to determine when he was no longer obtaining oil or other minerals in paying quantities, and if he so determined he might abandon the lease. An abandonment by him of the lease need not be proclaimed by word of mouth, but may be inferred from his conduct. In *Berry v. Frisbie*, 27 Ky. Law Rep., 727, when we had before us one of these oil leases, we said: "The deliberateness of entering into written engagements of itself implies a purpose to become bound by the making of an enforceable agreement, unless the very terms of the paper repel the idea. The purpose of these contracting parties must have been the finding of oil or gas in paying quantities on this land, if to be found, and their being worked so as to make money for each party.

"That was the point where their minds met. The owner of the soil could not have dreamed that he was putting it out of his power to ever develop the mineral possibilities of his farm; nor, if minerals were found, that it would be left to the exclusive discretion of the other party whether they would be brought into marketable condition."

Then after referring to authorities holding that it would contravene the nature and spirit of such leases to allow the lessee to continue to hold his term a considerable length of time without making any effort at all to utilize the property, as this would deprive the lessor of his royalty and of all opportunity to work the property himself or permit others to do so, the court concluded: "Our construction of this contract is, that when accepted, as it was within four months of its date, it bound the lessees to within two years from such acceptance explore the land described by actually sinking a well or wells upon it. If oil or gas or coal were found therein in paying quantities, then the lessees were bound to diligently work and operate same so as to bring the product to a present market, and so as to promptly yield to the lessor his royalty; that unless the lessees did so actually develop the land in question, and in good faith and diligence operate it, the lease should be deemed abandoned."

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COURT OF APPEALS OF KENTUCKY.

DROEGE, CIRCUIT CLERK OF KENTON COUNTY v. McINERNEY, SHERIFF OF KENTON COUNTY.

(Filed June 15, 1905.)

Elections—Election boards—Cities of second class—Substituting circuit clerk for sheriff—Special legislation—The election law of October 24, 1900, Kentucky Statutes, section 1596a, subsection 2, provides that the sheriff of the county by virtue of his office shall be a member of the election board, * * * and it is provided that "where there is no sheriff, or where from other causes the sheriff can not act, the circuit clerk shall act in his place." By an act approved March 22, 1904, the words last above quoted were changed so as to read as follows: "In counties where there is no sheriff, and in counties containing cities of the second class, or where from any cause the sheriff can not act, the circuit clerk of the county shall be a member of the board instead of the sheriff and shall act in his place, and is given all the rights and powers that are given to sheriffs under this section."

Section 59 of the Constitution provides that the general assembly shall not pass any local or special act "to provide for conducting elections." It also provides that in all cases where a general law can be made applicable no special law shall be enacted. Held—That the amended act of March 22, 1904, providing that "in counties containing cities of the second class the circuit clerk of the county shall be a member of the election board instead of the sheriff," is special legislation, and, therefore, unconstitutional and void.

S. W. Adams and Myers & Howard for appellant.

Wm. A. Byrne for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Hobson.

By the act of October 24, 1900, a county board of election commissioners was created. The act contained this provision: "The sheriff of the county, by virtue of his office, shall be a member of said board and shall preside at its meetings, and in case of disagreement between the other members of said board, acting as umpire, he shall be permitted to vote. * * * In counties where there is no sheriff, or where from other causes the sheriff

can not act, the circuit clerk shall act in his place. (Kentucky Statutes, section 1806a, subsection 2.)

By an act approved March 28, 1904, the words last above quoted were changed to read as follows: "In counties where there is no sheriff, and in counties containing cities of the second class, or where, from any cause the sheriff can not act, the circuit clerk of the county, by virtue of his office, shall be a member of said board instead of the sheriff, and shall act in the place of and is given all the rights and powers that are given to sheriffs under this section."

Appellant, Frank A. Droege, is the circuit clerk of Kenton county and appellee, M. D. McInerney, is the sheriff. This is a controversy between them as to the validity of the act of 1904 in so far as it provides that in counties containing cities of the second class the circuit clerk, by virtue of his office, shall be a member of the board instead of the sheriff. The circuit court held the act invalid and the clerk appeals.

Section 59 of the Constitution provides that the general assembly shall not pass any local or special acts "to provide for conducting elections." It also

lation, and although in the smaller counties all the fees of the office may be barely sufficient to support the officer, in the counties having a large population a part of the fees may be adequate for this purpose and the surplus may be turned into the State treasury. The limitation of the compensation of the officers takes away the temptation to use large sums of money to obtain the office and also tends to promote the public service. In *Walston v. Louisville*, 28 Ky. Law Rep., 1859, section 2998, Kentucky Statutes, which provides that in cities of the first class interest shall run at a certain rate on unpaid tax bills, was held constitutional. But this section is part of the act for the government of cities of the first class, and the legislature is given by the Constitution power to regulate the government of each class of cities. It has, therefore, power to provide such regulations to secure the prompt payment of taxes as may be necessary, and regulations that may be necessary in one class of cities may not be necessary in another class. In other words, the classification here is not arbitrary, but based upon natural reasons. Appellant's learned counsel had referred us to a number of decisions in other States, but they seem only to be in line with those referred to.

In the case before us there are no distinctive or natural reasons that the sheriff should be a member of the county board of election commissioners in all the counties of the State except those containing a city of the second class, or that the circuit clerk in the latter counties should be substituted in place of the sheriff. To except counties containing a city of the second class out of the operation of the general rule is to define a class arbitrary and unreasonably. If the legislature may do this it may provide that the county clerk in counties containing a city of the third class shall be a member of the board, or the jailer in counties containing a city of the fourth class, or the coroner in counties containing a city of the fifth class. If this may be done under the Constitution as to the board of election commissioners the same principle may be applied by the legislature in all matters relating to elections from the preparation of the ballots to the counting of the votes and the determination of the result. So there would be no uniformity at all of the law regulating elections. This would defeat the plain purpose of the Constitution.

Judgment affirmed.

COONS, &c. v. CLAY, &c.

(Filed June 15, 1905—Not to be reported.)

Land—Ownership—In this action the evidence considered and held that the appellee, Mrs. Clay, is entitled to one-sixth of the land in controversy as an heir, and the appellee, D. M. Clay, is entitled to one-sixth as a purchaser from John Eakins, who was also an heir, there being six children, and the land was the property of the father at the time of his death.

Thos. E. & E. C. Ward for appellants.

Clay & Clay for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Settle.

appears in the record.

When appellant, J. P. Coons, found the field notes he notified Walter Eakins, one of the heirs, and together they had the land surveyed by them, and without difficulty found the boundary, which was well defined. When this was done it was agreed by the appellant, Coons, that all the heirs should share in the 68 42-100 acres of land, and that a patent should be procured in the name of all the heirs, if they would pay their part of the cost of surveying, etc. It was also agreed by appellant Coons and Walter Eakins that the latter was to see appellee, Barnett M. Clay, tell him of the finding of the field notes and having the land surveyed and get of him his part of the expense.

Before Walter Eakins could see appellees the appellant, J. P. Coons, hastily took the necessary steps to procure the patent on the land, and very soon procured it to be issued in his own name and that of his wife. This he did, however, upon the understanding and agreement with the other heirs, and by the advice of his and their attorney, that each of the latter as would share the cost of obtaining the patent would be permitted to share in the land. As soon as the appellee, Clay, was informed of the arrangement for getting the patent he went to Henderson, saw the attorney of all parties, Judge Givens, and at once, through him, notified appellants of his purpose to pay for himself and wife their part of the cost of getting the patent, and to claim their share of the land, one-sixth for himself under his purchase from John Eakins, an heir, and a like share for his wife as an heir at law of Felix Eakins. Afterwards he offered to pay his and his wife's part of the cost, but appellants refused to accept it, or to convey appellees any part of the land upon which the patent was obtained. It appears that none of the other heirs paid any part of the cost of surveying the land or procuring the patent, though two of them besides appellees, viz., Walter and F. J. Eakins, testified that they offered to do so.

After obtaining patent and following their refusal to convey appellees any part of the land covered by the patent, appellants sold timber therefrom. Appellees then brought suit against appellants for two sixths of the land covered by the patent, and another suit against them and the purchasers of the timber to recover two sixths of the price thereof. The two actions were heard together and decided by the lower court in appellees' favor, and from the judgment this appeal is prosecuted. Upon the record we have no difficulty in reaching the conclusion that the judgment is free from error.

We think the weight of the evidence is to the effect that appellants surveyed the land and obtained the patent with the understanding and agreement between them and the other heirs that the other children and heirs of Felix Eakins were to share in the land upon the payment by each of his or her part of the costs of the proceedings. This agreement is fairly established by the testimony of F. J. Eakins, Walter Eakins, appellee, Barnett M. Clay, and that of the attorney of the parties, a wholly disinterested witness. Furthermore, appellant, J. P. Coons, never denied the agreement until after all the steps to obtain the patent had been taken and it was manifest that it would be issued. When he did announce his intention of not allowing the other heirs to share in the land, appellees, after tendering

the Sun Co. and consent that the Metropolitan Co. might assume the liability thereon, the Sun Co. was to assign to the Metropolitan Co. all premiums thereafter received on such policies and in consideration thereof the Metropolitan Co. insure the Sun Co. against claims which might be asserted thereunder. It was further agreed that all policies which the Metropolitan Co. assumed with the consent of the holder were to be stamped with a contract of assumption, and each contract was to contain a release of the Sun Co. by the policy holder. The effect of the contract was to require the Metropolitan Co., so far as the policy holder of the Sun Co. would consent, to stand in the shoes of the Sun Co., and thus be responsible to the insured instead of the Sun Co. There are other provisions in the contract unnecessary to recite. We will not state the steps taken in the action in the lower court by which the appellee, Belle Jenkins, became a party thereto. It is sufficient to say that the court allowed her to be made a party on a cross petition, and we do not pass upon the question as to whether the court erred in that respect, because we prefer to decide the important and controlling question in the case. It appears the court sustained a demurrer to her cross petition as amended, and that action of the court is here for review.

The Sun Co. issued to the appellant a policy of insurance on her life by the terms of which, in consideration of 10 cents per week, it agreed at her death to pay her personal representative \$144. She had been paying on it some time when a contract was entered into by the Sun Co. and the Metropolitan Co. It is averred in her petition that the Sun Co. has a large reserve fund and that her part of it amounted to \$20.18, and she seeks by this action to recover that sum for herself and other sums for a class of policy holders situated like herself. She agreed that the Metropolitan Co. might assume the liability which existed under her policy against the Sun Co. With her consent there was stamped upon her policy by the Metropolitan Co. an indorsement as follows: "The Metropolitan Life Insurance Co. hereby assumes this policy as its own, provided the same is in force by its terms, and agrees with the owner thereof to perform the same in place of the Sun Life Insurance Co. of America, and the owner of this policy hereby agrees to accept the Metropolitan Life Insurance Co. as a party to this policy in place and release of the Sun Insurance Co. of America, and to pay all premiums to the Metropolitan Life Insurance Co. This contract is placed upon this policy by agreement of the owner thereof. In witness thereof, the Metropolitan Life Insurance Co. has by its president and secretary executed this agreement."

It will be observed by the terms of the contract she agreed to accept the Metropolitan Co. as a party to her policy in place of the Sun Co., and she agreed to pay the premiums to the Metropolitan Co. It was made in accordance with the agreement that existed between the Sun Co. and the Metropolitan Co. Since the indorsement was made upon her policy she has continued to pay premiums to the Metropolitan Co. She had the same right to make the contract with the Metropolitan Co. that it would assume the liability of the Sun Co. as she had to make the contract with the Sun Co. for a policy of insurance. She is bound by the contract which she has made-

The Metropolitan Co. is required to carry out the obligations which the Sun Co. assumed when it issued the policy. Everything which the Sun Co. agreed to do the Metropolitan Co., with her consent, assumed to do for her. There is not the slightest doubt about her right to enforce against the Metropolitan Co. whatever rights existed by the terms of the contract, therefore, she is not in the slightest degree prejudiced by the contract which she made unless the Metropolitan Co. should ultimately be unable to perform the obligations imposed by the policy. If that be true, then she suffers from a risk that she voluntarily assumed, and she can not complain of the Sun Co. In some way the appellant seems to think that she is entitled to part of the reserve fund of the Sun Co. While she held the policy in the Sun Co. she had a right to look to that, together with other assets of the company, for the faithful performance of the terms of her policy, but, as we have said, she surrendered that right when she permitted the other company to assume all the liability imposed by the policy.

In subdivision 3, section 659, Kentucky Statutes, it is provided: "On policies of industrial insurance, where the weekly premiums are less than 50 cents each, it shall be optional with the company issuing said policy to pay either the cash surrender value or issue a paid-up policy of insurance, and upon such payments, the company shall be absolutely released from all further claims or demands whatsoever, under or by reason of said policies which shall then be canceled."

This provision of the statutes gives the company the option when premiums are less than 50 cents either to pay their cash surrender value or issue a paid-up policy of insurance, and upon such payment the company shall be absolutely released from all further claims or demands whatsoever under the terms of the policy. If the appellant had never released the Sun Co. and had made certain yearly payments, and then have failed to pay a premium she would, under another clause of section 559, Kentucky Statutes, have been entitled to the surrender value of her policy. To obtain this she would have been compelled to surrender her policy in the Sun Co.; so had she remained a policy holder in that company this action could not have been maintained against it upon the facts averred in her petition. We are of the opinion that her cross petition did not state a cause of action.

The judgment is affirmed.

HAMILTON'S EX'OR v. WRIGHT, ADM'R, &c.

(Filed June 15, 1905—Not to be reported.)

1. Purchase money liens—Limitations—Renewal of notes—A lien created by deed continues in full force until released of record, discharged by payment of the lien debt, or barred by the statute of limitations. Although more than fifteen years have elapsed since the maturity of a purchase-money lien note the lien still exists if there has been payments on the note keeping it alive; and renewing the purchase-money lien note from time to time has the same effect.

2. Usury—Where usury is included in the renewal of a lien note the usury may be required by the payor to be deducted in the settlement of the note.

3. Surety—Obstructing suit—Estoppel—Where an executor of an estate, which was liable as surety on a note, causes the owner of the note to refrain from suing on it, or to postpone the filing of it before the commissioner within seven years from its maturity, he is thereby estopped to rely on the statute of limitations in favor of sureties as a bar to the collection of the note.

J. M. Elliott for appellant.

C. W. Goodpaster, J. H. Hazelrigg and Hazelrigg & Hazelrigg for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Settle.

The appellee, W. M. Wright, in his own right recovered judgment in the Bath Circuit Court against the appellant, J. M. Elliott, as executor of the will of George Hamilton, deceased, upon a note of \$3,323.47, executed by the latter, with 6 per cent. interest thereon from April 25, 1885, till paid, subject to the following credits: \$1,065.48, as of May 23, 1889; \$447.54, as of December 26, 1890, and \$1,404.88, as of October 17, 1899, to be levied of assets in the hands of the executor unadministered. It was also adjudged that to secure the balance due on this note and his costs in the action appellee had a lien on 486 acres of land lying in Bath and Montgomery counties, known as the Stoner land, which was ordered to be sold for the payment of the debt and costs.

By the same judgment appellee also recovered in his own right of the appellant as executor of the will of George Hamilton the additional sum of \$1,821.71, due upon another note of the testator as surety of J. G. Ficklin, with 6 per cent. interest thereon from December 24, 1889, till paid, subject to a credit of \$123.75, as of December 24, 1890, to be levied of assets in the hands of the executor unadministered. In addition to the two notes already mentioned appellee, as administrator of the estate of A. L. Wright, deceased, in the same judgment recovered of appellant, as executor of the will of George Hamilton, the further sum of \$1,700, with 6 per cent. interest from December 24, 1889, upon a note of the latter as surety of J. G. Ficklin, to be levied of assets in the executor's hands unadministered.

Appellant complains of the judgment in all its parts and asks its reversal on the following grounds: First, that it erroneously allows usury on each of the three notes; second, that no demand of payment, accompanied by the necessary affidavits, was made of the executor as to any of the notes within a year next succeeding his qualification, for which reason the judgment should have refused appellee interest on them from and after the death of the testator; third, that appellee was not entitled to a lien on what is described in the judgment as the Stoner land as security for the first note upon which he received judgment; fourth, that the testator was relieved from liability on the two notes in which he was surety for Ficklin by the seven years' statute of limitation.

It appears from the record that George Hamilton died March 4, 1895. His will was admitted to probate by the Bath County Court on the 8th day of April, 1895, at which time the executor duly qualified. On the 18th day of January, 1896, W. W. Hamilton and J. M. Tenny, creditors of the testator,

bronght an action in equity in the Bath Circuit Court for a recovery of his estate. Appellant, as executor of the will, the heirs at law of the testator and devisees under the will, appellee and other creditors of the estate were all made parties to the action.

After long delay the cause was referred to the master commissioner for the purpose of ascertaining the indebtedness of the testator's estate, and he filed report in which the two notes due appellee in his own right and the one due him as administrator were reported and allowed. Later appellee upon motion of appellant, was required by the court to file answer, counterclaim and cross petition, setting forth, as by petition in an action to reverse thereon, the several notes held by him in his own right and as administrator of A. L. Wright against the estate of George Hamilton, deceased, and in the answer, counterclaim and cross petition and subsequent pleadings on the part of both appellant and appellee the several questions now urged by the former for a reversal of the judgment appealed from were put in issue and determined by the lower court. The note of \$8,323.47, upon which appellee obtained judgment, was executed, as appears from the record, under the following circumstances: R. G. Stoner and others, by deed of March 1, 1858 conveyed 486 acres of land to J. C. Hamilton, at the price of \$14,688.24, of which sum \$14,688.24, was cash in hand paid, for the remaining \$2,520 J. C. Hamilton executed to the grantors two notes of \$14,688.24, each payable in one and two years, respectively. The deed from the Stoners to J. C. Hamilton expressly retained a lien on the land to secure the payment of the two notes. The last note of \$14,688.24 was sold and assigned by the grantors of J. C. Hamilton to appellee.

At the time of the conveyance to J. C. Hamilton of the Stoner land for many years prior thereto, he and George Hamilton were partners engaged in the business of farming and dealing in stock, and it is admitted that they were partners in the purchase of the Stoner land, though the deed to same was made to J. C. Hamilton and he alone executed the notes for the unpaid consideration.

The partnership between George Hamilton and J. C. Hamilton was dissolved by the death of the latter some years after the firm's purchase of the Stoner land. After the death of J. C. Hamilton suit was instituted by George Hamilton against his children and heirs at law in the Bath Circuit Court for a partition of the partnership lands, and in the division which followed, commissioners appointed to make the same, allotted to George Hamilton the Stoner land, and it was conveyed to him by deed from J. C. Hamilton's heirs, through J. E. Hurt, special commissioner, by order of the court. Soon after receiving the deed of conveyance from the special commissioner George Hamilton removed to the Stoner land, and was living there at the time of his death. It is also admitted of record that George Hamilton was equally bound with J. C. Hamilton upon the two notes executed by the latter for the unpaid part of the purchase money on the Stoner land.

After the assignment by the Stoners to appellee of the land note of \$14,688.24 it was several times renewed, George Hamilton all the time remaining liable on it, and numerous payments were made on it by George Hamilton. After the death of J. C. Hamilton and the partition

the lands owned by the firm, the heirs at law of J. C. Hamilton paid appellee one-half of the balance then remaining unpaid of the original note of \$14,686.25, and for the other half, to wit, \$3,823.47, George Hamilton, April 25, 1885, executed to appellee his promissory note, due one day after date and bearing 8 per cent. interest from date until paid. This note recites that the amount for which it was executed is "a part of the third and last payment for the land conveyed by the heirs of G. W. Stoner, deceased, to J. C. Hamilton, deceased, it being the land on which I now reside, * * * conveyed to me by J. S. Hurt, commissioner, and others, * * * and a lien on the tract of land above mentioned for the payment of this note, it being for part of the unpaid purchase money therefor." * * *

In view of the recitals of the note and the lien retained in the deed from Stoner and others to J. C. Hamilton, we can find no support for the contention of appellant that the chancellor erred in adjudging to appellee a lien upon the Stoner land, or in decreeing its sale in satisfaction of the note in question. Indeed we find from an examination of the pleadings that no denial is made by appellant of the specific averment of appellee that the note was secured by such lien. Besides, no other creditor of George Hamilton is complaining that appellee was adjudged a lien. The only controversy here as to the lien arises between the holder of the note and appellant, as executor of the will of George Hamilton, and we think appellant, in view of the recitals in the deed and note and the absence of a denial that appellee has a lien, is estopped to controvert that fact.

A lien created by deed continues in full force until released of record, discharged by payment of the lien debt, or barred by the statute of limitation. And when the deed retains a lien to secure the payment of a purchase-money note, although the record discloses that more than fifteen years elapsed since the maturity of the note, the lien still exists, if there have been payments made on the note keeping it alive (*Cook v. Union Trust Co.*, 21 Ky. Law Rep., 455; *Clift v. Williams, & Co.*, 20 Ky. Law Rep., 1262), and renewing the purchase-money note from time to time has the same effect. (*Louisville Banking Co. v. Leonard, Trustee*, 90 Ky., 114).

As to the question of usury complained of by appellant we find it disclosed by the record that only 6 per cent. was allowed by the judgment upon each of the three notes in controversy from the dates of their execution, respectively, but the lien note of \$3,823.47, executed by George Hamilton for one-half of the balance of the purchase money due on the Stoner land, was made to include usury to the amount of \$80.70, made up of interest in excess of 6 per cent., calculated on previous renewals of the original note of \$14,686.24, assigned appellee by the Stoners, which former renewals bore interest at the rate of 7 per cent. per annum from date until their maturity, but that rate was erroneously charged and calculated down to the giving of the \$3,823.47 note and the usury included therein. For this usury, amounting to \$80.70, appellant did not receive credit in the judgment appealed from, but should have received credit as of the date of the \$3,823.47 note, and to that extent the judgment was and is improper.

We are unable to sustain the contention of appellant that the failure of appellee to file his claims, properly verified, with the commissioner, or make demand for their payment of appellant as executor within one year after

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on the two notes on which George Hamilton was surety for Ficklin and postponing the reference of the case to the commissioner, thereby preventing the filing of the two notes before him within seven years from and after their maturity, is also estopped to rely on the statute of limitation in favor of sureties. Manifestly appellee would have brought suit on the several notes held by him, or earlier presented them for payment but for the obstruction and hindrance resulting from the representations made by appellant as to the condition of the testator's estate and his assurance that they would be paid. Under such circumstances we think it would be perpetrating a wrong upon the appellee to sustain the plea of limitation relied on by appellant.

In *Northcut's Adm'r v. Wilkinson*, 12 B. M., 409, it is said: "In the case of *Hord's Adm'r v. Lee, &c.*, 4 Mon., 86, it was held that a promise by one of two administrators was sufficient to take the case out of the statute and to maintain the action against both the administrators. The doctrine is based upon the assumption that an administrator or executor represents the decedent to the extent of the assets in his hands, and that a promise made by him in his representative capacity to pay a debt should have the same effect as if it had been made by the intestate, or testator, himself, and if there be several; that they represent one individual and one fund, and the act of one in most cases is regarded as the act of all." (*Emerson v. Thompson*, 16 Mass., 429.)

"If the bar of the statute has not occurred at the time of the decedent's death, the personal representative may, in the absence of any statutory regulation, stop the running of the limitation, either by part payment or by a promise to pay, or by such acknowledgment of the debt as will imply a promise to pay." (*Am. and Ency. of Law*, 2d edition, volume 11, page 928.)

Kentucky Statutes, section 2552, provides: "The limitations given in the next four preceding sections (with respect to sureties) shall not apply to so much of the time as elapsed when there was no executor, administrator or other person to commence an action, nor to the six months during which an action can not be brought against a personal representative; nor to any delay assented to by the surety in writing. * * * And if such surety shall abscond, conceal himself, or by removal from the State, or otherwise obstruct or hinder his being sued, the time of such obstruction shall not be computed as part of the time of limitation in said section allowed."

Waiving the question as to whether the sworn statements, in affidavit form, made by appellant to postpone the reference of the case to the commissioner, and lull the creditors of the estate into a false security, was a delay assented to by the executor of the surety in writing we are clearly of opinion that his appeals to the court for time to realize the assets of the estate, and to appellee to stay suit and the filing of his claim against the estate, together with his assurances and promises that if he would not do so the amount due him and other creditors would, as soon as sufficient assets were realized, be paid in full, operated to obstruct, hinder and delay appellee in bringing suit upon, or sooner filing his notes, for, according to the weight of the evidence, he relied on the representations and promises of appellant, and was induced thereby to consent to the delay asked, consequently appel-

not been published.

N. W. Halstead, John D. Wickliffe and Greene & VanWinkle for appellant.

R. C. Cherry for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge O'Rear.

Dr. James Muir before his death in February, 1900, had been for many years a citizen and resident of Bardstown, which is a city of the fifth class. He had omitted to list cash notes and securities of the value of \$14,000 for each of the years 1895, 1896, 1897, 1898, 1899 and 1900, inclusive. The taxpayer was required to list his property for taxation with the town assessor as of the 15th day of September of the year previous to the one for which the tax was collectible. For example, the property owned on 15th of September, 1899, being listed as of that date for city taxes for the year 1900.

There was no provision of law in Bardstown for listing omitted properties prior to August, 1900. The council then passed an ordinance providing that upon affidavit filed before the city clerk by the city marshal (who was the collector for the city), the clerk was to issue a summons or notice to the property holder, citing him to appear five days thereafter before the city council and show cause why his omitted property (named in the notice) should not be listed for taxation for such years for which it was omitted. The ordinance further provided that upon the filing of such affidavit, and after the notice had been given as stated, the city council should determine from the facts whether the property was liable to taxation, and fix its value. This being done, the tax levy made previously for the year in question should apply to the omitted property. The result was certified to the city marshal, who was then to proceed to collect the tax as other taxes.

This suit was brought by Dr. Muir's administrators, seeking to enjoin the city council from passing upon the question of plaintiff's liability for the tax, it having proceeded under the ordinance alluded to to assess Dr. Muir's omitted property retrospectively for the years named above. The ordinance under which the appellee was proceeding was attacked on constitutional grounds and for other reasons, which will be noticed in order. It is claimed that the city council had not the power to pass the ordinance in question, because it is not to be found, so it is argued, in the powers expressly granted to cities of the fifth class by the legislature.

By subsection 3 of section 3637, Kentucky Statutes, cities of the fifth class are empowered to levy and collect annually an ad valorem tax, not exceeding 75 cents on the \$100 of the assessed value of all real and personal property within such city. By section 3644 the council is given the power, and it is made their duty, "to provide by ordinance a system for the assessment, levy and collection of all city taxes, not inconsistent with the provisions of this chapter (chapter 89, title Municipal Corporations), which system shall conform, as nearly as the circumstances of the case may permit, to the provisions of the laws of this State in reference to the assessment, levy and collection of State and county taxes, except as to the times for such assess-

have regard to amounts theretofore received as to those which may be received thereafter. It has, therefore, been very properly held that there is no constitutional or other legal objection to the levy of taxes, to pay for municipal improvements which had been previously made "

But this proceeding is not, properly speaking, the initial levying of a tax to act retrospectively. The tax was levied in advance. It was made a charge upon "all property subject to taxation" within the city. By omission of the taxpayer or of the assessing officer some of the property liable to the tax was not assessed. This ordinance was intended to cure that omission. From its nature it is essentially retrospective. That it was also retroactive, and was so intended, is manifest from the language of the ordinance, as well as from the state of evils which it sought to correct.

It is in no sense an ex post facto law, aside from the penalty added, which has already been discussed. The taxpayer was liable originally to pay the tax. This ordinance did not create any liability whatever. It merely provided a method for enforcing an old one. A tax is not a punishment as some people seem to think. The ordinance does not make any act illegal which was legal when done, nor does it impose a liability for doing or omitting to do an act for which, when done or omitted, there was no liability.

That no appeal was allowed by the ordinance does not invalidate it.

Whether an appeal, or provision for review of assessments be allowed, when one hearing is given to the taxpayer, in matter altogether of legislative discretion. If the assessing tribunal acts within its jurisdiction it seems that, though erroneous, it is thought best that it should end there, rather than tie up indefinitely the administration of government at repeated complaints of the taxpayer, which, after all, would have to be finally decided by somebody. It is likely that the tribunal nearest to the taxpayer is generally most competent to pass upon the justness of his complaints. If, on the other hand, the assessing tribunal acts without warrant of law, or assesses to the taxpayer property that did not belong to him, or if for any reason the taxpayer is not legally liable to pay the tax, the courts are open to him notwithstanding the assessment.

The next objection to the ordinance is that by it the council has conferred upon itself jurisdiction of a judicial nature, which violates the constitutional limitations upon the part of the legislature to create any judicial tribunals other than the courts expressly named in that instrument. In assessing omitted property the act partakes somewhat of ministerial, and somewhat of judicial, or quasi judicial functions; that is to say, the act in listing of the property for taxation is clearly a ministerial act; and, as an incident, it finds the fact whether the property was in fact omitted; whether it belonged to the alleged recalcitrant taxpayer, and what its fair value then was. To hear evidence, and therefrom to find, whether a certain fact was or was not, partakes of judicial functions. Still it is not necessarily judicial in the sense that it is an act of a court. Many ministerial acts include in part the determination of pre-existing facts, and the exercising of the quality of judgment, sometimes called discretion, with respect thereto. For that matter, the town assessor does precisely that thing, or may do so, in every

ing or trade the custom may likewise be shown by parol, which has given the word its extraordinary meaning in the case.

9. Terms—Changed meaning—Judicial notice—Terms in contracts in which time is the essence are construed according to the common or general meaning of the words. This is because they come to be so frequently employed in a different sense from that of their former meaning that the changed meaning comes to be the common one. Of these changes the court must take notice as they do, judicially, of all matters of common knowledge.

8. Time—Standard—Custom—Evidence—Contracts to begin or end at an hour certain, without naming a standard for reckoning the hour, must be deemed to have intended the system in most common use. Or, if more than one standard was in use at the place where the contract was to be performed and as both could not have been intended, it is admissible to prove the prevailing custom at the place of performance in the business of which the contract under consideration partook, that the court might determine which was probably in the minds of the parties.

4. Noon—Meaning of—Guide to determine—In determining whether the word "noon," as used in a written contract of insurance, meant 12 o'clock standard time, the following guide should be given to the jury: If the jury believe from the evidence that at the time the policy of insurance was issued there existed in the place where the contract was made a custom or usage with reference to the meaning of the word noon, so well settled and uniformly noted upon, and of such continuance as to raise a presumption that plaintiffs and defendants knew of it, and entered into the contract of insurance sued on with reference to it, such usage will govern the jury in arriving at their conclusions."

5. Insurance—Expiration of policy—Inevitable loss—Liability of insurer—If a fire broke out in the insured building before the policy expired and continued to burn thereafter till it was totally destroyed, the loss is one occurring within the insured period. It is all deemed one event and not severable. A damage begun is damage done where the culmination is the natural and unbroken sequence of the beginning, but where the fire did not break out in the insured building before noon of the day the policy expired the company is not liable although it was inevitable, at the noon hour, that the building would be destroyed by the fire then raging which had broken out in another building.

Gibson, Marshall & Gibson, Bodley, Baskin & Flexner and A. S. Brando for appellants.

Humphrey, Hines & Humphrey and Trabue, Doolan & Cox for appellees.

Appeal of Rochester German Ins. Co. v. Peaslee-Gaulbert Co. from Jefferson Circuit Court, Common Pleas Branch, Third Division.

Appeal of National Fire Ins. Co. v. Peaslee-Gaulbert Co. from Jefferson Circuit Court, Common Pleas Branch, First Division.

Appeal Pacific Fire Ins. Co., & Co. v. Louisville Lead and Color Co. from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge O'Rear.

The Peaslee-Gaulbert Co. and Louisville Lead and Color Co. are distinct corporations, but operating together a plant for the manufacture and sale of paints, oils, and so forth. The plant consisted of three buildings located at Fifteenth street and Portland avenue, in Louisville. The buildings were

that it had been published. As publication by posting a written or printed copy was as good as by insertion in a newspaper, by deaths, removals and forgetfulness of witnesses, it would in time be impossible to establish the validity of a town ordinance. We think the presumption of law, that public officers have done their duty, applies here, and that it is upon one attacking such ordinance to show affirmatively and satisfactorily that it had not been published. After a long lapse of time the presumption of publication, where it has never been called in question, and the ordinance has been acted on in the meantime, would be conclusive.

In addition the city council re-enacted the ordinances, and published them. This would cure the defect of not publishing them originally, if they were not published then. (*Levi v. Louisville*, 97 Ky., 194; *City of Somerset v. Somerset Banking Co.*, 22 Ky. Law Rep., 1120.)

An ordinance of the city made the second Tuesday in each month the regular time of meeting of the council. The principal ordinance involved in this suit was passed at a meeting held on the second Tuesday in the month. Appellant contends that the first Tuesday was the day fixed for the regular meetings. The printed volume of the city's by-laws shows the first Tuesday as the regular meeting date, but it is conclusively shown that this was a typographical error. The original record book shows that it was the second Tuesday. The caption of the proceedings of the meeting and of many previous meetings showed that the council met on the second Tuesday, and that it was the regular date for the meetings. The time of meeting stated in the ordinance had become also a custom, well known. It is not claimed that appellant or any one else was misled by the error. Nor does it appear to us to have affected the case.

Appellee prosecutes a cross appeal because the court did not adjudge it to recover the taxes for the year 1896 and refused to adjudge the penalty of 20 per cent. imposed by the ordinance, and refused to adjudge appellee its costs. For the year 1896 the taxes were "a liability imposed by statute," and were barred by limitation, the five-year statute applying, and having been pleaded. The penalty has already been discussed. The costs were refused upon the idea that the city did not show itself entitled to recover until it had passed curative ordinances since the suit has begun. While the last proposition is not so clear, yet we are satisfied upon the whole that substantial justice has been done by the judgment.

Wherefore, it is affirmed, both upon the original and cross appeals.

ROCHESTER GERMAN INS. CO. v. PEASLEE-GAULBERT CO.

NATIONAL FIRE INS. CO. v. SAME.

PACIFIC FIRE INS. CO., &c v. LOUISVILLE LEAD AND COLOR CO.

(Filed June 16, 1905.)

1. Written contracts—Ambiguity—Construction—Extrinsic evidence—The construction of words in a written contract is for the court generally; if ambiguous the meaning intended may be gathered by the aid of parol or other extrinsic evidence, or if used in a sense peculiar to some special call-

owned by Peaslee-Gaulbert Co., known as the Fifteenth Street Warehouse, and another owned by Louisville Lead and Color Co., known as the "factory" building, were also physically connected, in addition to the bridges mentioned, by a belt canopy, extending from one building to the other, and formerly used to shelter a belt operated from the factory building, so as to run a pulley and elevators in the warehouse building. It had not been used, though, for some time, and was left so that it afforded an opening from one building to the other, the canopy or chute constituting a sort of flue or vent.

All the properties, including the contents of the Fifteenth street warehouse building, were insured against loss or damages by fire, under a number of policies, issued by various companies, including the policies sued upon in these actions. The policies are identical in terms. Two of the cases (National Fire Ins. Co. v. Peaslee-Gaulbert Co. and Pacific Fire Ins. Co. v. Louisville Lead and Color Co.) present the same sole question for decision on this appeal. The other case, Rochester German Ins. Co. v. Peaslee-Gaulbert Co. presents the same question and one other, hence, the appeals are heard and decided together, though coming from different branches of the circuit court.

The question for decision that is common to all the cases is the construction of the term "noon" contained in the clauses of the policies (which reads "does insure the insured) from the first day of April, 1901, at noon, to the first day of April, 1902, at noon." A fire occurred in the insured premises on April 1, 1902, by which all the insured property was totally lost. Whether the loss occurred before "noon" of that day is the question. The fire originated in the "factory" building at about 11:45 a. m., standard time. The alarm was turned in at the fire department of the city at 11:59 a. m., standard time, according to the records of that department. The difference between central standard time, based upon the mean time of the 90th meridian west of Greenwich, and mean solar time at Louisville, is 17½ minutes, so that at 11:45 a. m., standard time, it would be reckoned 12:02½ p. m., sun time, at Louisville.

In declaring upon the policies plaintiffs pleaded: "The plaintiff states that the word 'noon' contained in said policy, and at the time said policy was issued, had two meanings, largely dependent upon the community in which said word was used. One of these meanings was 12 o'clock midday, by what is commonly called 'sun time,' and one was 12 o'clock midday by what is commonly called 'standard time.' Said fire occurred after 12 o'clock midday sun time, and before 12 o'clock midday, standard time, as was in use in Louisville, Ky., where the property destroyed and damaged was situated. At the time said policy was executed and delivered the word 'noon,' as used in the city of Louisville, in business transactions, in making engagements, and in ordinary speech and writing, was understood to mean 12 o'clock midday, standard time, and such was the sense in which the parties to the policy sued on used said word in said policy."

The contention of appellants is that the word "noon" has a fixed, certain and universally understood meaning, having reference alone to the physical fact of the coincidence of the center of the sun's circle with a given meridian

Terms in contracts in which time is of the essence are construed according to the common or general meaning of the words. As is well known, words change in their meaning. This is because they come to be so frequently employed in a different sense from that of their former meaning, that the changed definition comes to be the common one. Of these changes the courts must take notice, as they do judicially of all matters of common knowledge. When, however, a word is undergoing the change, its use in a contract may have reference to its former or later meaning. So it may be said to be ambiguous, having more than one meaning. The object of all construction being to arrive at the true intent of the parties to the compact, and it being the province of the courts to construe the language of written contracts, words of one meaning will be construed conclusively by the courts according to that meaning. But it would be unsafe and unjust to follow an ironed rule of construction, that of single meaning, where it was commonly employed in different senses even concerning the same subject. To put the court in the light of the situation in which the parties were when they entered into the contract, in construing such terms, parol evidence ought to be admitted to show that the custom of that community was such, so general, and of such long standing and notoriety, that the parties may be presumed to have been controlled by it in framing the terms of their agreement. Probably no better example for the application of this course of construction will be found than in the cases at bar. Perhaps nothing entered more commonly into the affairs of life, every phase of it, than time. To know the time, and to act upon the means of such knowledge as if it were a practical certainty, is of the first importance in most of the transactions of daily life. A general custom adopted with reference to noting the hour means that in all walks it is noted upon tacitly as an accepted fact. So, although there is not, and has never been, a legal establishment of any standard time in this State, it was formally accepted without question that the customary mode of reckoning time by the solar system of days, divided into 24 hours of 60 minutes each, each day beginning at midnight, and divided again at midday at or near the time when the sun was in the meridian, was meant, when speaking of the hour or time of day. Conditions have arisen in the last several years by which the old custom of dividing and noting time has been abandoned in a very considerable portion of the United States, and there has been substituted for it another system, no less arbitrary, but more fully meeting all of the needs of society. Allowing one hour for each 15 degrees of longitude west from Greenwich, the 75th meridian passing somewhere near Washington, the 90th near St. Louis, and so on, and by establishing one uniform standard of time for all the territory within each of the sections named, a satisfactory, practical basis is attained. Business and social engagements naturally become adjusted to it.

The custom originated, it is believed, with certain railroad lines in their endeavors to regulate the running of their trains which traverse wide sections of the country, so that unvarying and safe schedules might be adopted and enforced throughout a system where the average mean time was not

different directions, on account of a minute or a few minutes difference in the time of starting from the opposite extremes of the same line or arc. Other business, including government and finally social affairs, adopted the same standards, until now it has become, in the more populous countries at least, almost exclusive. And this has been so for a number of years. Contracts to begin or end at an hour, certain, without naming a standard for the reckoning of the hour, must be deemed to have intended the standard in most common use. Or, if more than one standard was in use at the place where the contract was to be performed, and as both could have been intended, it is admissible to prove the prevailing custom at the time of performance in the business of which the contract and the parties partook that the court might determine which was probably intended by the parties. Sun time, as it is called, has so fallen into disuse in communities that it is known only by comparison with "standard time" or by computation. It could scarcely be maintained that parties to a contract meant to adopt an hour for the termination of important business which never otherwise entered into their business or social affairs.

In the early case of *Finnle v. Clay*, 2 Bibb, 851, the parties had agreed that certain lands might be surveyed in "squares to the cardinal points." The survey was made according to the magnetic needle, and not to the true cardinal points, that is, the true meridian. The court decided that as the parties had not declared whether the courses should be run according to the true meridian or magnetic needle (the former being strictly and technically the meaning of the term used) the popular rather than the technical meaning should be adopted, and proof was admitted showing that at that time the usual and almost universal mode of making surveys was according to the magnetic courses. Said the court: "Where a usage has prevailed so long and so generally it is much more reasonable to suppose the parties had reference to it than to the mode of surveying according to the true meridian, so little known and seldom used in practice. That an agreement ought to be interpreted with reference to the usage of the country although such an interpretation is contrary to the technical meaning of the language used by the parties, is fully warranted by the English authorities."

The question we are now considering came before the Supreme Court of Iowa, in *Jones v. German Ins. Co.*, 110 Iowa, 75, 81 N. W., 188, 46 L. R. A., 860. The fire occurred after 12 o'clock by sun time, but before 12 o'clock m., standard time. The policy expired "at 12 o'clock at noon" that is, at noon. It was there said: "The court submitted to the jury whether, because of a known and established custom obtaining at Creston, the expression, 'at 12 o'clock at noon,' was intended by the parties to the contract to mean 12 o'clock standard time. While it was admitted that central standard time was in general use there by the railroad company, the schools and business men generally, it does not appear but that the sun time was also used by other people of the city. As common or sun time was presumed to have been intended, the burden was upon the defendant to show to the contrary and the issue was rightly left for the determination of the jury. But is it noon at 12 o'clock standard time? If so, just before the change from 12

o'clock. We are of opinion that it was not only necessary to show the customary use of standard time, but that by custom of the place 'at 12 o'clock at noon' meant at 12 o'clock standard time."

Appellants would distinguish the Iowa case from these because the words "at 12 o'clock at noon," it is claimed, have a different meaning from the word "noon." We think the expressions amount to the same thing. Both refer to midday. Noon is midday; so is 12 o'clock in the day time. Noon is merely a shorter expression than 12 o'clock in the day time. Originally it represented the ninth hour of the day after sunrise, or about 3 o'clock p. m., and was the canonical hour of nones, at which was celebrated a religious rite (Webster's Dictionary "Nones.") It has ceased to denote the ninth hour of the day so long ago that it can scarcely be traced. It came by usage to represent midday, or 12 o'clock solar time, which was deemed midday for so many years. The word is undergoing a similar change or has undergone one in this country in recent years, so that it represents now midday not necessarily as shown by "sun time," but by the standard in use, whatever it is. It does not, as counsel argued, represent a physical phenomenon, as does "sunrise" and "sunset," any more than "10 o'clock a. m." represents a physical phenomenon. Both terms, "noon" and "10 o'clock a. m.," are used to express practical approximations, and neither refers necessarily to the actual fact.

In time, doubtless, the old standard of solar time, or, for that matter, the more recent standards, may fall so entirely into disuse as to become obsolete. The word noon may then have but one meaning. In that event recourse to extraneous evidences to determine what it meant in written contracts would not be allowed. The evidence is that in some business, particularly that of banking, in Louisville "sun time" is still used. In the present state of the use of the term it was proper, in our opinion, to have submitted to the jury, as was done, whether the word noon, as used in the contracts meant "12 o'clock standard time," and that in determining that fact the following guide should be adopted by the jury, as given in instruction No. 8 (Judge Muir's): "If the jury believe from the evidence that at the time said policy of insurance was issued there existed in Louisville, Ky., a custom or usage with reference to the meaning of the word 'noon,' so well settled, uniformly acted upon, and of such continuance as to raise a presumption that plaintiffs and defendant knew of it, and entered into the contract of insurance sued on herein with reference to it, such usage will govern the jury in arriving at their conclusions under the first instruction."

In the Rochester German Insurance Co. case the further question arises, when must the loss occur? This question is presented by the following instruction: "The court instructs the jury that the policy of insurance sued on herein insured certain goods for plaintiffs in their warehouse at the northwest corner of Fifteenth and Portland avenue against fire from April 1, 1901, at noon, to April 1, 1902, noon. Now if the jury believe from the evidence that the fire which destroyed said goods started in said warehouse before noon on April 1, 1902, or if they believe from the evidence that said

Appeal from Nelson Circuit Court.

Chief Justice Hobson delivered the following opinion on motion to dismiss:

The appeal filed May 13, 1905, is dismissed for want of jurisdiction, the amount in controversy being under \$200. The question of allowance must be determined in the first instance in the circuit court, and may then be reviewed here. The motion for an allowance here to the wife's attorney is, therefore, overruled.

Appeal dismissed.

HELTON v. COMMONWEALTH.

(Filed June 15, 1905—Not to be reported.)

1. Homicide—Affidavit for continuance—Time for preparation—Inability to consult counsel—Where it was shown on the trial of accused for the killing of two brothers on August 29, for which he was indicted by special grand jury on August 31, and his trial had on September 10, by his affidavit for a continuance, that he was too poor to employ counsel, and by reason of a severe wound in the head inflicted in the affray by one of the brothers, from which he was suffering as to be unable to communicate with the counsel appointed to defend him, so as to properly prepare his defense, and by reason of the great excitement in the community because of the double homicide, feeling ran high against him and he was in danger of mob violence, which in a great measure prevented his preparation for trial, his motion for a continuance should have been sustained.

2. Evidence—Self-defense—Concerted assault—Instructions—Where on the trial of accused for the killing of two brothers there was proof to the effect that the accused was assaulted by them, one striking him on the head with a jug, felling him to the ground before he shot, and that the assault was concerted by the brothers, the court in defining defendant's right to act in self-defense, should not have limited it to danger, real or apparent, at the hands of one of them, but the court should have told the jury that if they believed from the evidence that accused was first assaulted by the two acting in concert, and that there was about to be inflicted on him immediate death or great bodily harm at their hands, or at the hands of either of them, that the accused had the right to use such force as was necessary, or as to him, in the exercise of a reasonable judgment, appeared to be necessary to repel the assault or threatened danger, real or to him apparent, even to the taking of the lives of his assailants.

K. D. Perkins and H. H. Tye for appellant.

N. B. Hays and Chas. M. Morris for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant shot and killed Flem. Bray and William Bray on August 29, 1904. He was arrested and lodged in jail that day, and was indicted by a special grand jury convened August 31, and put on his trial at the same term of the court on September 10, 1904. When arrested he was suffering from a severe wound in the head, inflicted, he says, some time during the affray in which the killing occurred. The accused was drunk when it

occurred, and he claims was not in condition to know clearly what then transpired. Being too poor to employ counsel, the court appointed two members of the bar to defend him. When the case was called for trial appellant filed his affidavit, showing reasons why he was not ready for trial. Among others, he stated that he had been suffering so from his wound that he had been unable to communicate to his counsel all the facts of the occurrence, or to intelligently advise with them with respect to his defense; that great excitement prevailed in the community because of the double homicide, and feeling against the accused was running so high that he had been, and was then, in great danger from mob violence; this in a measure prevented his preparation of his defense; that his counsel had been busily engaged in other trials in the court since their appointment to defend appellant, and by reason thereof had not had a chance to confer with him or to properly prepare his defense. His motion for a continuance was overruled, and he was put upon his trial. The verdict of the jury found him guilty and sentenced him to death.

While promptness in the apprehension and trial of persons accused of crime is commendable, the interests of the Commonwealth are primarily in having the accused tried under circumstances where the verdict will be just, and will represent the deliberate and calm judgment of a properly selected and instructed jury in a court having jurisdiction of the offense. Innocence is as much entitled to be protected, to say the least of it, as it is due to crime to be punished. And whether one or the other, courts will not be hurried by popular clamor, or delayed by technical quibble, to the detriment of the orderly administration of justice. Great delays in bringing such cases to trial should be discountenanced, but undue haste, by which one brought to trial for his life is railroaded through the form of a trial in the midst of popular clamor for his blood, are even a greater reproach to the law. We do not mean to say that such extreme haste is indicated in this trial, but, as was observed by this court in a very similar case (*Brake v Commonwealth*, 100 Ky., 194): "While there is nothing in the record to show that the learned judge of the trial court in overruling the motion for a continuance was actuated by other than a high sense and purpose of fairness and duty, both toward the Commonwealth and the accused, yet, under the circumstances surrounding and growing out of this deplorable tragedy and considering the pitiable condition in which the accused was found, we are of opinion that he or his counsel, who were officers of the trial court and had undertaken the burden of defending the accused in obedience to its order, and whose statements ought to have had great weight with the court upon the question of continuance, did not have sufficient time to prepare for the trial of the case at that term of the court. In this view of the case the continuance asked for ought to have been granted by the trial court."

This trial was for the killing of Flem. Bray. There was proof to the effect that the accused was assaulted by the two brothers, Flem. and William Bray, the latter striking him on the head with a jug, felling him to the ground before he shot; that the assault by the two Brays was concerted. Certain of the physical facts tend to corroborate the claim that the two Brays were acting together, and that one of them did strike appellant a violent blow on the head, which was done of course before the shot that

the blow, if either did. In defining the defendant's right to act in his self-defense the court limited it to danger, real or apparent, to the accused at the hands of Flem Bray. Under the circumstances shown in the evidence we think the court should have told the jury that if they believed from the evidence that the accused was first assaulted by the two Brays acting in concert, and that there was about to be inflicted upon defendant immediate death or great bodily harm at their hands, or at the hands of either of them, being aided and abetted therein by the other, that the accused had the right to use such force as was necessary, or as to him, in the exercise of a reasonable judgment, appeared to be necessary, to repel the assault and threatened danger, real or to him apparent, even to the taking of the lives of his assailants.

Judgment reversed and cause remanded for a new trial under proceedings consistent herewith.

UNDERWOOD v. MAGRUDER, &c.

(Filed June 17, 1905—Not to be reported.)

Wills—Devise to person and "heirs"—Construction—By a devise of "all my property to W. E. M. for her lifetime, and at her death to go to Mary Jane Slemmons and her heirs, a fee simple in land owned by the testator passed to Mary Jane Slemmons upon the death of the life tenant, W. E. M.

Hills List for appellant.

Turner & Turner for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Hobson.

The will of Lucy J. Smither, after a number of bequests of personalty, concludes with these words:

"Also bequeath to Walter Ellen Magruder her lifetime all my remaining property, consisting of a house and lot in North Pleasantville, Ky., bank stock at Pleasantville, Ky., and all other property not mentioned above, including my eight silver tablespoons, and at her death remaining property to go to Mary Jane Slemmons and her heirs.

"Section 11. I appoint Henry C. Slemmons executor of this will, and to have full control of Walter Ellen Magruder's share and care of her."

Walter Ellen Magruder, Mary Jane Slemmons and H. C. Slemmons sold the house and lot in Pleasantville to John A. Underwood. He declined to accept the deed which they tendered him, on the ground that under the will they had not power to pass to him a good title; that Mary Jane Slemmons is the mother of two living children, who take the property jointly with her under the will, and that the deed tendered did not convey their interest in the land. They filed this suit against him to require him to accept the deed. The court sustained a demurrer to the answer of the defendant setting up these facts, and he appeals. The entire estate by the will is vested in Walter Ellen Magruder for life, with remainder to Mary Jane Slemmons. The word "heirs" is a word of limitation, not of purchase. Its usual office in a deed or will is simply to show that a fee simple is given. The meaning of the

tain and support the school for the ensuing year. The court granted to appellees the relief sought, and appellant has appealed.

The statute prior to May, 1904, required that the board of trustees for graded common schools should consist of six persons. But the general assembly at its session next prior to that date passed an act reducing the number to five. At that time the board consisted of the following members: W. B. O'Bannon, H. J. McRoberts, O. L. Penny, B. F. Rout, W. G. Welch and J. N. Saunders. W. G. Welch died previous to May 12, but the exact date is not known. Appellee, A. M. Pence, was elected (to succeed O. L. Penny) at the regular May election. He qualified and took the oath on the 14th of May. It is indicated that B. F. Rout went out of office about the 18th of May, the end of his term, no one succeeding him.

Unfortunately for the district and themselves the trustees became involved in dissension and a division of purpose, and their zeal and energy was wasted in efforts to circumvent and defeat the purposes of the other. We are convinced that if they had remained united, and put forth their power and energy with an eye singly to the advancement of the interest of the school, that they did to foil and defeat the objects and purposes of each other, it would unmistakably have resulted in making the school in that district one of the best, if not the best, in the State.

At a meeting of the board on the 12th of May, 1904, when all were present, except Welch, who had died, the appellee, W. B. O'Bannon, presented the following writing to the board:

"Stanford, Ky., May 7, 1905.

"To the Honorable Board of Trustees of the Stanford Graded Common School: .

"Gentlemen—I hereby resign my position as trustee of the above named institution, the same to take effect May 27, 1904, which date is the close of the present school year.

(Signed) "W. B. O'BANNON."

At the same meeting the board adopted the following: "W. B. O'Bannon having offered his resignation as a trustee, to take effect on May 27, 1904, which resignation is accepted."

On the following day, the 13th, O. L. Penny, H. J. McRoberts and appellant, J. N. Saunders, signed the following notice:

"Stanford, Ky., May 13, 1904.

"We, the undersigned members of the board of trustees of the Stanford Graded Common School, hereby request and demand that you call a meeting of the board, to meet at the law office of J. N. Saunders, at 10 o'clock p. m., this day, for the transaction of such business as may come before the board."

This notice was served upon O'Bannon about 9 o'clock p. m. He failed to comply with the request or demand, and at the hour named in the notice the persons who signed it met at the law office of appellant, and organized by electing H. J. McRoberts chairman, and then proceeded to elect one R. B. Mahony to fill the vacancy in the board, caused by the death of Welch. The election of Mahony was invalid for the reason that trustees O'Bannon and Rout, whose term did not expire until the next day, were not notified of the time and place of the meeting. (Scott v. Pendley, 24 Ky. Law Rep.,

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COURT OF APPEALS OF KENTUCKY.

SPEARS v. CONLEY.

(Filed June 17, 1905—Not to be reported.)

Land—Owner inducing another to purchase—Estoppel to claim—One who induces another to buy land and improve it is thereby estopped to assert a claim to it against such purchaser or his vendee.

W. H. Vaughan and C. B. Wheeler for appellant.

Geo. C. Middaugh for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Chief Justice Hobson.

John Conley, Sr., and James H. Milem were adjoining land owners in Johnson county. There was a dispute between them as to the division line and Milem sued Conley to recover the piece of land in controversy between them. In that suit the jury returned a verdict in favor of Milem for the land there in controversy, but they located the line between them so that a piece of the land which Milem had enclosed and in cultivation fell to Conley. This was in 1887. In 1888 Conley notified Milem, in writing, to set his fence back, but this Milem does not seem to have done. In 1893 Milem was sued by his vendor for the purchase money of the land and pleaded as a defense the loss of the piece referred to in the suit with Conley. He and Conley gave their depositions in that case. A judgment was entered in that case on May 3, 1894, by which Milem was given credit for \$50 for the loss of the five acres of land and a judgment was rendered against him for the remainder of the purchase money, subject to credits for the amounts he had paid and a sale of the land was ordered. On July 2, 1894, Milem sold the land to Enoch Spears, he having enclosed and put in cultivation the five acres referred to and having built a house on it and held it since the verdict in the ordinary action. Spears was a son-in-law of John Conley, Sr., and before buying the land he went to see his father-in-law about his proposed purchase from Milem, and Conley told him that he did not want it and for him to go ahead and buy it. Spears went on to look at the land and his wife stayed there to dinner. After Spears left Conley told his daughter,

Mrs. Spears, to tell her husband to go ahead and buy that land; that it would not do him any good, and that he never expected to get it. Spears then went on and bought the land. He repaired the fences, sowed the five acres in controversy in grass and oats and put a tenant on the property. From that time on he used the land as his own just as Millem had done before he bought it. Conley lived from a quarter to a half of a mile from the land, and from the circumstances plainly knew that his son-in-law had bought it from Millem and was using it as his own. Conley died in October, 1897, and after his death appellee, Burns Conley, his son, in the division of his lands was allotted that part of the home tract. He thereupon brought this suit against Spears, on April 8, 1900, to recover the five acres. Spears pleaded adverse possession in him and those under whom he claimed for fifty years, and also pleaded that John Conley, Sr., was estopped to claim the land after inducing him to purchase it from Millem in the manner above described. The circuit court adjudged in favor of Burns Conley, and Spears appeals.

The proof leaves no doubt that John Conley, Sr., knew that his son-in-law, Spears, was about to buy the land from Millem, and that he encouraged him to buy it. His house was so close to the land that he could not but understand that Spears was holding the land and using it as his own. The use of the land by Spears for three years without objection on the part of Conley is conclusive confirmation of the parol testimony that Conley, when he knew that his son-in-law was about to buy the land, urged him to go on and buy it, and that he did this intending to forego any claim that he had to the five acres. He wanted his son-in-law to buy Millem out, and was willing to release in favor of his son-in-law any claim which he had. After inducing his son-in-law to buy and improve the land he would not be permitted to assert claim to it, but would be estopped to do so. (*Ratcliffe v. Bellefont Iron Works*, 87 Ky., 564. The appellee, Burns Conley, simply takes from his father and stands in his shoes.

Judgment reversed and cause remanded, with directions to the circuit court to dismiss the petition.

SMITH v. SISTERS OF THE GOOD SHEPHERD.

(Filed June 17, 1903—Not to be reported.)

Clerks—Stenographers—Duty to furnish transcript to poor persons—The settled rule of this court is that the clerk of the circuit court must furnish the appellant with a transcript of the record where he is a poor person and unable to pay for it, and it is the duty of the circuit judge to direct the appropriate officer to furnish appellant a transcript of his notes of the

Appellant's case against the circuit clerk requiring him to furnish her a transcript of the record, also against the stenographer, requiring him to furnish her a transcript of his notes of the testimony heard on the trial, on the ground that she is a poor person and unable to pay for them, and that they refuse to furnish them without being paid.

The settled rule of this court is that the clerk of the circuit court must furnish the appellant with a transcript of the record where he is a poor person and unable to pay for it. This construction of the statute has been followed so long that the question is no longer open. (*Collins v. Cleveland*, 17 B. Monroe, 454; *Duncan v. Baker*, 13 Bush, 514.)

The stenographer relies on the following provision of section 4642, Kentucky Statutes: "Provided, however, that said reporter shall not be required to file any of said transcripts without payment therefor by the party or parties in whose behalf the same is ordered." Provided, however, further, That the presiding judge of said court or division may direct said reporter to file a transcript upon the motion of any party suing in forma pauperis."

The judge of the circuit court refused to direct the reporter to furnish the transcript, and his order so refusing is relied on. While it is true that the judge of the circuit court may direct the reporter to file a transcript upon the motion of any party suing in forma pauperis, his ruling on this question, as on any other, is subject to review by this court, and we do not see any more practicable way to review it than by a motion as in the case before us. The purpose of the statute is to allow poor persons to obtain transcript without the prepayment of fees, and it must be so administered as to effectuate this purpose. Under the facts shown appellant is entitled to the transcript, and the circuit court should have required the reporter to furnish it.

The rule is, therefore, made absolute both as to the clerk and the reporter.

HOLDER'S ADM'R v. HOLDER.

(Filed June 17, 1905.)

1. Homestead—Debt created before occupancy—Liability—A homestead right exists when the claimant is in occupancy of it as a housekeeper in good faith at the time the attempt is made to subject it by execution to the payment of a debt, although at the time the debt was contracted the claimant was unmarried and did not then live on the land or claim it as a homestead.

2. Living on adjoining land—Using homestead therewith—Married woman—Exemption to husband—Where a wife owned a homestead before her marriage, which she inherited, and she and her husband rented and lived on an adjoining place and used the wife's land in connection therewith, by cultivating part of it and using the balance for pasture purposes, the wife is entitled to a homestead therein, and such homestead of the wife continues after her death for the benefit of the surviving husband.

Prewitt & Senff for appellant.

R. A. Mitchell for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Paynter.

The personal representative of N. E. Holder instituted this action to settle her estate and for the sale of land left by her to pay the debts which her personal property was insufficient to pay. The husband, Wm. Holder, resisted the sale of the real estate upon the ground that it was of less value than \$1,000, and that he was entitled to the use of it as a homestead. For the creditors it is contended that he is not entitled to the homestead in the property because the debts were contracted while the decedent was a single woman, and when she did not live on the land or claim it as a homestead. The position of the creditors, whose debts were contracted under the circumstances detailed, is untenable. This court in the case of *Nichols v. Sennitt, &c.*, 78 Ky., 682, held that if the land was purchased or improvements made prior to the creation of the debt the homestead right exists when the claimant is in occupancy as a housekeeper in good faith at the time the attempt is made to subject it by execution to the payment of the debt. In this opinion the court criticized the case of *Griffin v. Proctor*, 14 Bush, 572, and said that the contrary view expressed in that case was merely the opinion of the judge who wrote the opinion. In the case of *Hensy v. Hensy's Adm'r*, 92 Ky., 164, the court recognized the correctness of the rule announced in *Nichols v. Sennitt*. Counsel for appellant is evidently misled by the case of *Park v. Wright*, 25 Ky. Law Rep., 128, where the contrary doctrine is announced. The court's attention in that case was not called to the case of *Nichols v. Sennitt* and *Hensy v. Hensy's Adm'r*.

There is a more serious question in this case than the one considered. After she had inherited the land she married the appellee, Holder, who was her husband at the time of her death. There was an indifferent house on the thirty acres of land herein involved and the decedent and her husband rented an adjoining place and lived on it, but used the wife's land in connection therewith by cultivating part of it and using the balance of it for pasture purposes. The homestead of the wife continues after her death for the benefit of the surviving husband. (*Ritter v. Huffman*, 21 Ky. Law Rep., 111.) It exists so long as he continues to occupy the land, although he has neither family nor children living with him. (*Ellis v. Davis*, 90 Ky., 188.) The question is, therefore, raised whether the wife under the facts detailed was entitled to a homestead in the land at the time of her death.

This court has held in *Nicholas v. Sennitt*, 5 Ky. Law Rep., 199, and *Donaldson v. Richert*, 22 Ky. Law Rep., 2268, where a party occupies one piece of land with his family and owns a distinct and separate tract of land not adjoining the one upon which he lives, but uses it in connection with the one so occupied, he is entitled to hold it as a part of his homestead, if both do not exceed in value \$1,000. It was held in *Redmon v. Citizens Bank of Paris*, 19 Ky. Law Rep., 187, that where a debtor resided upon the dower land of his mother, using and cultivating as a part of the same farm an adjoining farm owned by him, he is entitled to his land as a homestead. This case can not be distinguished from *Redmon v. Citizens Bank of Paris*. Therefore, we conclude that the wife was entitled to homestead at her death as against the claims of her creditors. It follows, therefore, that the husband

has a homestead in the land. This land can only be sold by his wife's creditors subject to his homestead rights, and the lower court so held.

Wherefore, the judgment of the lower court is affirmed.

DURRETT v. KENTON COUNTY, &c.

(Filed June 17, 1905—Not to be reported.)

1. Taxation—Turnpikes—Road districts—Liability—In this action it is held that the passing by the legislature of the act of May 5, 1893 (Kentucky Statutes, section 4136), had the effect to amend the act of May, 1890, in relation to creation of road districts in Kenton county for taxing turnpikes, and the two acts must be construed and considered as one consistent whole. And when any liabilities were created and assumed after the act of May 5, 1893, took effect, it must be presumed that they were created and assumed under the act of 1890 as modified by the general act of 1893.

2. Statutes—Constitutionality—Kentucky Statutes, section 4136, was not intended to be retrospective in its operation, but was intended to change the effect and operation of the act of 1890 from that date. Whether or not the general assembly has the power to enact a law shifting the liabilities owing by one person and placing them upon another without his consent is expressly not decided. Section 4136 is not in conflict with section 171 of the Constitution, and the costs of constructing roads in Kenton county should be paid for as required by the aforesaid acts. The legislature had the power to pass this act, and, to the extent named, it is valid.

M. M. Durrett for appellant.

F. M. Tracey for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

The general assembly in May, 1890, made Kenton county, excluding Covington, Central Covington, West Covington and Ludlow, a turnpike taxing district. The act provided for the creation of road districts for the construction of turnpike roads to extend on each side one mile from the proposed road and one-half a mile from the end thereof. These small road districts were required to bear each one-half and the county, excluding the cities named, the other half of the cost of the construction of the roads.

After the adoption of the new Constitution it appears that the fiscal court of the county construed section 171 as in conflict, and repealing in part, the act of 1890. This provision of the Constitution required that taxes shall be uniform on all property subject to taxation within the territorial limits of the authority levying the tax. The fiscal court conclude that that part of the act of 1890 which required persons living within the small road districts to pay one-half the cost of constructing the roads was not uniform taxation within the meaning of the Constitution, and relieved those persons from that tax and placed the whole cost of constructing the road upon all the county, excluding the cities named.

This action of the fiscal court was, in the case of Carpenter v. The Town of Central Covington, 26 Ky. Law Rep., 480, declared void, and it was decided that section 171 of the Constitution had no application to the question

involved, and that the cost of constructing roads in Kenton county should be paid for as required by the acts with reference thereto. Upon the return of that case the fiscal court again attempted to adjust the taxes for turnpike road purposes, not however in accordance with the act of May, 1890, but in conformity with an act of May 5, 1893, which is section 4136 of the statutes, and is as follows: "Whenever in any county there is in force a system of taxation for turnpike purposes, under which part of such taxes are general and part thereof levied in turnpike road districts, then when the same property is situate in more than one of such districts, such property shall be liable for only one such district tax, which district tax shall be that levied in the turnpike road district wherein is the turnpike road from which such property and the owner thereof derives the greater benefit, and the question which turnpike road does most benefit such property shall be determined by the board of county commissioners, in counties which have such boards, and in other counties by the fiscal court, and when said question is determined, then the district taxes levied under such system shall, as to such property, be levied as if said property were situate only within said turnpike road district and not within any other. And the district taxes from which property situate within more than one district is so relieved shall not be added to nor embraced within the levy of any district taxes levied in any district, but the same shall be added to and embraced in the general taxes levied under such system of taxation, upon all the taxable property within the county or part thereof within which such system is in force. From said determination and judgment of such board of commissioners or county court there shall be no appeal. But whenever, after the going into effect of this act, any person, under any such system of taxation, petitions for the construction of a turnpike road, and the same is constructed, then such petitioner and his property shall be liable for district taxes for or on account of such turnpike road."

It appears that many turnpikes have been constructed in Kenton county, thereby placing many persons in more than one taxing district, and the cost is so great to them that the result is almost a confiscation of their property, and the object of this statute and the action of the fiscal court was to relieve them of this burden, but in doing so they placed an additional burden upon the citizens of Kenton county outside of the road districts and the cities named, appellant being one of the persons whose burdens were so increased. The appellant claims that the statute above quoted is unconstitutional and void for the reason that it undertakes to shift the assumed liabilities from those living within the road district and imposing them upon those without the district when they had not willingly assumed the payment thereof and against their consent.

In our opinion the section of the statute quoted above was not intended to be retrospective in its effect, but was intended to change the effect and operation of the act of May, 1890, from that date. Whether or not the general assembly has the power to enact a law shifting the liabilities owing by one person and placing them upon another without his consent is expressly not decided. When the general assembly passed the act of 1893 it was then understood that enforcing the act of 1890 would have the effect of bankrupting many persons in the road districts, and for the purpose of giving relief

to such persons and others similarly situated throughout the State it passed this general act, which had the effect to repeal the provisions of the act of 1890 in so far as they were in conflict with this new act. In other words it had the effect to amend the act of 1890, and the two must be construed as one consistent whole. And when any liabilities were created and assumed after the act of May 5, 1893, took effect it must be presumed that they were created and assumed under the act of 1890 as modified by the general act of 1893. In our opinion the general assembly had the power to pass this act, and to the extent named it is valid.

The action of the lower court in sustaining the demurrer to the petition not being in conformity with the views herein expressed the case is reversed and the cause remanded for further proceedings consistent herewith.

TIPTON, &c. v. HARRIS.

(Filed June 17, 1905—Not to be reported.)

Appeals—Final order—On rehearing the court withdraws the former opinion in this case (26 Ky. Law Rep., 909), and now holds that though the court had no jurisdiction over the property except to enforce a mortgage lien thereon for an amount that might be found to be due on final trial, yet where a sale of the property would have the effect to divest the owner of a property right, and in such manner as to put it out of the power of the court, after the expiration of the term, to place the parties in their original condition, it was a final order from which an appeal would lie.

J. B. White and C. W. & R. B. Friend for appellants.

L. A. West and Hugh Riddell for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Nunn.

This court dismissed this case November 4, 1904, upon the ground that the judgment or order appealed from was not final and, therefore, this court did not have jurisdiction. (26 Ky. Law Rep., 909.)

The case is again before us on a petition for rehearing, and after a careful consideration of it by the whole court we have arrived at a different conclusion, and are of the opinion that the order for the sale of the sawmill and mules was a final order, and that this court has jurisdiction of the appeal.

In the case of Maysville & Lexington R. R. Co. v. Punnett, 15 B. M., 38, the court used this language: "A final order either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right, in such a manner as to put it out of the power of the court making the order after the expiration of the term, to place the parties in their original condition." This court has approved this definition in at least three other cases. (Turner v. Browder, 18 B. M., 658; Applegate v. Applegate, 4 Met., 212; Helm, &c. v. Short, &c., 7 Bush, 624.)

The appellant owned this sawmill and mules, and the appellee only had a lien thereon to secure his claim. The court had no power or jurisdiction over this property except to enforce the lien of appellee for the amount that might be found due him on a final trial. The appellee had obtained no

attachment. (Lee v. Newton, &c., ante, 1004, decided at this term.) This order and a sale of the property thereunder certainly would have the effect to divest the appellant of a property right, and in such a manner as to put it out of the power of the court after the expiration of the term to place the parties in their original condition, and that, too, in such a manner as would leave the appellant without remedy as the appellee had not executed a bond of any kind for his indemnity.

The case of Wilson, &c. v. Aultman & Taylor Co., 91 Ky., 300, was very much like the one before us, except the order of sale of the mortgaged property was made by the judge in vacation instead of in open court as the one at bar. In that case this court assumed jurisdiction, and said in substance that the court had no power to order a sale of mortgaged property in advance of the regular foreclosure sale, because such action would deprive the mortgagor of the title to his property in advance of the appointed time for a decision on the merits, involving the right of a foreclosure sale of it, and which advance sale would deprive the owner of his property, although he might successfully resist the foreclosure sale. And the court also decided in that case that when mortgaged property was not attached upon bond executed by the plaintiff the only power of the court with reference to the property was to appoint a receiver to take charge of the property in order to preserve it for the benefit of both parties. If the order made in that case by the judge in vacation was a final order, certainly the one made in this case, for the same purpose, in open court was also a final order. (Lee v. Newton, supra.)

For these reasons the former opinion is withdrawn and the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

NICOLS v. COMMONWEALTH.

(Filed June 17, 1905—Not to be reported.)

Duff & Hutcherson for appellant.

N. B. Hays and Chas. H. Morris for appellee.

Appeal from Barren Circuit Court.

Judge Nunn delivered the following extended opinion:

This court affirmed the judgment of the lower court in an opinion reported in 27 Ky. Law Rep., 690. We affirm the principles therein stated. The court was under the impression at that time that there was a special act in force in Barren county prohibiting the sale of liquors, in which case proof of that fact was not necessary, but it now appears that if prohibition exists in that county it is by reason of the general local option law put in force by a vote of the people. There being no proof introduced on the trial to establish this fact, therefore, the order affirming the judgment is set aside and the judgment is reversed and remanded for further proceedings consistent herewith.

Roscoe Vanover and J. F. Butler for appellant.

J. M. Roberson for appellee.

Appeal from Pike Circuit Court.

Judge Barker delivered the following response to petition for modification of opinion:

All that is intended by the opinion in this case is to hold that, on the facts stated, the transaction between the appellant and appellee was fraudulent, and that we will not, for that reason, enforce the specific performance of the contract concerning the sale of the land in question. No general language which the opinion may contain is to be construed as enunciating any rule beyond the facts of this case.

We do not believe the opinion is subject to the criticism suggested by counsel, but in deference to their views we place the matter beyond question.

ANGLIN v. CONLEY.

(Filed June 17, 1906—Not to be reported.)

J. A. Scott, Theobald & Theobald and C. B. Wilhoit for appellant.

G. W. Armstrong, H. L. Woods and R. D. Davis for appellee.

Appeal from Carter Circuit Court.

Chief Justice Hobson delivered the following response to petition for rehearing:

In the petition for rehearing counsel argues the case as if the court had found the vendee, James E. Anglin, had participated in the alleged fraudulent transaction with his brother, the vendor. On the contrary, the court concludes that if the vendor had a fraudulent purpose in conveying the land to appellant he had no knowledge of such fraudulent purposes. Of course if the appellant had participated in the alleged fraud he could not get back his \$500 or any other sums advanced by him under the contract with his brother to the prejudice of his brother's creditors. The authorities cited by counsel for appellee applied to cases where the court found that the transaction was fraudulent and the vendee was a party to the fraud.

Petition overruled.

HENDERSON BRIDGE CO. v. COMMONWEALTH.

(Filed June 17, 1906.)

Helm, Bruce & Helm and Yeaman & Yeaman for appellant.

Montgomery Merritt and N. Powell Taylor for appellee.

Appeal from Henderson Circuit Court.

Chief Justice Hobson delivered the following extended opinion:

erty assessment on December 1 after they became due as provided by the statute. No interest will be allowed thereon until the bringing of the action as taxes do not bear interest unless so provided by statute. But after the action was brought a different principle applies. The taxes were collectible by suit. The defendant's defense being adjudged bad the taxes owed for, like any other account, should bear interest from the time the suit was brought, otherwise the defendant would be allowed to profit by the law's delay, and a premium would be held out to secure such delay, whereby the State is deprived of the money and the defendant is enabled to retain money it should have paid. The ends of justice require that in these tax suits the same principle should be applied as in other suits for money due by the defendant and interest should be allowed from the filing of the petition. The same principle applies to the franchise taxes after the suit was brought.

The opinion heretofore delivered is modified as above indicated.

THE AGRICULTURAL AND MECHANICAL COLLEGE v. HAGER. AUDITOR.

(Filed June 17, 1906.)

1. Appropriations—Constitutionality—The question in this case is whether an act of the general assembly which became a law March 20, 1904, making an annual appropriation of \$15,000 for the benefit of the Agricultural and Mechanical College, is in violation of section 184 of the Constitution, which is as follows: "The bond of the Commonwealth issued in favor of the board of education for \$1,507,000 shall constitute one bond of the Commonwealth in favor of the board of education, and this bond and the \$73,500 of the stock in the Bank of Kentucky held by said board of education, and its proceeds shall be held inviolate for the purpose of sustaining the system of common schools. The interest and dividends of said fund, together with any sum that may be produced by taxation or otherwise for purposes of common schools, and to no other purpose. No sum shall be raised or collected for education, other than in common schools, until the question of taxation is submitted to the legal voters, and the majority of votes cast at said election be in favor of such taxation: Provided, The tax now imposed for educational purposes and for the endowment and maintenance of the Agricultural and Mechanical College shall remain until changed by law. If this appropriation is upheld it is because it has been made under a power vested in, or rather not withheld from, the legislature by the Constitution, the evidence of which is to be found within the proviso above quoted. The expression "the tax now imposed for educational purposes" implies that there was then being raised by taxation a fund for the purpose of education other than through the common school system already just provided for in the first part of the section. We find that the following State institutions were then in existence: Asylum for the Deaf and Dumb, Kentucky Institute for the Blind, Institute for the Feeble-Minded Children, State Normal School for Colored Persons, and the appellant college, all establishments used solely for educational purposes and all maintained by the State through appropriations raised in whole or in part by taxation. The proviso is to

"changed by law;" that is, the taxes imposed for these institutions were to remain until "changed by law," implying that existing appropriations were continued, and further appropriations were allowed, or all might be lowered or discontinued in part or entirely, as the law-making department of the government might deem most expedient.

2. Aid to interpretation—Debates in constitutional conventions—An aid to the interpretation of this section is a reference to the debates of the constitutional convention, which show that when this section was reported from the committee of education without the proviso it was objected to upon the grounds that it might be construed to prevent further appropriations to the very institutions which have been named, including appellant, when members of the convention, including the chairman, a distinguished citizen and lawyer, disclaimed such a purpose and defended the report by the assertion that it could not properly be so construed, and which, after debate, culminated in the adoption of the proviso.

3. Contemporaneous construction—Another aid to its interpretation is its contemporaneous practical construction by all the other departments of the State government, including the legislature, by which every one of these institutions has been sustained by annual appropriations at nearly every session since the adoption of the present Constitution, which have been approved by the chief executives of the State.

4. Doubtful constitutionality—The final canon of construction is, where there may be doubt after all sources of aid have been resorted to, whether the act violates the Constitution, the doubt is resolved in favor of its constitutionality.

5. Levying taxes—This appropriation is not upheld on the ground that it is not a levying of taxes. If an object can not have a tax levied for it if deemed necessary by the proper power, then no appropriation of public money can be made to it. Where the Constitution forbids the levying of a tax for a given purpose it must be held that it also withholds the power of making appropriations for that purpose unless there is something in the Constitution which particularly and unmistakably authorizes an appropriation, which is not the case here.

Lewis McQuown, W. O. Davis, R. L. Stout, E. H. Brown, Jr., John McChord and G. B. Kinkead for appellant.

N. B. Hays and C. H. Morris for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant is an educational institution, created, maintained and operated by the State of Kentucky. It is incorporated, but is officered by trustees appointed by the governor by and with the advice and consent of the senate, the governor being ex-officio member and chairman of the board. While a part of its sustenance is drawn from general appropriations made by the United States government, and in part from tuition fees received from certain of its pupils, yet it is in every essential feature a State college. Its main support is derived from the tax of one half cent. on the \$100 levied in its behalf by the State of Kentucky.

An act of the general assembly, which became a law March 26, 1904, made an annual appropriation of \$15,000 for the benefit of appellant, payable to its treasurer by the State treasurer upon warrant issued by the auditor of

public accounts. The auditor having doubts of the constitutionality of the appropriation, declined to issue a warrant for the sum appropriated for this year. The petition of the appellant for a mandamus to compel the issue of the warrant was dismissed by the Franklin Circuit Court.

It is claimed on behalf of appellee that the act of appropriation violates section 184 of the Constitution; that by that section no sum whatever can be appropriated for education by the State other than for the common schools, unless it be first approved by a majority of the votes of the people at an election to determine the question.

Section 184 of the Constitution reads as follows: "The bond of the Commonwealth issued in favor of the board of education for the sum of \$1,327,000 shall constitute one bond of the Commonwealth in favor of the board of education, and this bond and the \$78,500 of the stock in the Bank of Kentucky, held by the board of education, and its proceeds, shall be held inviolate for the purpose of sustaining the system of common schools. The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose. No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation: Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law."

The inherent power of the legislature to appropriate public funds, or to raise funds by taxation, for governmental purposes, save as may have been withheld or limited by the Constitution, is not questioned. It is conceded that public education is a purpose for which taxes may be levied, and that, unless restricted by the Constitution, the exercise of the power in behalf of appellant would fall clearly within the rule. Whether there is such restriction in the section quoted is the question for decision. Its analysis discloses that it is severable into three parts, viz., one, wherein a capital fund is provided, whose income and all other sums raised for the common school system, are exclusively set apart for the benefit of the common schools; second, the exclusion of all other methods of public education by taxation until the question has been approved by the voters of the State; and, third, a limitation of the last-named provision, excluding from its operation certain institutions.

The common school system of this State is defined by statute (chapter 112, Kentucky Statutes). It is a uniform series of district schools, each local to its district, but all of general or equal grade throughout the State, varying only according to the population of the districts, and whether the districts have or not adopted the graded or high school system in addition: They afford free tuition for certain parts of the year to all resident children within the statutory age. They are sustained in the main by the income provided by section 184 of the Constitution, by certain taxes levied directly for their benefit and certain fines and forfeitures. They may be aided, however, by local taxation in addition. Neither the Agricultural and Mechanical College, nor any other institution, is now or was then comprised

rived from the bonus, stock and income mentioned in section 187, Constitution, and inviolably set apart for the common schools. Nor was the question of this appropriation submitted to or passed upon by the voters of the State. If it is upheld, it is because it has been made under a power vested in, or rather not withheld from, the legislature by the Constitution, the evidence of which is to be found within the proviso above quoted.

A mere reading of the section does not afford a conclusive guide to the intention of the framers of the Constitution, and presumably of the voters who adopted it. But, as is usual and always permissible, the evils which it was intended to avoid, and the conditions existing at the time of its adoption, must be looked to also. If the words of the section were perfectly plain and admitted of but one interpretation, there would be no occasion to consult anything but the language of the section itself. But they are not. The expression, "the tax now imposed for educational purposes," implies that there was then being raised by taxation a fund for the purpose of education, other than through the common school system already just provided for in the first part of the section. Indeed the phrase forms an exception to the preceding clause, which treats of "education other than in common schools" through taxes levied for the purpose. It is, therefore, necessary to a clear understanding of the proviso, and of the clause with which it is most intimately connected, that we look to see what taxes were then being imposed for educational purposes, other than through the common schools. We discover that the following State institutions were then in existence: Asylum for the tuition of the Deaf and Dumb, established in 1822 (chapter 4, General Statutes), name since changed by statute to Kentucky Institute for Deaf Mutes (section 275, Kentucky Statutes); Kentucky Institution for the education of the Blind (chapter 59a, General Statutes, section, 209); Institution for the Education and Training of Feeble-minded Children (chapter 40, General Statutes), name since changed by statute to Kentucky Institution for Feeble-minded Children by section 264, Kentucky Statutes; State Normal School for Colored Persons (chapter 96a, title "Schools," article 3, General Statutes; section 4527, Kentucky Statutes), and appellant college. (Acts of 1878, pages 46-116, and 1 Session Acts 1879, pages 5, 10, 18, 38, 45, 73, 101, 137 and 138.) All of these institutions, established and used solely for educational purposes, were then owned and were being maintained by the State through appropriations of public funds raised in whole or in part by taxation. The proviso is then understood to read as if those very institutions had been named therein. That which is ambiguous, if not meaningless otherwise, now becomes apparent.

There are yet other sources from which light may be drawn to aid in the more complete understanding of the section. One is the history of the time, including the troubles which had been encountered before the convention was called, and which it may fairly be assumed acted in part upon the popular judgment in bringing it into being to redraught the organic law of the State. The cause of public education had suffered at the hands of some of the previous legislatures. Funds distributed to the State in the first Federal allotment for the benefit of education had been diverted from their proper application, and others had been lost in mismanagement,

Sometimes that which was raised for school purposes by taxation was "borrowed" by other departments, and if not permanently diverted, it failed to reach in due time the ends for which it had been paid in by the people; the Federal aid, extended to encourage agricultural and mechanical education, particularly among the States, had been turned over, that which had not been lost, to certain denominational schools, or institutions of private enterprise, who would undertake to do what was required by the act of congress. All these things led to more or less abuse of the educational interests of the State, and embroiled them in bitter strifes in the rivalries of contending factions. Such is the sum of the evils which had grown up in the midst of a system designed by the people as one of the mainstays of the State, and which, happily, in spite of these untoward circumstances, continued to thrive in a measure. No one dreamed when a new Constitution came to be framed in 1891 that the Commonwealth had tired in her efforts to furnish the best system her resources could provide for the education of the youth of the State, or intended to take a step backward. But warned by the experience of the past, and desiring to be rid of those evils which had hampered, and indeed threatened, our whole system of State education, the convention sought to give the system stability, to make impossible the recurrence of the conditions just alluded to. Therefore we find the section of the Constitution dealing particularly with this subject, placing forever beyond the reach of any other use the principal sum and its investments which had been raised and received for educational purposes; it was likewise made impossible that the annual contributions of taxes for school purposes should be even temporarily diverted from their intended end; it was not so provided that the State could not embark in any further partnership educational enterprises, at least until the matter had been first approved by the people. In drawing the lines for safety about these matters which had been so disturbed and endangered, it was seen that the terms employed were so strict that possibly other institutions of learning belonging to the State, and forming no less a part of its system of popular education, might be hampered by a literal construction of the words, hence the proviso that forms the exception to what had been said—that rescued what followed from what had gone before. We have seen that those institutions were as named in the excepting clause, therefore, as to them, the legislature was left free to continue, and indeed they were in terms continued by the Constitution itself, till such time as it might be "changed by law." It could scarcely be claimed that the convention had the thought, or that the language used, in view of the conditions, admits of it, that for all the other means of public education the convention intended that the legislature might deal with them as varying conditions seemed to demand, while these particular institutions, also essentially and entirely educational, and so long established and maintained by the State as to be no longer experiments, the legislature might not provide for them as their exigencies might seem to require from time to time. The language does not so restrict purpose. It would have been unnatural and inharmonious with the general plan disclosed by the whole section. The taxes imposed for these institutions were to remain "until changed by law," implying plainly existing appropriations were continued, and further appropriations

Still another aid to a proper interpretation of the section is open to us, that is, a recourse to the debates of the constitutional convention. While recognizing that these are in no sense controlling, as they may not have represented the views of the great majority of the body whose votes incorporated the measure as finally adopted, and with even less assurance that they represent the views of the people whose votes ratified the instrument at last, still they may properly be consulted in arriving at the meaning of doubtful phrases. As observed by Judge Cooley (Cooley's Const. Lim., 66): "Where the proceedings clearly point out the purpose of the provision the aid will be valuable and satisfactory."

The section was reported from the committee on education without the proviso. It was objected to on the ground that it might be construed to prevent further appropriations to the very institutions which have been named above, including appellant. Members of the committee, including its chairman, a distinguished citizen and lawyer, disclaimed such purpose, and defended the report by the assertion that it could not be properly so construed. At that time a specific tax of one-half cent on the \$100 was being collected by law for the maintenance of appellant college. Its friends in the convention feared that the committee's report if adopted would take away that aid unless it were submitted specially to a vote of the people. A member of the committee, the delegate from Crittenden county, used this language in response to criticism of the stringency of the committee's report:

"So far as I am individually concerned, let this convention use language in this report that will not wipe out that half-cent tax, but leave it in such a condition that the legislature in the future, if the people demand it, may deduct that half-cent tax, or add more to it, or do as they please with it, according to the necessities of the case.

"Let the people, through their representatives, say whether they want this tax to remain as it now stands or not, or increase it, or build up other institutions in the State. Let that matter rest with the people as the necessities of the case may require in the future. (Page 4530.)

"The convention will bear in mind that the legislature has already all power, except as restricted by this Constitution. Now I ask what restriction is there in this section, or in any other section, of the Constitution upon the legislature from appropriating any fund that it sees proper in aid of the Agricultural and Mechanical College, the Normal School, the school at Bowling Green, Centre College, or any other college in the State of Kentucky?" (Page 4574.)

As embodying these views, in so far as they referred to institutions owned and controlled by the State, the same member offered the following as a substitute in part to the report of the committee:

"Provided, however, The tax now imposed for educational purposes shall remain until changed by law."

It appears that the welfare of appellant college was, however, that which elicited the most comment in the debate, though it is equally clear the other institutions named were not lost sight of. The member from Fayette

county, where appellant college is located, who had spoken in its behalf before the convention, and who was extremely solicitous in its behalf, offered the following amendment to the substitute: "Amend the substitute by adding after the word 'purposes' the words 'and for the endowment and maintainance of the Agricultural and Mechanical College.'" (Page 4576.)

The substitute, as amended, was adopted. The debate was indulged in extensively by the members, culminating in the adoption of the amendments referred to, to meet the views expressed by those who feared that without it the legislature would be powerless to provide by annual appropriations for these very institutions so long maintained and recognized as forming important parts of the State's educational provision.

There is yet another aid to the interpretation of the section, that is, its contemporaneous, practical construction by all the other departments of the State government, including the legislature. Every one of these institutions has been sustained by annual appropriations, and at nearly every session of the legislature since the adoption of the present Constitution special appropriations have been made to some of them. These acts have received the approval of the various chief executives of the State, and have not been questioned, so far as we are advised, by any other executive officer. Thus for fourteen years the legislative and executive departments have construed that there was reserved to the legislature the plenary power with regard to the subject of education conducted through the means of the institutions just discussed; that the limitation upon its power was as to extensions by means of other institutions. This long and unquestioned construction, coming up for actual decision at least several times each year, ought to have, and by the rules of the courts does have, great weight in resolving any doubt that the words themselves may have left as to the meaning of the section.

The final canon of construction, too, is where there may be doubt, after all proper sources of aid have been resorted to, whether the act of the legislature violates the Constitution, the doubt is resolved in favor of its constitutionality. Though we are left without doubt as to the meaning of the section, those who have doubts this last-named rule must control. It is argued for appellee that there is really a difference between appellant and the other institutions particularized in that the others are charitable institutions. While in a sense charitable, in that they provide a means of education to classes of helpless unfortunates, not materially different in principle though from that required to be done by appellant, yet they are distinctively educational institutions.

They are provided with teachers, not guards. Instruction, not restraint, not physical care alone, is the main idea. The inmates are received as pupils, at ages when other pupils are thought to be most impressionable, and are required to leave the institution upon the completion of the courses of instruction provided there. This is true of all. Appellant and the State Normal School for Colored Persons are so similar in character that they may be deemed identical for purposes of classification. Appellant seeks to uphold the appropriation on the ground that it is not a levying of taxes, and that only the levying of taxes for educational purposes is prohibited by the Constitution. We reject the argument as unsound. Appropriations of

public funds, and levying taxes to raise funds for the same end, rest upon the same principle. If an object can not have a tax levied for it, if deemed necessary by the proper power, then no appropriation of public money can be made to it. Where the Constitution forbids the levying of a tax for a given purpose, it must be held that it also withholds the power of making appropriations for that purpose, unless there is something in the Constitution which particularly and unmistakably authorizes the appropriation, which is not the case here.

The judgment of the circuit court must be reversed and cause remanded, with directions to overrule the demurrer to the petition and for further proceedings not inconsistent herewith.

Whole court sitting, except Cantrill, J., absent.

HALL, &c. v. WRIGHT.

(Filed June 17, 1905.)

Deeds—Conveyance to J. H. and children—Construction—A deed made March 21, 1885, by Eli Hall and wife to their son, Joseph Hall, the granting clause of which reads as follows: "This indenture, made and entered into by Eli Hall and Polly Hall, of the first part, and Joseph Hall and his children, of the second part," all of Letcher county, Kentucky, for 600 acres of land. The habendum clause is as follows: "We, the party of the first part, doth bargain, sell and convey the above-named tract of land, and will warrant and defend the title of the same from us and our heirs and assigns and from all others unto the said Joseph Hall and his children forever, etc." At the date of the conveyance Joseph Hall had some children living and others were subsequently born. Held—That Joseph Hall was entitled only to a life estate in the land and his children born, and thereafter born, take the remainder in fee.

Fleenor & Patton and Hazelrigg, Chenault & Hazelrigg for appellants.

S. B. Dishman and Hager & Stewart for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Nunn.

This appeal involves the construction of the following deed: "This March 21 day, 1885: This indenture, made and entered into between Eli Hall and Polly Hall, of the first part, and Joseph Hall and his children, of the second part, both parties of the county of Letcher and State of Kentucky. Know all men by these presents, that I, Eli Hall and Polly Hall, of the first part, hath this day bargained and sold unto Joseph Hall, of the second part, a certain tract of land, containing 600 acres, be the same more or less, in and for the sum of \$300, to me in hand paid, the receipt whereof is hereby acknowledged. (Here follows a description of the land.) We, the party of the first part, doth bargain, sell and convey the above-named tract of land, and will warrant and defend the title of the same from us and our heirs and assigns and from all other unto the said Joseph Hall and his children forever, etc."

It is agreed that Joseph Hall was the son of the granters, Eli and Polly

Hall, and also that Joseph Hall had at that time several children living, and afterwards others were born to him.

The appellee contends that as the children of Joseph Hall were not referred to in the granting or conveying clause they took no interest in the land, and that Joseph Hall took the fee-simple title, and that the word "children" in the habendum clause, being followed by the word "forever," should be construed as heirs. The appellants contend as the children were named as grantees with their father in the caption of the deed, and as they were again named in the habendum as parties in interest with their father, that they took the land in remainder after the life estate of their father. In construing a deed the intention of the parties as it appears from the whole deed must control. If the intention appears, technical rules of construction can not be applied if they lead to a different result. If the granting clause and the habendum are irreconcilable, and the other parts of the deed do not make it apparent which the grantor intended should control, it must be said that the granting clause will prevail. But in the deed under consideration there is not any conflict between the granting clause and the habendum. The granting clause contains no words of inheritance. It is not indicated in that clause what is to become of the estate at his death, nor is it intimated that he has any power to dispose of it. It is not granted to him and his heirs and assigns, but to Joseph Hall alone. And when it is stated in the habendum that it is to go to the children, there is no conflict with the granting clause, but only supplies a defect in that clause. Under section 2842 of the Kentucky Statutes, which was the law at the time this deed was executed, it is provided: "Unless a different purpose appears by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of." Under the common law, when a grant was made to a person without words of inheritance, the estate would not pass to the heirs and the grantee would not take the fee simple title, hence the necessity for this statute to pass the fee-simple title to purchasers when no words of inheritance were contained in the conveyance. But this statute does not apply where there are any words in the conveyance indicating how the title is to pass.

In the case of *Baskett v. Sellars, &c.*, 93 Ky., 8, the court construed a deed containing clauses similar to the one at bar. The granting clause was as follows: "For and in consideration of natural love and affection the said party of the first part (the father) has for his daughter, the said A. H. B. Farley, and his son, T. L. Farley, parties of the second part, the party of the first part has this day sold, and by these presents doth grant, bargain, sell and convey to the parties of the second part the following described land, etc." The habendum was: "To have and to hold to them, my said daughter and son, and their children forever." The court in that case decided that there was no conflict between the two clauses, and that the property went to the children of the grantees as directed in the habendum clause. In that case it was contended, as in this, that the grantor used the word "children" in the sense of "heirs," and consequently the grantees took a fee-simple estate. The court in that case said: "But there is nothing in the deed indicating that the grantor used the word 'children' in the sense of

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by Christ and wife of the one part and Francis and Sarah Thomas of the other, and the grant was to Sarah Thomas and her children forever Sarah being the daughter of the grantor. The court said: "This is a deed inter partes, in which Christ and wife are named parties on the one side and Sarah Thomas and her husband on the other; the children are not parties, nor are they named as such in the caption of the deed, which, by the designation of the parties, is intended to confine the deed to those named is exclusion of all others as contracting parties. And as a stranger who is not a party to a deed can derive no legal interest under it, or maintain covenant on it, so it is well established that those who are not parties to a deed can take no present interest under it; but those who are not parties may take by way of remainder. (Co. L. 281a; M. & S., 308, 3 Mod., 116; Corpus Digest, title Fals D., 2, &c.)

"So to give to the deed operation at all as to the children, they must be construed to take in remainder only, as they can not take a present interest with the mother. And surely such construction should be given to the deed, as to give some beneficial interest to the children, as they were clearly intended to be provided for. By giving to them an estate in remainder in fee, to take effect after the life estate of their mother, they may all be provided for, not only those who were born before, but those who were born after the date of the deed, for in that case there is a freehold to support the remainder until all the children were born. And it may be fairly presumed that it was as much the object of the donor to provide for afterborn children as those that were born before the date of the deed."

This case is in point. It is true that none of the children of said Thomas were made contracting parties to the deed in that case, but it is likewise true in the present case that only the children of Joseph Hall in esse were or could be made parties, and as no reason can possibly be suggested why the afterborn children should have been intentionally excluded and as they can not take a present interest under the Webb-Holmes case the court must effectuate the intention by giving all the children of Joseph those in being at the date of the deed and those thereafter born, an estate in remainder.

The case of Foster v. Shreve, 6 Bush, 519, is similar to the Webb-Holmes case, supra. The conveyance was from a father to his daughter and her present heirs, the father and daughter only being the contracting parties in the caption of the deed. The court held that while the "present heirs" of the daughter, meaning her present children, were not capable of taking a present interest, they could take in remainder, and a life estate was given to the daughter, with remainder to her children as described in the deed.

The case of Bodine's Adm'r v. Arthur, 91 Ky., 55, is also in point. The clauses of the deed there in dispute were: "Have this day given, granted, bargained and sold to Hattie E. Bodine, certain lands . . . To have and to hold unto the said Hattie E. Bodine, wife of said B. W. Bodine and to her children by him begotten forever."

The court held that the last expression of the grantor as to the construction which included a grant to the children of Mrs. Bodine, controlled the former expression in which they were omitted, and continuing, said

clear, judging from the whole conveyance and attendant circumstances, that the grantors intended the habendum to operate as an addendum or proviso to the conveyancing clause, and to control the same to the extent of limiting the estate conveyed to a life estate, remainder to her children begotten by B. W. Bodine, for, according to the uniform decisions of this State, such conveyances gives to the named vendees a life estate, remainder to the children. This construction grows out of the fact that as there must be parties vendors and vendees in order to make a valid conveyance, none but parties vendees can take a present estate. Such parties may be designated by their proper names, or by such other designation as will identify the particular persons meant as vendees. In this case the expression "her children by B. W. Bodine begotten" does not identify the particular individuals who are to take, because they, or some of them, may hereafter be born, hence they can not be deemed parties vendees in the sense of taking an immediate estate, but they can take an estate in remainder. (Foster v. Shreve, 6 Bush, 529.) Such conveyances thus construed are effective, otherwise not, etc."

Clearly this construction is not dependent upon whether there were or were not some child or children in existence when the deed was made. While some of them may have been in existence, it was patent that some of them might be born after the date of the deed. And such is the case, generally speaking, as the testator and grantor in such cases can not know what lies in the future. While it is true that the children in esse might take a present estate under such a grant, yet those possibly to be born thereafter could not, and as the grant includes both, all must be postponed in the enjoyment of the estate to effectuate the intention of equality by giving a life estate to the first taker, and remainder to the children born and to be born.

In Carr v. Estill, 16 Ben Mon., 308, the devise was "to May Baker Dilake and her children" a tract of land, etc. At the time of the devise she was unmarried and had no children. The court held that "the words of the devise, abstractly and literally, import an immediate gift not only to the devisee in being, but to those not in being, but there being no children in esse at the time of the devise it could not have been the intention to give an immediate estate to them, for that were impossible. And as the words of the devise, as conceded by all authorities, manifest a clear intent that the children shall take, the only consistent and rational construction is that the testator intended the devisee in being at the time should take a life estate, remainder to the children."

In the Bodine-Arthur case it does not appear whether there were any children in being at the time of the deed or not, but in the Carr case there were no children when the devise was made or took effect. The same construction, however, must obtain, for the donor is in the same state of ignorance as to future children in the one case as in the other. The unborn children, when there are already children, and when there may be more, and the unborn children, when there are as yet none, are presumably alike the subject of the donor's thought. And such is the rule, as we have already seen, in the Turner-Patterson and Webb-Holmes cases and others of the older cases.

In Mefford v. Dougherty, 89 Ky., 58, the devise was: "To my son,

George, and to his children, the heirs of his body, about fifty acres of land. * * * The land I have given my son, George, is bounded," etc. There was precisely the same language giving the daughter 100 acres, except her share was burdened by the payment of \$800. The court held that the children of George and of his sister took as purchasers, and adjudged in express terms the sister entitled to a life estate, with remainder to her children, and by necessary implication that the son did the same.

The case of *Smith v. Smith*, 27 Ky. Law Rep., 368, was one in which the father devised real estate "to his son and his children." The lower court gave the son the estate for life, with remainder to the son's children. This judgment was affirmed.

In the case of *Adams v. Adams*, 20 Ky. Law Rep., 655, there was a devise by a father "to his daughter, Martha Jane Adams, and her children in their exclusive right."

It was contended that Martha Jane and her children took a joint interest in fee. The court held otherwise, giving a life estate to the mother and remainder to her children, not because it was likely that a stranger to the blood of the donor might get some of the estate to the exclusion of his own blood, which is the reason generally given where the husband is providing for his wife and children, but saying: "If a joint estate is given, the quantity of interest each takes will remain uncertain and shift on the birth of each afterborn child, for confessedly in such cases the devise opens up for the benefit of all the children, whether in existence at the time the will speaks or not. It is hardly to be supposed the testator intended to create such an estate."

Thus was again recognized the principle that the language "to A. and his children" imports an immediate taking by all of A.'s children, those in existence as well as those to be born thereafter, and as that was impossible as to afterborn children, the most effectual way to carry out the intention of the donor in such cases was to give A.'s son a life estate, with remainder to his children."

In *Kuhn v. Kuhn*, 24 Ky. Law Rep., 112, a father devised to a daughter, "to her and her children to be theirs." This was held to create a life estate in the daughter, with remainder to her children.

In *Mitchell v. Simpson*, 88 Ky., 125, the devise was from a father to his daughter, and her bodily heirs, of certain lands, except a certain part of it was to be disposed of by her as she wished. It was held that she took a life estate, with remainder to her children, except where she was given the right to dispose of a certain part.

In this connection it may be observed that there are quite a number of cases where the donor is the husband and makes a provision for his wife and children. In all these cases the court has with rare unanimity held that the wife takes a life estate, with remainder to the children; and this, because otherwise, as indicated above, the estate might eventually come to those who are strangers in blood to the donor. A few of these cases are: *McFarland v. Hatchett*, 26 Ky. Law Rep., 276, and cases cited therein; *Jarvis v. Quigley*, 10 B. Mon., 104; *Smith v. Upton*, 12 Ky. Law Rep., 28; *Davis v. Hardin*, 80 Ky., 678; *Frank v. Unz*, 91 Ky., 631; *Koenig v. Kraft*, 87 Ky., 95; *Right v. Forrester*, 1 Bush, 278.

The case of *Powell v. Powell*, 5 Bush, 620, seems to form an exception to the rule, and of this case it is said in *Davis v. Hardin*, *supra*, that the court would doubtless have followed the general rule as announced theretofore in *Webb v. Holmes* had its attention been called to it. The case is not in accord with the established rule in this State.

In *Tucker v. Tucker*, 78 Ky., 564, a conveyance was made by a stranger for a valuable consideration paid by John C. Tucker to "Martha Ann Tucker (wife of John C. Tucker) and the heirs of John C. Tucker and their heirs forever." The "heirs of John C. Tucker" were held to mean his children, and the mother and children were given a joint estate. It appeared, however, that John C. Tucker had made a will, and gave the bulk of his estate to an afterborn child for the reason that the mother and children living at the date of the conveyance in question had been given the lands embraced therein in fee, to the exclusion of the afterborn child, and the court felt constrained doubtless to effectuate the manifest intention of the father.

It is said, however, that there has not been entire unanimity in the decisions of this court where the donor is other than the husband making provision for his wife and children, and this in a measure is perhaps true. It would be singular if there was given the same meaning even to the same words in every will or deed. The cardinal rule is to effectuate the intention of the testator or grantor, and this is to be arrived at by looking at the whole will or deed, and the conditions which induced the execution of the instrument, and not alone to some particular expression therein.

The case of *Cessna v. Cessna*, 4 Bush, —, decided in 1868, is one of the cases supposed to be in conflict with the rule so overwhelmingly established by the cases cited above. There a father covenanted with his son, for a valuable consideration, to convey to him by name "and his lawful children" a certain tract of land. It was the contention of the son's creditors that he took the fee because the words "lawful children" were used in the sense of "heirs." It was contended, on the other hand, by the children of the son that these words were words of purchase; and further, that they took as joint purchasers.

The court upheld the contention of the children as made by them. The opinion is devoted almost entirely to a discussion of the use of the words 'lawful children,' as words of purchase, and only the following is found on the question of how the grantees held: "As children were born to W. W. Cessna, after the date of the writing aforesaid, the estate would open up to such afterborn children, and they would take their respective shares."

No contention was made by the parties or considered by the court involving the suggestion of giving the first taker a life estate, with remainder to the children.

In the case of *Bullock v. Caldwell*, 81 Ky., 566, the devise was to a daughter and her children, and the court followed the *Powell* case *supra*, which, as we have seen, belonged to a different class, being a case where a husband was providing for his wife and children. But the court in the *Bullock* case was careful to say: "What effect the conveyance would have as to afterborn children is not a question before us." There being no such children, and presumably no possibility of any, the court gave the words their literal and abstract import. It will be noticed in the last cited case, and in the cases

of *Davis v. Hardin* and *Smith v. Upton*, supra, which are husband and wife cases, the court referred to the fact that in cases where a husband was making provisions for his wife and children there was less reason to suppose the donor intended the beneficiaries to take as joint tenants in cases where a father was making provision for his child and his child's children, because in the former case there was greater danger that the estate would pass into the hands of a stranger. But we are to keep in mind that while this is true, the court did not lay down the rule that even in the latter state of case the child and the child's children were to take as joint tenants. No such case was before the court either in the *Smith-Lupton* case or in the *Webb-Holmes* case, nor do we suppose the court in the *Bullock-Caldwell* case was attempting to lay down such a rule unless indeed it was in such cases as where the donor not only knew that there were no afterborn children, but knew also that there could not, by any possibility, be any such children. There would in that class of cases, be no opening up of the grant or devise to let in such children, and, therefore, no shifting and uncertain interest created.

It is manifest, however, that the cases where the donor can know in advance that there will be no afterborn children can be very rare, and whether such cases may afford grounds for a joint tenancy rule is a question we need not consider here. It is certain that the application of such a rule should only be made, if at all, in cases where it clearly and affirmatively appears that at the time the donor acts he knew there could be no afterborn children. We can not believe, unless a contrary intent clearly appears, that the donor ordinarily, in the use of language granting or devising property to his child and his child's children, intends that his child, having one child, shall first own one-half in fee, and then on the birth of another child own one-third in fee, and then one-fourth, and so on, until in his old age only he may finally come to know what land he really does own. We conclude, therefore, in the present case, that Joseph Hall was entitled only to a life estate in the lands in dispute, and his children born and to be born take a remainder in fee. Some time after the date of the deed referred to Joseph Hall became indebted to the Aultman & Taylor Machinery Co. for machinery in the sum of \$1,270, and he executed a mortgage on this land to secure the payment of the debt. After the debt became due the company brought an action to enforce its mortgage lien. The land was sold, and it became the purchaser. Some years afterward this company instituted an action under section 11 of the statutes, alleging that the children of Joseph Hall were claiming to be the owners of this land, or the remainder therein, and sought by the petition to quiet the title thereto, and in the action obtained a judgment to that effect.

In the month of July, 1904, the appellants, the children of Joseph Hall, their father being dead, instituted this action against the appellee, W. J. Hall, who is the grantee of the Aultman & Taylor Machine Co., alleging in substance that the judgment last referred to is void and was obtained by fraud, that those representing the interests of these appellants in that action included with the Aultman & Taylor Machine Co. and for a money consideration sold out their interest, abandoned their defense, and in effect agreed to a judgment which in effect deprived them of their interest in the land.

The appellee demurred to this petition, and the court sustained it upon the ground that the deed referred to passed to Joseph Hall, their father, the fee-simple title to the land, and this appeal is from this judgment. There is no appeal from the former judgment.

For the reasons indicated the judgment appealed from is reversed and the cause remanded for proceedings consistent with this opinion.

ILLINOIS CENTRAL R. R. CO. v. BUCHANAN.

(Filed June 15, 1905—Not to be reported.)

The Illinois Central R. R. Hospital Association is a corporation organized under chapter 82, sections 879, 880 and 881, Kentucky Statutes, "to give proper care and treatment to the sick and wounded employes of the Illinois Central R. R. Co. in a certain territory. All officers and employes of the Illinois Central R. R. Co. in said territory are members of said association, and are subject to monthly assessments to support same. While appellee was in the service of the Illinois Central R. R. Co. his knee cap was broken and he was sent to said hospital for treatment. He claims that while there under the care of the physicians and nurses he was unskillfully treated and has brought this suit against the Illinois Central R. R. Co. for damages. Held—

1. Hospital association—Separate corporation—Separate duties—Liability of Illinois Central R. R. Co. for unskillful treatment of employe—The mere fact that the board of directors of the hospital association are selected by reason of their connection with the Illinois Central R. R. Co. does not make them the agents or officers of the Illinois Central R. R. Co. in the performance of a duty for another and distinct corporation. The duties which they are required to perform are not such as are required in the execution of the purpose and objects of the organization of the appellant.

2. Contractual relations—There is no evidence that the Illinois Central R. R. Co. made any contract with the appellee that he should be "properly and skillfully treated by proper and skillful surgeons and attendants." The fact that the hospital association was organized for that purpose does not tend to prove that appellant made such a contract with appellee. The Illinois Central R. R. Co. is simply the agent that collects the funds for the benefit of the hospital association.

3. Liability of the Illinois Central R. R. Co.—The hospital association is a separate and distinct corporation from the Illinois Central R. R. Co., and the latter has no financial interest in the result of its management, and in no way is it liable for the conduct of its directors or the physicians or attendants at the hospital.

J. M. Dickinson, Trabue, Doolan & Cox and Gordon & Gordon & Cox for appellant.

C. J. Waddill and William Worthington for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Paynter.

While appellee was in the service of the Illinois Central R. R. Co. his knee cap was broken and he was sent to the Illinois Central Hospital for treatment. He claims that while under the care of the physicians and nurses of the hospital he was unskillfully and improperly treated and

thereby sustained damages, and this action was instituted to recover thereon a trial of which resulted in a verdict for him. The alleged right to recover of the Illinois Central R. R. is based upon the averment that it had entered upon a contract with him by which it undertook, in the event of his injury, "that he should be properly and skillfully treated by proper and skillful surgeons in attendance." The court by its instructions in substance submitted to the jury the issue made by a denial of the above averment.

The appellee had been in the employ of the Illinois Central R. R. Co. for more than four days, and, therefore, was entitled to be received by the Illinois Central Hospital Association at Paducah for treatment. The Illinois Central Railroad Hospital Association is a corporation organized under the general laws of this State. The articles of incorporation read as follows:

"That M. Gillens, W. J. Harahan, A. Philbrick, D. G. Murrell, John L. McGuire, John W. Whedon, have associated themselves pursuant to an act of the general assembly of the Commonwealth of Kentucky of March 22, 1892, which act is incorporated into chapter 32, sections 879, 880 and 881, Kentucky Statutes, to form a charitable corporation, from which no private pecuniary profit is to be derived, and have formed, and now form, such corporation, and adopt the following articles of incorporation:

"Article 1. The name of the corporation is Illinois Central Railroad Hospital Association. The hospital of said association is located at Paducah, Ky., and the principal office and place of business is at Paducah, Ky.

"Article 2. The object for which the corporation is formed is to give proper care and treatment to the sick and wounded employees of the Illinois Central R. R. Co. on the Louisville division, and that portion of the Memphis division extending from Paducah, Ky., to Memphis, Tenn., including Memphis, Tenn.,

"Article 3. The corporation shall have the right to sue and be sued, to contract and be contracted with, have and use a common seal and alter the same at pleasure, and receive and hold such property, real and personal, whether obtained by purchase, gift or devise as may be necessary to carry on or promote the objects of the corporation, and may sell or dispose of such property at pleasure, unless the property has been received as a gift or devise, for some special purpose, and if so received it shall be used and applied only for such purpose. The corporation may adopt such rules for its government and operation not inconsistent with law as the directors may deem proper, but it shall not be operated, managed or used for private gain, nor engaged in any plan or scheme of banking or insurance. The corporation, by the consent of two-thirds of the directors, may amend any part of the articles of incorporation by filing and recording the amendment in the office of the secretary of state and recording in the county clerk's office of McCracken county, Kentucky. The corporation, for the support of its hospital, shall have power to levy a monthly assessment upon the members of the corporation of such sums as shall be fixed by the by laws of the corporation, and to enforce the payment of such assessment in the manner provided by the laws of the corporation.

"Article 4. All officers and employees of the Illinois Central R. R. Co. on the Louisville division and that portion of the Memphis division extending from Paducah, Ky., to Memphis, Tenn., including Memphis, Tenn.,

be members of the corporation except persons of known disability or suffering from chronic disease.

"Article 5. The corporation shall be governed by a board of eleven directors, constituted as follows:

"M. Gilleas, the assistant general superintendent of southern lines of the Illinois Central R. R. Co., and his successor in office.

"D. G. Murrell, the assistant chief surgeon of the Illinois Central R. R. Co., located at Paducah, Ky., and his successor in office.

"W. J. Harahan, superintendent of the Louisville division of the Illinois Central R. R. Co., and his successor in office.

"A. Philbrick, the superintendent of the Memphis division of the Illinois Central R. R. Co., and his successor in office.

"H. R. Dill, the assistant superintendent of the Evansville district of the Illinois Central R. R. Co., and his successor in office.

"L. A. Downs, the roadmaster of the tenth division of the Illinois Central R. R. Co., and his successor in office.

"D. Sheahan, the roadmaster of the thirteenth division of the Illinois Central R. R. Co., and his successor in office.

"John McGuire, John W. Whedon and John Lane.

"The term of office of the first-named eight members of the board of directors shall be continuous. The term of office for the last named three of the board of directors shall be for one year, and until their successors shall be elected. The successors of the said three members shall be elected by the other eight members of the board on the second Friday in August, 1901, and annually thereafter, and shall be so selected as to represent as nearly as possible the employes of the transportation department of the mechanical department and of the road department, and such persons shall be selected from said departments as will best be able to attend all meetings of the board of directors. M. Gilleas shall be chairman of the board of directors, and shall be succeeded in the chairmanship of the board of directors by his successor in office, the assistant general superintendent of the southern lines of the Illinois Central R. R. Co. The regular meetings of the board of directors shall be held quarterly, on the second Friday in February, May, August and November of each year, and the meeting held in August shall be the annual meeting of the board of directors. All the corporate powers of the corporation shall be vested in the board of directors. The board of directors shall elect all officers except chairman of the board, and shall fix the term of office of the officers of the hospital at one year, with power to remove such officers for cause, which shall be stated in writing and acted upon by a majority of the members constituting the board. The by-laws shall provide for the government of the hospital, for proper committees of the board and for such officers as the board of directors may deem proper for conducting the business of the corporation. The principal officer of the corporation shall be the chairman of the board of directors.

"Article 6. The corporation shall begin its existence when these articles have been filed in the office of the secretary of state of Kentucky and recorded in the office of the county clerk of McCracken county, Kentucky, and shall continue for fifty years from that date."

These articles of incorporation were signed by the persons designated as

directors therein and were duly acknowledged and recorded, and the corporation was thus regularly formed. It is contended that the directors are officers and agents of the Illinois Central R. R. Co., and, therefore, the Illinois Central R. R. Co. is liable for the misconduct or unskillful act of the physicians and nurses in charge of the institute. It will be observed by article 4 that all officers and employes of the Illinois Central R. R. Co. are members of the corporation, with certain exceptions.

By article 8 the hospital corporation, for its support, shall have power to levy upon its members such sums as shall be fixed by the by-laws of the corporation, and enforce their payment as provided by the by-laws. Under the by-laws of the corporation those entering the service of the Illinois Central R. R. Co., who work more than four days, are entitled to the benefit of the hospital. Under the by-laws the members of the association who receive \$40 per month and under are required to pay 40 cents monthly, and the amounts to be paid by other employes are governed by the salary or compensation received by them. Members of the association are entitled to free medical and surgical attendance, medicine, board and nursing at the hospital while disabled, whether from sickness or injury, unless the disability arises from certain diseases. Sums which the members of the association are required to pay are collected by the Illinois Central R. R. Co. to pay the expenses of the hospital, and it goes into the hands of the treasurer of the hospital association, who is also the treasurer of the Illinois Central R. R. Co. There is no evidence that the Illinois Central R. R. Co. retains or gets the benefit of a cent of the money or enjoys any profit by the operation of the hospital. Under the articles of incorporation the appellant does not even retain control of the funds which it gathers for the association, for they go to the treasurer of the hospital association.

The parties who are designated as directors are not made so as the officers of the Illinois Central R. R. Co., but they are selected by the hospital association by reason of the fact that they hold such positions with the Illinois Central R. R. Co. The evident purpose is to make it easy to keep a full board of directors of the hospital, and that that board shall be composed of persons who are entitled to the benefits of it and who are interested in its success. The mere fact that the board of directors are selected by the hospital association by reason of the fact of their connection with the Illinois Central R. R. Co. does not make them the agents or officers of the Illinois Central R. R. Co. in the performance of a duty for another and distinct corporation. The duties which they are required to perform are not such as are required in the execution of the purposes and objects of the organization of the appellant.

There is no evidence showing that the Illinois Central R. R. Co. made any contract with the appellee that he should be "properly and skillfully treated by proper and skillful surgeons and attendants." The fact that the hospital association was organized for that purpose does not tend to prove that the appellant made such a contract with the appellee. There is an implied contract between the employe who becomes a member of the association and the Illinois Central R. R. Co. that the latter will pay over the money which it retains out of his earnings to the treasurer of the hospital association for its benefit. The Illinois Central R. R. Co. is simply the

agent that gathers the funds for the benefit of the hospital association, consequently for the benefit of its members. So the proposition is presented that because the Illinois Central R. R. Co. simply acts as the agent in the gathering of the funds from its employes for the hospital purposes, that it thereby made a contract to be responsible for the conduct of those in control of the hospital, a separate and distinct corporation. If the Illinois Central R. R. Co. was the real party in interest, and was simply using the hospital association for its financial profit, then the court might consider whether or not it was a case where it should look at the substance and not the shadow of things in determining its liability. But this question has not arisen because of the facts we have detailed.

Doubtless the Illinois Central R. R. Co. was indirectly benefited by its employes having proper and humane treatment at the hospital prepared for them, but that incidental benefit can not raise the question suggested or make it liable for the act of servant or agent of an independent corporation.

Our conclusion is that the hospital corporation is a separate and distinct corporation from the Illinois Central R. R., and that the latter has no financial interest in the result of its management, and in no way is it liable for the conduct of its directors or the physicians or the attendants at the hospital. The appellee is a member of the hospital association and those in charge of it in part serve him and his interest, and he contributes to help pay the expenses of those performing that service and for the care and treatment of his associate employes. A peremptory instruction should have been given to the jury to find for the appellant.

We have not seen proper to discuss the question as to the liability of the Illinois Central R. R. Co. for plaintiff's injury had it owned or controlled the hospital, nor the liability of the hospital association for the alleged unskillful acts of the surgeons and attendants in charge of it, because from the conclusions we have reached these questions do not arise and had best be discussed when a case involving them is brought to the consideration of the court.

The judgment is reversed for proceedings consistent with this opinion.
Judge Nunn dissenting.

WHITNEY v. WHITNEY, &c. (158.)

SAME v. WHITNEY (169).

(Filed June 17, 1905—Not to be reported.)

1. Partnerships—Settlement—Rights of parties—Where two men form a partnership as insurance agents, one quite young and inexperienced and the other older and a well-known active business man, with an established insurance business, the fact that the older man was elected city assessor at a salary of \$2,400 a year, which was beneficial to the firm in procuring business, and by reason of his duties as assessor the younger partner was required to do most of the office work, would not justify the court, in a settlement of the partnership, to allow the younger partner a salary in addition to his half of the profits of the firm.

2. Same—Where in the business of the partnership an option was taken by

one of the partners in the name of the firm on the sale of which a profit was made, such profit was properly adjudged to belong to the firm.

8. Same—In a settlement of a partnership business one-half of the attorneys' fees paid out by either partner in the firm business should be charged to the other partner, also any other expense necessarily paid out by either in the firm business should be paid by the firm, and one-half of any dividends collected by either on stock owned by the firm should be accounted for to the other member of the firm.

B. F. Graziani and Greene & VanWinkle for appellants.

Wm. A. Byrne for appellees.

Appeals from Kenton Circuit Court.

Opinions of the court by Judge Settle.

Appellant is a nephew of appellee. In 1884 they became equal partners in the insurance business, and this partnership continued until March, 1902, and was then dissolved by act of the partners. Following the dissolution each partner brought suit against the other for a settlement of the partnership business and affairs. The two actions, in effect the same, progressed as one. Before a settlement of the partnership was effected by the commissioner, to whom the two causes were referred for that purpose, the chancellor entered a judgment directing the sale of the book of expirations owned by the firm, which contained entries showing the names of the persons holding policies issued by the insurance companies formerly represented by appellant and appellee as agents, and when such policies would expire. The chancellor soon thereafter entered a second judgment for a sale of all the partnership property and effects of the firm, except the book of expirations.

An appeal was taken from the first judgment by appellee and from the second by appellant. This court reversed the first and affirmed the second judgment.

Upon the return of the cases to the court below appellant moved the chancellor for an order of sale of the book of expirations with the other property and effects of the firm directed by the second judgment (affirmed by this court) to be sold. His motion was overruled and from the judgment overruling same appellant prayed and was granted an appeal, and he thereafter executed an appeal bond. Later the appeal thus granted by the lower court was by order set aside over appellant's objection. But appellant thereafter renewed his motion for a sale of the book of expirations with the other property and effects of the firm, which was again overruled, and to this judgment overruling his motion for an order for the sale of the book of expirations with the property of the firm he excepted.

In the meantime the commissioner sold all the property and effects of the firm, except the book of expirations, under the second judgment after its affirmance by this court, and also made and reported to the court a settlement of the partnership. Appellant excepted to the report of sale and both he and appellee excepted to the settlement, but the exceptions were all overruled and both reports confirmed by the chancellor, and from the judgments confirming the sale and settlement appellant also prayed and was granted an appeal.

We deem it unnecessary to decide whether or not the chancellor was in

error in setting aside so much of the first judgment as granted appellant an appeal, though we think his motion for an order directing the sale of the book of expirations with the other property and effects of the firm should have been sustained, as it could have been sold to much better advantage with the other property than alone, and, besides, under the opinion and mandate of this court it could not properly be sold alone. But we do not think the refusal to order the sale of the book of expirations with the other property of the firm, or the setting aside of the order granting appellant an appeal therefrom, will now authorize this court to direct the setting aside the sale. Besides, all questions that might have arisen on that appeal can now be raised on the exceptions to an appeal from the judgment confirming the sale of the other property. We do not think the chancellor erred, however, in overruling the exceptions to the report of sale, notwithstanding his error in refusing to sell the book of expirations with the other property sold. The purchaser at the sale did not claim to have been prejudiced by that error of the court, and in all probability the book of expirations at the time of the sale had become practically valueless from the lapse of time and the expiration in large part of the policies, the dates of which appear therein. The book of expirations should yet be sold by order of the court.

Appellant complains that the commissioners' report of settlement and the judgment rendered thereon should have allowed him, in addition to his share of the profits of the partnership business, compensation or salary as manager of the business during the existence of the partnership, which compensation he insists should be at least \$100 per month. It is contended by appellant that he had, during the existence of the partnership, the active management of the business of the firm, and was faithful and efficient in the conduct thereof, whereas appellee during the whole of the partnership, except the last two years, was assessor of the city of Covington at a salary of \$2,400 a year, and by reason thereof had no time to devote to the business of the firm, and did not in fact do so. It, however, appears that when taken into the firm by appellee as a partner appellant was quite young and inexperienced and out of employment. Upon the other hand, appellee at that time was a well-known and active business man, with an established insurance business, and his position as assessor of Covington gave him a wide acquaintance with the people of that city having property to insure, and it appears from the evidence that he used his official position to good effect in obtaining business for the firm. Though but little of his time was spent in the office, and the clerical and other active work of the firm was done by appellant, there can be no question but that appellee, by reason of his older business head and experience as the senior member of the firm, his official position and personal popularity, was at all times during the continuation of the partnership a potent factor in maintaining its financial standing and bringing to it business and patronage.

The mere fact that appellant did the greater part of the clerical and other work of the firm, and had the active management of its business, would not have justified the court in allowing him a salary. It is a well-recognized rule of law in respect to partnerships that partners are not entitled to charge each other, or the firm of which they are members, for their services in the firm business unless there is a special agreement to that effect, or

such agreement can be readily implied from the course of business between the partners. The evidence in this case does not show such an agreement between the partners, nor does it, in our opinion, raise the implication that such an understanding existed between them, therefore, the chancellor did not err in refusing appellant the additional compensation asked. It is also insisted for appellant that the commissioner and court erred in allowing appellee one-half the profit of \$1,100. made on the Stem property. An option was taken on this property by appellant in the name of the firm and sold to Overman & Scroder Cordage Co. at the profit named. We think the evidence shows that while this transaction was in the main conducted by appellant it was done in the firm name and for the firm. And the suit which was brought against Stern to recover the profit realized on the transaction was in the name of the firm. If no recovery had resulted appellee would have been equally liable with appellant for the attorneys' fees and other costs incident to the action. It was not error, therefore, to allow appellee one-half of the profit on the Stem property.

There are, however, at least three errors in the report of settlement and judgment: First, they fail to charge appellee with half the attorney's fee and costs expended by appellant in the suit against Stern; second, they fail to charge the firm with certain expense moneys necessarily paid out by appellant from year to year during the partnership in the conduct of the firm's business. Appellant should have credit by such of these expenditures as the evidence may show were made by him for the firm. Third, appellant should have been allowed one-half of the dividends collected by appellee on four shares of stock in the Covington Coal Co., which had never been charged to appellee on the books of the firm. We think the evidence shows that this stock was the property of the firm, though transferred to and held by appellee alone to enable him to become a director in the coal company.

Because of the errors indicated the judgment confirming the report of settlement is reversed and cause remanded for further proceedings consistent with the opinion.

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No. 15

COURT OF APPEALS OF KENTUCKY.

SUPREME LODGE KNIGHTS OF PYTHIAS v. HUNZIKER, &c.

(Filed June 17, 1905.)

1. Life insurance—Co-operative societies—"Suicide"—Subsequent by-laws—Agreement concerning—Statutes—Where in an original certificate of insurance there was no provision concerning suicide, but the application contained a provision by which the applicant agreed to be controlled by all the rules and regulations of the order then in force, or that might thereafter be enacted, where a by-law was subsequently adopted by the company, under the provisions of section 879 of Kentucky Statutes, requiring all contracts pertaining to such policies and all by-laws, rules and regulations, or copy thereof, to be attached to the policy or it shall not be considered as a part thereof, while it did not affect the previous contract in so far as its obligations had been fixed, we see no reason why the statute, although passed since the original contract was made, should not apply to alterations or changes of such contracts.

2. Alterations—New contract—Impairing obligations—Such alterations are in a sense new contracts, although it had been previously provided that they might be entered into. When the new matter became attached to the original contract as an obligation of the parties, a police regulation of the State required certain prerequisite formalities before it became their act. This did not impair the obligation of the old contract, but dealt alone with the attempt to alter that contract. Such new matter could not have been added at all, as was done, except for the provisions in the old certificate that let it in. That provision gave to the insurer the right to alter the terms or conditions of the original agreements of the parties at any time in the future by the adoption of a new rule or regulation of the society affecting it. The new law, leaving the old contract precisely as it was found, laid hold of the parties and said in effect, when you make alterations of this contract, as you may do, by the adoption of by-laws or rules, the sovereign power of the State requires that a copy of such by-laws shall be endorsed on or attached to the certificate or policy of insurance. But it will not do to tender such copy years after it should have been done and after the liability of the insurer has been completed under the original contract.

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8. Pleading—Foreign contract—Right of State courts—A pleading, that the contract was an Illinois contract, made and to be performed in that State, and that the statute of this State could have no extra-territorial force there, was properly rejected. The statute applies to persons insured in this State by companies doing business in this State. It had no right to come in this State to do an insurance business except upon such terms as this State might impose.

4. Federal corporation—Subject to State laws—The fact that appellant is a "Federal corporation," having been organized in the District of Columbia, under an act of congress, is no defense. No matter where created, by its presence in Kentucky as an insurance corporation its contracts are to be construed and enforced by the courts of Kentucky when it is sued in our courts.

B. T. Davis, Carlos A. Hardy, Robert L. Greene and Hazelrigg & Hazelrigg for appellant.

Robbins & Thomas for appellees.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge O'Rear.

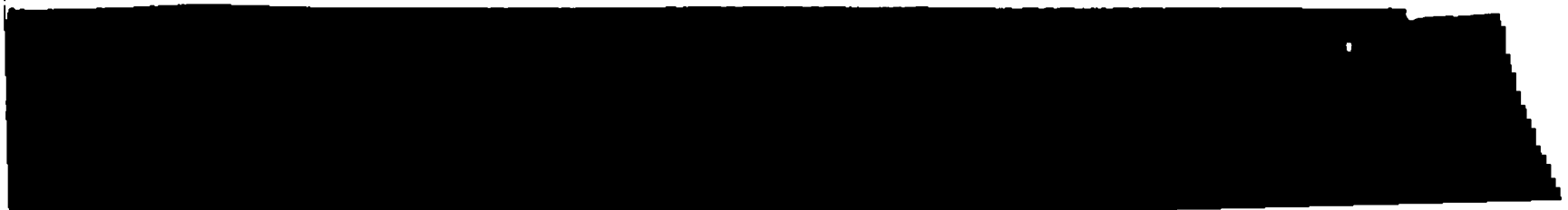
The nature of this case is fully shown by the opinion delivered on the former appeal (25 Ky. Law Rep., 1510). The question there decided was as to the effect of a by-law adopted by appellant, a fraternal benevolent society, upon a benefit certificate, a form of life insurance, issued to one of its members, Gustave Hunziker, December 27, 1888. In the original certificate there was no provision concerning self-inflicted death. The by-law adopted September, 1896, provided that if death of a member of the fourth class (to which Gustave Hunziker belonged), whether admitted before or after that date, was the result of suicide, whether such member was sane or insane, the supreme lodge would pay only a certain part of the sum written in the certificate. The original application made in 1888 contained a provision by which the applicant agreed to be controlled by all the rules and regulations of the order governing that rank then in force, or that might thereafter be enacted. The court held that as section 679, Kentucky Statutes, enacted in 1893, was in force when the by-law was adopted, the latter, being in addition to the terms of the contract made after the enactment of the statute, was subject to the terms of the statute, which provided that by-laws of such societies were not to be deemed part of certificates of insurance unless such by-laws were printed upon or attached to the certificate. The point is made here that the enforcement of the statute as to contracts then in existence was not contemplated by the statute, and, besides, would be an impairment of the obligation of the contract, a repugnance to the Constitution of the United States. The same point seems to have been urged on the former appeal, which was disposed of by the court upon the conclusion that the statute applied as affecting only the remedy, and would not, therefore, be within the vice contemplated by the section of the Federal Constitution invoked. It was further remarked: "Counsel for appellee (appellant now) contends that the statute, because of the words 'all policies hereafter issued,' etc., has no application to a policy (certificate) that like the one on the life of Gustave Hunziker was issued before its enactment. That question is not now before us for adjudication."

From the foregoing quotation appellant now argues that the question presented on this appeal was expressly reserved and not decided. But counsel are mistaken in this construction of that portion of the opinion which is set out above. The court was then speaking alone of those cases where the by-laws had been passed, as well as where the certificate had been issued, before the enactment of the statute. This is made clear by the next sentence following the quoted language, which is: "We have only decided that the statute does apply to the by-laws relied on by appellee as it was adopted after the enactment of the statute, and its purpose and effect was to materially alter the original contract of insurance, for which reason it was required by the provision of the statute to be attached to the original contract, or certificate."

The former opinion is, therefore, the law of this case, though we should have felt ourselves unable to longer adhere to the principle in its application to other cases. But as the original opinion was selected by the court for official publication as declaratory of the law for all similar cases, and as it is so earnestly urged that the effect of the statute, if applied to pre-existing contracts, is to impair their validity, we have re-examined the question.

It is true that the statute itself excludes prior contracts from its operation. This meant completed contracts. There could have been no other purpose on the part of the legislature to exclude prior contract of insurance than to respect their obligation as it then was. The mischief aimed at by the statute was to prevent fraud and oppression being practiced upon insured persons, for, although the insurer might be a co-operative concern, it was recognized that its governing body, whether representative or not, might overreach his understanding, and unjustly impose on him by secret regulations or by-laws made part of the contract by reference only. This pernicious practice had obtained to some extent. The idea was to curb it; to make it impossible in future. The provision in the old policy, that it should be subject to by laws then in force, or that might thereafter be adopted, left the contract open for amendment in the future. How it was to be amended, further than it was to a "rule or regulation" of the society, was not stated. Now the State, after that kind of open contract was made, has, by the statute alluded to, required, in effect and intent that all future engagements of insurance of this class should conform to a prescribed procedure, or else they should be void. It did not affect any previous contract, in so far as its obligation had been fixed. But we see no reason why the statute should not apply to alterations or changes of such contracts. Such alterations are in a sense new contracts, although it had been previously provided that they might be entered into. The new matter was never before an obligation. When it became to be attached to the original contract as an obligation of the parties a police regulation of the State required certain pre-requisite formalities before it became their act. This did not impair the obligation of the old contract, but dealt alone with the attempt to alter that contract.

The new matter could not have been added at all as was done, except for the provision of the old certificate that let it in. That provision gave the right to the insurer to alter the terms or conditions of the original agreement of the parties, at any time in the future, by the adoption of a new rule



did not. The right to alter or amend by-laws and rules, or to adopt new ones, is untouched by the statute, hence it can not be said that it was impaired. The new law, leaving the old contract precisely as it was found, laid hold of the parties and said, in effect, when you make alterations of this contract, as you may do, by the adoption of by-laws or rules, the sovereign power of this State, in the exercise of its duty to prevent oppression and fraud in insurance effected in this State, requires that a copy of such by-laws shall be endorsed on or attached to the certificate or policy of insurance.

It is pointed out in argument that as there is no provision in the statute for serving upon a policy holder a copy of the after-enacted by-laws, and as he might refuse to surrender his policy or certificate that such copy might be attached or endorsed upon it, or such policy holder might be abroad and inaccessible to either notice or contact, it could not have been contemplated that after the delivery of such policy or certificate the statute would apply, hence it is reasoned the statute has not covered the case of policies issued before its enactment and made subject to by-laws adopted afterwards. The statute makes no provision, it is true, for serving a copy of such amended or new by-law upon a policy holder to whom a policy had been delivered. But this omission applies as well to new as to old policies, to those issued afterwards as well as to those issued before the statute was passed. Either one of two courses must be deemed to have been contemplated by the legislature in that event, either that such new by-laws could not be adopted, or that a service of a copy, by offering to deliver and attach it to the policy, would suffice. As the former would tend to cripple the power of such societies to improve their conditions by prudent amendments to their by-laws, as well as beget a variety of liabilities in the same class of contracts and among its members having equal rights in its assets and equally liable to its assessments, it must be rejected, because it would be at war with the whole scheme of mutual cooperative life insurance, which is recognized by the statute as a legitimate business. On the other hand, as the view just discussed is rejected, it must be that an offer to do what one is bound to do, if tendered in season and the offer is maintained, will always be accepted as a compliance with that part of the obligation. It will not do, though, to make the tender years after it should have been done, and as in this case after the liability of the insurer had been completed under the original contract.

A pleading filed upon the return of the case, in addition to the matter just discussed, pleaded that the contract was an Illinois contract, made and to be performed in that State, and that the statute of this State could have no extra-territorial force there. The statute applies to persons insured in this State by companies doing business in this State. Appellant does not deny that it is, and then was, doing business in this State. It had no right to come into the State to do an insurance business, nor to stay here, except upon such terms as this State might impose. Appellant can not ply its business here as an insurance society without making its contracts of insurance with citizens of this State, to be effective in this State, wherever entered into, subject to the statute of Kentucky regulating the form and

enforcement of such contracts, when they come to be enforced in the courts of this State.

Another matter pleaded is, that the appellant is a "Federal corporation," having been organized in the District of Columbia under an act of congress. Just what effect that plea was intended to have in the case is not made clear. There was no motion to transfer the case to the United States Circuit Court. But whether created under an act of congress, or of any State, appellant's presence in Kentucky as an insurance corporation is subject alone to the will of Kentucky, and its contracts are to be construed and enforced by the courts of Kentucky, when it is sued in our courts, according to their understanding of the law and merits of the case, whatever be its domicil. We conclude that the demurrer to the rejoinder of appellant was properly sustained.

Judgment affirmed.

CARNES v. COMMONWEALTH.

(Filed June 17, 1905—Not to be reported.)

1. Homicide—Self defense—Instructions—On the trial of appellant, who was jointly indicted with another for murder, where there was no evidence that the accused sought or provoked the difficulty, it was error in the court, after giving the usual and proper instructions as to murder, manslaughter and self-defense and defense of another, to add to the self-defense instruction: "Unless you shall further believe from the evidence, beyond a reasonable doubt, that the defendant, Pal Carnes, first willfully and feloniously assaulted the deceased with a deadly weapon, a pistol, and in so doing thereby made the harm or danger, if any there was, towards him or his codefendant necessary or excusable on the part of deceased and those acting with him, if any, in which event you can not excuse the defendant upon the ground of self-defense or apparent necessity." As the evidence conduced to show that appellant fired first the jury probably understood that the court meant by this instruction that if accused fired first, it was the assaulting referred to by the court in the instruction quoted, and that, therefore, the accused was deprived of the right of self-defense. The court should have omitted the qualification in the instruction named.

2. Improper questions—The court erred in permitting the attorney for the Commonwealth to repeatedly ask the appellant, against his objection, why he did not leave the store and go home when he found deceased there. As the court overruled the appellant's objection, it may have led the jury to believe that the court was of the opinion that appellant, by going home, could have avoided the difficulty, and the jury may have been impressed with the idea that it was the legal duty of the appellant to have done so.

B. B. Golden, James D. Black and Pitzer D. Black for appellant.

N. B. Hays and Chas. H. Morris for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Nunn.

The appellant and one James Gray were jointly indicted for the murder of one John Mills. Appellant was tried at the December term, 1904, of the Knox Circuit Court, and was convicted of voluntary manslaughter, and his punishment fixed at eight years in the penitentiary.

Appellant asks a reversal for several reasons, but we do not deem it necessary to notice but two of them. One is that the court erred in limiting or qualifying the instruction on self-defense, the other is that the court erred in allowing the Commonwealth attorney to ask of the accused, when on the stand as a witness, certain questions over the objection of his counsel.

To arrive at a proper understanding of the questions involved it is necessary to state in substance the facts, as they appear in the record, leading up to the moment of the killing.

The homicide occurred on May 28, 1904, in the store room of one H. C. Mills, on Straight creek, in Knox county. A few weeks previous to that date there was an election of a Republican committeeman for that precinct, at which appellant and his codefendant and many others were present. One Hubart Mills, a relative of the deceased, and another young man engaged in a scuffle bordering on a fight, when appellant's codefendant, James Gray, attempted to separate the belligerents, when Mills turned upon him with a knife, struck at him, and knocked his hat off. Appellant and others interceded and quelled the trouble. The deceased was not present. But it appears that erroneous reports of that difficulty reached him, which incensed him. He uttered repeated threats against the defendants, some of which were communicated to them, at least they were informed that deceased threatened their life.

On the day of the killing deceased and his cousin, Clark Mills, who it appears was a stranger in that vicinity, left the former's home and went to Flat Lick, where they procured some whisky and became intoxicated. They purchased a supply of cartridges for their pistols and shot gun and started up the creek to H. C. Mills' store. On the way they met several persons, from whom they made inquiries for the defendants, stating in substance that if they found them they would kill them. Arriving at the store, deceased entered it with the shotgun held in position to fire, with head erect, and appearing to be closely scanning the faces of all present in the store. The two Mills then called for, and were furnished, oysters, which they ate at the back end of the storeroom. Soon after this appellant and James Gray entered the store and took seats upon the counter. Deceased approached to where they were and also took a seat on the counter between them. In some manner Mills caused a keg or something to come in contact with Gray's foot. Gray remarked that he had a corn on his foot which gave him much pain, to which deceased made answer: "By G—, let me shoot it off." Gray replied that that would make it hurt worse. Appellant at this juncture left the storehouse through the back door, going to a well nearby and procuring some water. Deceased and Clark Mills also went out, and approaching the well, deceased, according to the statements of the defendants, said to them with an oath: "When you want to knock anybody's hat off, knock off the hat of some one who can fight and kill you." At the time of this remark he had his pistol drawn. Gray answered that he did not wish any trouble, and that he (deceased) was mistaken about his having knocked off the hat of Hubart Mills; that it was his own hat that had been knocked off, and, turning to appellant, said: "Let us get Mills' (the merchant's) razor and shave." Gray and appellant immediately returned to the store, and after being handed the razor, deceased remarked "give

them a forty-five and let them shave themselves with it." To this the merchant replied: "They can't shave with that," when deceased retorted "I can shave them with my 32 special." Defendants, without replying, repaired to the merchant's dwelling house, distance some fifteen or twenty feet from the storehouse. After shaving, which occupied them some twenty or thirty minutes, they returned to the store. In the meantime the two Mills had remained in the store, and it appears that deceased had informed the merchant's wife of what he had said to defendants at the well, in substance what they stated occurred. The merchant's wife, anticipating trouble, requested a person about ready to leave the store to induce the deceased to leave with him, which he declined to do, giving as a reason that he had not finished trading. He had bought several articles when the defendants returned to the store. Appellant began to make his purchases, taking a seat on the counter situated on the right of the door, entering from the front, while Gray was seated on the opposite side. Clark Mills appears to have been standing near the front door and between the counters, with the shotgun, which some of the witnesses state he held in shooting position, while others testified that he held it with the muzzle pointed downward. At this moment deceased received a sack from the merchant, and with it started toward the front door, but stopped at Gray, slapped him on the thigh, and remarked: "By G—, when you slap a person's hat off slap one who can fight," and immediately turned his left side to appellant, looking him squarely in the face, and, according to appellant's witnesses, undertook, with his right hand, to draw his pistol from a holster. At that moment appellant fired the fatal shot. The proof shows that instantly after appellant fired and shot John Mills, Clark Mills fired at appellant with his shotgun, without effect. Then Clark Mills turned his gun upon James Gray, but at the first effort the gun missed fire and snapped. Appellant and Gray both then opened fire upon Clark Mills, who, however, during the firing, succeeded in discharging a shot at Gray, which also went wild. John Mills, after receiving the wound, started toward the front door, where he fell, just outside the storeroom. When his body was turned over, he having fallen on his face, a "32 special" was found in a holster, with most of the handle exposed. It appears also from the evidence that just at the time John Mills slapped Gray, as related, the merchant's wife approached him and said: "John, brother, do not raise anything here." He did not appear to notice her. At this moment she also noticed appellant get upon the counter, drawing his pistol. She immediately stepped toward appellant and asked him not to shoot, but he fired with the result stated.

There is some conflict in the evidence as to whether deceased attempted to draw his pistol when he was shot. The evidence also shows that deceased bore the reputation of being a dangerous, violent man, while appellant was shown to be a quiet, peaceable citizen. The Commonwealth made no attempt to contradict this testimony, but sought to weaken or destroy its force by impeaching, or attempting to impeach, the character of most of the witnesses who testified upon that point.

The Commonwealth introduced no evidence tending to prove that appellant ever at any time threatened deceased, or used an unkind word to or concerning him. The only effort he ever made to harm deceased, it appears, was when he fired the fatal shot.

Upon these facts the court gave the usual and proper instructions on murder, voluntary manslaughter and self-defense and defense of another, save that he added the following to the self-defense instruction: * * * "Unless you shall further believe from the evidence, beyond a reasonable doubt, that the defendant, Pal Carnes, first willfully and feloniously assaulted the deceased, John Mills, with a deadly weapon, a pistol, and in so doing thereby made the harm or danger, if any there was, towards him or his codefendant, James Gray, necessary or excusable on the part of the said John Mills, and those acting with him, if any, in which event you can not excuse the defendant upon the ground of self-defense or apparent necessity."

We are of the opinion that this limitation was prejudicial to the substantial rights of appellant. As the evidence conduced to show that appellant fired first, the jury probably understood that the court meant by this instruction that if the accused fired first, it was the assaulting referred to by the court in the instruction quoted, and that, therefore, accused was deprived of the right of self defense. In other words, as the accused fired first he could not be excused on the ground of self-defense.

In the case of Commonwealth v. Hoskins, 18 Ky. Law Rep., 60, the court said: "The accused ought not to be deprived of the benefit of his plea unless the evidence established beyond reasonable doubt that he sought and provoked the difficulty with the accused, in which the killing occurred, and was throughout the aggressor therein, with the felonious intention and purpose to make the difficulty an occasion of taking the life or of seriously injuring the deceased."

There was no evidence that the accused sought or provoked the difficulty unless their going to the store armed with pistols was evidence of that fact.

They had worked at a sawmill that day until 3 o'clock p. m., at which time they went to their homes for a change of clothing, afterward going to the store named above to purchase supplies for their families. They both stated that they carried their pistols to protect themselves from the deceased and the father of Hubart Mills, who had also threatened to kill them; that they did not know that they, or either of them, would be at the store, but thought it probable they would be. It might be best for peace and the good of society for a person whose life had been threatened to remain at home and abstain from transacting business, and give the dangerous, lawless element possession of the highways and places of business. The law does not require this, but gives equal rights to all at such places. We are of opinion that the court should have omitted the above quoted qualification in the instruction alluded to, and should do so on another trial, if the evidence is substantially the same.

The court permitted the attorney for the Commonwealth, over the objections of appellant's counsel, to ask appellant several times why he did not leave the store and go home when he found the deceased there, and asked him why he did not remain in the dwelling house, and why he did not go home from there instead of going back to the storehouse. Appellant's answer to each of these questions was in substance that they had come there to purchase supplies, and desired to do so before leaving. While these questions and answers possibly did not materially prejudice the substantial rights of the appellant, yet the jury may have believed, as the court over-

ruled the objections to these questions, that the court was of the opinion that appellant, by going home, could have avoided the difficulty, and the jury may have been impressed with the idea that it was the legal duty of appellant to have done so. While we would not reverse on that ground alone, yet on another trial of the case the court should not permit such a course of examination.

Wherefore, the judgment is reversed and cause remanded for proceedings not inconsistent herewith.

CITY OF DAYTON v. HIRTH.

(Filed June 17, 1905.)

1. Action—When commenced—Failure to verify petition—Where a petition for personal injuries was filed against the city by one who was injured by falling into a hole in the sidewalk and a summons was issued thereon and served, the action was begun, although the petition was not verified until after twelve months from the date of receiving the injury.

2. Delay in prosecution—Filing away petition—Redocketing—Discretion of court—The fact that a petition had been filed without verification on which summons was duly issued, remained on the docket about three years after it was filed and then was filed away, it was in the discretion of the court to redocket the case on motion of the plaintiff, and to allow an amended petition to be filed, and this court will not disturb the action of the lower court in matters of discretion unless it be made clearly to appear that it abused that discretion. The plea of the twelve months' statute of limitations to such petition was properly overruled.

3. Personal injuries—Negligence of city—Excessive verdict—Where it is shown by the evidence that a pedestrian in passing along on a sidewalk of a street of a city was severely injured by falling into a hole on the sidewalk six feet deep, of which she was not aware and which was known to the city officials or by the exercise of ordinary care could have been known by them in time to have repaired it before the accident, considering the nature and permanency of the injuries a verdict for \$3,550 was not excessive.

C. J. Van Fleet for appellant.

Lucius Desha and Arthur C. Hall for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Nunn.

On August 23, 1900, the appellee was severely injured by falling into a hole, about six feet deep, in the sidewalk, on one of the streets of appellant city. She instituted her action for damages on April 17, 1901; the summons was issued on her petition on that day, and served two days thereafter. No steps were taken in the case until the 23d day of July, 1904, and on that day the court made an order filing the case away. Within less than a month, and on the 20th of February, 1904, it made an order redocketing the case, to which order the appellant objected and excepted, and at that term of the court the appellee filed an amended petition and the appellant filed its answer traversing all the allegations of the petition and amended petition, pleaded contributory negligence on the part of appellee, and pleaded the one-year statute of limitations in bar of her action. The issues were com-

The appellant filed the following grounds for a new trial: First, the damages were excessive and appeared to have been given under the influence of passion and prejudice, second, the verdict was not sustained by sufficient evidence and was contrary to law; third, that it had discovered evidence material to its defense, and which it could not have, with reasonable diligence, discovered and produced at the trial.

We will consider the first two grounds together. We deem it unnecessary to detail the evidence produced upon the trial, but it showed that this hole in the sidewalk did exist to the depth stated, and that appellee, in passing along this walk after dark and not being aware of it, stepped into it. The proof showed that appellant's officials knew, or by the exercise of ordinary care could have known, of the existence of it for a sufficient length of time prior to her injury to have repaired it. Considering the character, nature, extent and permanency of the injuries received, as proven by herself and the physicians who treated and examined her, the amount of recovery is not excessive.

The appellant filed the affidavits of two newly-discovered witnesses with reference to what they knew about the case. Their evidence, if admitted, was of not much importance and merely cumulative. It failed to file the affidavit of the only other new witness or give any reasonable excuse for its failure to do so. (*Bright v. Wilson's Adm'r*, 7 B. M., 123.)

Appellant contends that its plea of the statute of limitations was a complete bar to appellee's cause of action, and should have been sustained for the reason that appellee did not, in the sense of the statute, institute her action until she verified her petition in March, 1904, at the time she filed her amended petition. It refers to the case of *Park v. McKeynolds*, 23 Ky. Law Rep., 298, as sustaining this position. In that case the court was considering the question as to whether or not the pleading had been made up a sufficient length of time to authorize the court to try the case at that time, and in discussing the question the court used language which seems to sustain appellant's position. But in the same connection the court, in speaking of the filing of a reply, used this language. "Or if it be considered filed at all, it can not be taken as a complete pleading until it is verified or the verification waived by some act of the adverse party." It is provided by section 2624 of the statute that an action shall be deemed to have been commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction of the cause of action. By section 39 of the Code it is provided an action is commenced by filing in the office of the clerk of the proper court, a petition stating the plaintiff's cause of action and by causing a summons to be issued thereon. This section does not refer to the verification of the petition. It would seem that the verification is not a prerequisite to constitute it a petition; it would merely be defective, but this could be made perfect at any time by the plaintiff, or by motion and rule at the instance of the opposite party.

Objection to a pleading for want of verification should be made by rule requiring party to verify, and upon his failure to do so the pleading should be stricken from the record, but not until a rule to verify has been awarded and time given. (*Wheeler v. Wales*, 3 Bush, 225; *Baxter v. Knox*, 17 Ky.

Law Rep., 489; Payne v. Trigg, 19 Ky. Law Rep., 801.) The Park McReynold case, 23 Ky. Law Rep., 896, is overruled so far as it conflicts with this opinion. Appellee's action was begun within the twelve months after she received her injury, and, in our opinion, she had an action pending from the date of the filing of her petition, and the issuing of the summons thereon, although she did not verify it until after the twelve months had expired from the date of receiving her injury. It was within the discretion of the court to redocket appellee's action, and this court will not disturb the action of the lower court in matters of discretion unless it be made clearly to appear that it abused that discretion, and there being nothing in the record showing that fact, it is to be presumed that the lower court acted properly in the matter.

Perceiving no error in the record prejudicial to the substantial rights of appellant the judgment of the lower court is affirmed.

McMAKIN v. McMAKIN.

(Filed June 17, 1905—Not to be reported.)

1. Divorce and alimony—In an action by the wife against her husband for divorce and alimony on the ground of cruel and inhuman treatment and such injury, and attempted injury, as indicates an outrageous temper in him and probable danger to her life, evidence considered and held that the plaintiff has failed to sustain the charges in the petition; that as she did not have sufficient grounds for leaving her husband, and that she abandoned and remained away from him without his fault, and is, therefore, not entitled to divorce or alimony.

2. Attorneys' fees—Allowance to wife—By section 900, Kentucky Statutes, it is provided that in actions for divorce and alimony the husband shall pay the costs for each party unless it be made to appear that the wife is in fault and has ample means to pay the same. While we have concluded that the wife is in fault, the record makes it extremely doubtful whether she has any property of her own with which to pay her attorneys, and she should be allowed \$1,000 by the lower court, payable to her attorneys, for services rendered in the lower court and in this court in this case.

W. C. McChord, Morgan Yewell, John D. Wickliffe and W. S. Pryor for appellant.

Geo. S. Fulton, John S. Kelly and John A. Fulton for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Paynter.

The appellant and appellee are husband and wife. The appellant instituted this action against the appellee and sought a judgment of divorce from the bonds of matrimony and for alimony. The grounds averred are: First, that the defendant has habitually behaved toward her in such a cruel and inhuman manner as to indicate a settled aversion to her and to destroy permanently her peace and happiness; second, that he was guilty of such cruel beating and injury, and attempt at injury, as indicates an outrageous temper in him, or probable danger to her life or great bodily injury from her remaining with him. A great volume of testimony was taken in the

case, much of which is irrelevant and incompetent. The appellant chiefly sought to establish her claim for divorce and alimony by attempting to prove that on two occasions the appellee administered strychnine to her with the intention of destroying her life; that on one occasion he choked her at the henhouse near the residence and threatened to take her life unless she turned over to him certain property; that on the 2d of January, 1902, while on a train going from Louisville to Bloomfield, he threatened to cut her throat. There are one or two things proven that we deem unnecessary to refer to, as they are of minor importance in this controversy. Before going into detail as to the above matters the court will call attention to some facts shown in the record. The parties were married in August, 1898. Appellee was a widower about fifty years of age and the appellant a widow about forty-six years of age at the time of the marriage. The appellee had an estate of about \$90,000 and the appellant an estate of the value of from \$8,000 to \$10,000. They had known each other for many years. After their marriage they lived upon appellee's farm near Bloomfield, Ky., with male and female servants to perform household duties and wait upon them. On two occasions, in May, 1901, the appellant was taken violently ill at her home. On both occasions a physician was sent for, and as her condition was so alarming, her brother in the neighborhood and sisters elsewhere were notified of her illness, and the appellee's relations were likewise notified. It resulted in the relations of both visiting their home and doing what they could to relieve her, besides giving her deep sympathy in her suffering. She finally recovered and went to Denver to visit her son. While there she and her husband exchanged letters, kindly in tone and manifesting a deep sentiment of affection for each other. Finally, in September, the appellant wrote appellee a letter in which she substantially accused him of administering poison to her on the occasions mentioned. She returned to Kentucky in October, but before she came he consulted his attorney and advised him not to receive his wife in his home until their friends could meet and mutually consider the question arising from the charge she had made against him. She was carried by her nephew to her brother's home, and after a visit by a mutual friend the appellee went to see her, and after talking the matter over, she was taken to his home. So far as this record shows they lived happily together until the 2d of January, 1902, when she left him and refused to live with him again.

There is evidence tending to show that at the time the appellant was sick in May, she had some of the characteristic symptoms of persons who are suffering from the effects of a dose of strychnine. Four reputable doctors distinguished in their chosen profession, testified that from the facts detailed by the attending physician that she was suffering from the effects of strychnine. Four other physicians, distinguished in their professions, like some of the other physicians mentioned, were professors in medical colleges, testified that the symptoms did not indicate that she was suffering from the effects of strychnine, and these opinions were based upon the same facts as were those of the physicians who testified to sustain the appellant's theory. The court is asked to find that the appellee administered a dose of strychnine to the appellant with the purpose of destroying her life. Since doctors learned in their profession differ so widely upon the question, it would seem

the smoker and was shortly afterwards discovered reading a newspaper. The appellant complained to the passengers on the train that he had made the threat, and that she was afraid of him and asked the passengers to protect her from him, and they assured her that there was no danger. When they reached their destination they both alighted from the train. The appellee attempted to take her bundles and assist her to their carriage, which was waiting. She refused to let him have them or to enter the carriage. He asked her permission to send her to the hotel in his carriage, but this offer she declined. The appellee begged her to go home with him that night, but could not prevail upon her to do so. He went to the hotel the next day and on bended knees begged her to go home and live with him, and called her his "darling wife," but she informed him that she was no longer his darling wife. She ever afterwards refused to live with him, and in seven days thereafter instituted this action.

We have reached the conclusion that she has failed to sustain the charges in the petition, and that she did not have sufficient grounds for leaving the appellee. It is the duty of a husband to support his wife, but she has no right to require him to do so so long as she remains away from him without cause. Our conclusion is that she abandoned and remained away from him without his fault, and is therefore, not entitled to a divorce or alimony.

In the petition the appellant prayed to have a reasonable attorney's fee allowed her and entered a motion for that purpose, and the court heard evidence as to the value of the services rendered appellant by her attorneys and fixed the amount at \$1,000. Subsequently the court concluded that it did not have jurisdiction, because notice of the motion had not been given, and thereupon set the judgment aside. We think the court erred in setting the judgment aside. By section 900, Kentucky Statutes, it is provided that in actions for alimony and divorce the husband shall pay the costs of each party unless it shall be made to appear that the wife is in fault and has ample means to pay the same. We have concluded that the wife was in fault, but the record makes it extremely doubtful whether she has any property with which to pay her attorneys, because by the terms of her first husband's will if she married again the property devised to her was to go to her children. Her children are living, therefore, it would seem that the children could compel her to surrender the property, as she holds it by her former husband's will. We are of the opinion that the appellant should be allowed \$1,000 by the lower court, payable to her attorneys for services rendered in the lower court and in this court, and for the failure of the court to make this allowance the case is reversed. We are of the opinion that the appellee did not show that he was entitled to a divorce, and on the return of the case he may file an amended answer and cross petition, if he desires to do so, alleging any grounds of divorce which may exist.

The judgment is reversed, with directions on final trial to dismiss appellant's petition for divorce and alimony, and for proceedings consistent with this opinion.

ILLINOIS CENTRAL R. R. CO. v. BUCHANAN.

(Filed June 17, 1905—Not to be reported.)

J. M. Dickinson, Trabue, Doolan & Cox and Gordon, Gordon & Cox for appellant.

C. J. Waddill and Win. Worthington for appellee.

Appeal from Hopkins Circuit Court.

Judge Nunn delivered the following dissenting opinion:

The appellee recovered a judgment against appellant on account of injuries and damages sustained by the malpractice of the house surgeon of the Illinois Central Railroad Hospital Association. The evidence shows that this surgeon was either incompetent or that he treated appellee so negligently and carelessly that he was injured rather than benefited, and was amply sufficient to authorize the court to submit the question to the jury.

This court reverses this judgment upon the grounds that there was a failure of proof showing any contract on its part to furnish appellee competent and skillful surgeons to treat his injuries while in its employ; that the hospital association was and is a charitable, independent corporation; that appellant was and is in nowise responsible for its conduct; that the services performed by the appellant for the hospital association were performed as its agent. The effect of the opinion by a majority of the court is to overrule the case of this appellant against Gheen, 28 Ky. Law Rep., 1952.

I have the record in the Gheen case before me, and have examined it with care. The appellant made the same defense as to nonliability for the acts of the association in that case as in this. The same proof upon this question was introduced in that case as in this. The by-laws for the operation and control of the association were introduced in that case and in this, and they are identical except in verbiage and also at that time there were nine directors while now there are eleven. In that case, as in this, the court told the jury in substance that if they believed from the evidence that the hospital association was operated and controlled by its members, and was not operated and controlled by the appellant, they should find for it. The only difference between the facts in the two cases with reference to the point under discussion is that the association was then a copartnership while now it is a corporation. In the Gheen case, supra, this court said: "The testimony as to the formation, conduct and management of the hospital presents no material disagreements as to the facts. These appear to be that each employe on the Louisville & Memphis division, who is employed as much as four days in a month, contribute to the maintainance and support of the hospital. The sum payable is fixed by a scale according to wages earned per month, and the amount payable is withheld by the paymaster of the appellant out of the wages due the employe and turned into the hospital fund,

which is held by the treasurer of the appellant. The hospital association is not incorporated, nor, on the other hand, is it purely voluntary. If the fact that an employe has no option about paying out of his earnings the fixed assessment for the support of the hospital could be termed a voluntary payment, then the hospital association might be termed a voluntary association. It has a board of directors, but these are such, save two, by reason of the official position with appellant's road. The two exceptions are a conductor and an engineer who are selected by the other members.

The surgeon in charge is practically appointed by the chief surgeon of appellant. The men who contribute the monthly assessment to pay the hospital expenses have in fact, no voice in the management or control of the hospital, save and except that of giving certificates of admission thereto to subordinate employes when sick or injured. Employes of the class of appellee have no rights or powers in regard to the hospital, save that of paying the monthly assessment, which in fact they never see, and the right of treatment in case of injury or sickness. As to the ownership of the hospital grounds and buildings and equipment there is no proof. We are of opinion that these facts, proven without serious, if any, contradiction, would have authorized the court to instruct the jury peremptorily that if appellee had been engaged more than four days he was entitled to admission into the hospital, and if he was refused permission to enter, or certificate entitling him to transportation and entrance to the hospital, and was injured by such refusal, he was entitled to recover. It is clear that if appellant corporation ceased to exist, or should attempt to withdraw from the hospital, the hospital would cease to be of any service. The appellant is the very life of the hospital association. Its funds, management, control and service are all furnished by appellant. In fact the hospital association is the Illinois Central Railroad."

The facts stated in this opinion agree precisely with the facts as shown by the record in the case at bar except that the hospital was then an association or copartnership, since then and in the year 1900, attempted to become incorporated as a charitable organization. If in the Gheen case the facts proven showed conclusively that the appellant operated and controlled the hospital, then under the same facts then why or how is it to be said that it does not operate and control the same association? Can it be that it is because it now has the name of "corporation?" Has the word "corporation" about it some magic which prevents its control by anybody or anything? In my opinion, if the appellant controlled and operated the hospital as an association or a copartnership, it controls and operates it as a corporation.

By a unanimous opinion in the Gheen case this court decided that appellant did control and operate this hospital, and that the hospital was a part of appellant. The incorporation of the hospital did not give it any greater rights or higher powers than it had before the incorporation, the only differ-

ence being that it would be more convenient to sue and be sued in its corporate name than as a copartnership.

Under the articles of incorporation copied in the opinion it is provided that the term of office of the first-named eight members of the board of directors shall be continuous. The term of office of the last-named three of the board of directors shall be for one year and also the successors of the last three shall be elected by the other eight members of the board.

By section 3 of the by-laws it is provided: "The association shall be governed by a board of eleven directors, constituted as follows: The assistant general superintendent southern lines, who shall be chairman of the board; the assistant chief surgeon, Paducah, Ky.; the superintendent Louisville division the superintendent Tennessee division; the assistant superintendent Evansville district; the roadmaster Louisville division; the roadmaster Tennessee division; the master mechanic Paducah shops; an employe of the transportation department; an employe of the machinery department and an employe of the road department."

By section 8 of the by-laws it is provided that the chief surgeon of the Illinois Central R. R. Co. will appoint the surgeon in charge of the hospital, and is also required to appoint and fix the salaries of the local physicians within the territory covered by the association.

By section 9 it is provided: "The local treasurer of the Illinois Central R. R. Co. at Chicago shall be the treasurer of this association, and shall receive all moneys belonging to the hospital and pay all bills against it, upon vouchers certified to by the surgeon in charge and approved by the chief surgeon of the Illinois Central R. R. Co."

By section 10 it is provided: "The auditor of disbursements of the Illinois Central R. R. Co. shall act as the auditor of this association."

It appears from the proof that these three officials last named have their offices in Chicago, and are the chief officers of their respective departments of the appellant, and it is not contended that they are, or ever have been members of the hospital association.

It is indeed singular, if it is a fact, that this hospital association is an independent association and not governed or controlled to any extent by appellant, that it would organize by selecting the chief officials of appellant, who are not members of the association, and give them full and complete power to control and govern the association and take from itself all power and right to manage the institution. As will be seen, the association is controlled by the officials of the appellant, and the employes have no voice in its control. The board of directors provided in by-law No. 2 that all officers and employes in the above territory shall be members of the association except those afflicted with chronic or other named diseases.

By section 15 it is provided: "Any member of the association in any manner leaving the service of the company ceases at once to have any participation in the funds."

Thus it appears that a prerequisite to membership in this association is that the party must be an employe of appellant, and when he ceases to be an employe of appellant, it matters not for what cause, he is no longer a member of the association. He is dropped, leaving all that has been deducted from his wages in the hands of appellant's chief officials. This is true of

officials of the appellant. In view of these facts it is apparent why the court in the Gheen case, *supra*, used the following language: "The appellant is the very life of the association. Its funds, management, control and service are all furnished by appellant. In fact the hospital association is the Illinois Central R. R. Co."

Under that case the judgment herein must be affirmed as the evidence is the same unless the bare fact that since then the hospital association has been incorporated changes the rule. To so hold is to recognize form, not substance. The operatives of the railroad company have no option as to the retention by it of a percentage of their wages for the support of the hospital, they have no control over the hospital or its management and no voice in its affairs. If they do not acquire a right to be treated in the hospital, they get nothing for their money, and if they have this right it must be against the railroad company who retains their money, and is the only person who deals with them. If a surplus of the funds retained is left the operatives have no right to it, and have no voice in the determination of how much shall be spent. The incorporated hospital association simply takes the place of the old unincorporated association, and like it is merely an agency of the railroad company for the accomplishment of its purposes, formed and controlled by it and can not exist for a day without the railroad company. The action may be maintained against the real party in interest, the railroad company. The hospital association is nothing more than a form under which the railroad company transacts the business.

The court in its opinion says that appellant is only the agent of the hospital association. This, to my mind, is an unwarranted conclusion under the facts as they appear in this record. We have a case where the pretended principal, the hospital association, is without power to appoint or elect its board of directors or name their successors; to enact or change a by law; to appoint its own surgeon, assistants or attendants; to in any way govern or control the admission or exclusion of its members; in fact it can not perform any act to change its affairs or contract any debt for any purpose without first obtaining the consent and approval of persons not members and who are the chief officials of appellant, the pretended agent. To me this appears inconsistent unless the shadow is to be regarded rather than the substance.

It is stated in the opinion that there was no evidence showing that the Illinois Central R. R. Co. made any contract with the appellee that he should be properly and skillfully treated by proper and skillful surgeons and attendants. The proof does show that it retained of his wages a sum each month for three or four years for the purpose of giving him treatment in its hospital in the event he should become sick or receive an injury. This being true, it amounted to a contract. At least it was implied on the part of appellant that it would place in charge of the hospital physicians and surgeons of reasonable skill and learning, and that the sick and the injured should have reasonably proper and skillful treatment, and for a failure in this the appellee has a cause of action. In the case of the Union Pacific R. R. Co. v. Artist, 23 L. R. A., 582, the court said: "If one contracts to

treat a patient in a hospital, or out of it for that matter, for any disease or injury, he undoubtedly becomes liable for any injury suffered by the patient through the carelessness of the physicians or attendants he employs to carry out that contract."

In the case of *Richardson v. Carbon Hill Coal Co.*, 20 L. R. A., 340, the court said: "If, on the other hand, the company was conducting a hospital with its own physicians for the purpose of deriving profit therefrom, or if it contracted with appellant to furnish him with the services of a competent physician and to properly treat him in case of an injury, it would be liable for the negligence or want of skill of its physician in attending him."

But it is contended that if such a contract existed it was without consideration and not enforceable; that appellant derives no benefit or profit from the hospital. This is error, for it receives from its thousands of employees a monthly sum amounting to many thousands of dollars annually to officer and maintain this hospital. In addition to this there are other ways that the appellant derives great benefit from the maintenance of the hospital. Under this contract with its employees it can send the injured to the hospital at once and get them into hands friendly to it, thus avoiding many damage suits. This method also saves appellant the payment of medical bills when an employee recovers judgment against it for negligent injuries. Again, it enables its capable and efficient employees to be treated and return to work at the earliest possible moment.

This is commendable, but it ought not to attempt to shift the responsibility of maintaining the hospital upon a pretended charitable organization. This is not a charitable organization within the meaning of the statutes. What these employees receive they pay for. There is nothing given or contributed, and in addition the articles of incorporation include only the employees of appellant and exclude the ones who are afflicted with chronic and other named diseases.

For the above reasons I dissent from the majority opinion.

Chief Justice Hobson concurs in this dissent.

AMERICAN GERMAN NATIONAL BANK v. HAGER, AUDITOR, &c.

(Filed July 22, 1905.)

Opinion by Judge Paynter on motion to dissolve injunction of Franklin Circuit Court.

This case is before me on a motion to dissolve an injunction granted by the judge of the Franklin Circuit Court. The effect of the order, as I understand it, is to prevent the State Board of Valuation and Assessment from assessing the property of the plaintiff as contemplated by law. The plaintiff claims there is a discrimination in law and in fact in favor of State banks and trust companies as against national banks in the method of assessing their property. The plaintiff does not object to the assessment made except it claims that \$50,000 should be deducted therefrom because it holds bonds of the United States government, the par value of which is that amount.

The law does not authorize the State Board of Valuation and Assessment

has never made such a deduction in valuation of the property of State banks and trust companies.

The capital, surplus and undivided profits of the State banks and trust companies in the State amounts in round numbers to \$19,000,000. The national banks in round numbers to about \$19,000,000, so the capital, surplus and undivided profits of all the banks and trust companies of the State amounts to about \$38,000,000. If the theory of the plaintiff is sustained nearly all of the banks and trust companies in the State will be relieved from the payment of any taxes to the support of the State, county and municipal governments. The only ones of the financial institutions that will be required to pay any taxes are the trust companies, whose capital stocks are very large compared to their deposit accounts, and for that reason can not afford to buy and hold United States government bonds equivalent to their capital, surplus and undivided profits. Banks and trust companies could buy government bonds the day before the law required their property to be assessed, which would be equivalent to their respective capital, surplus and undivided profits, and sell the bonds the following day and thus avoid the payment of their fair share of the burdens of the government. If a bank could escape the payment of taxes by investing in government bonds a sum equivalent to its capital, surplus and undivided profits it would be profitable in most cases to hold the bonds as an investment because the interest on them added to the taxes saved upon the amount represented by them would constitute a profitable investment.

My attention was called to a statement of the First National Bank of Owensboro, which shows its capital stock to be \$137,900, its surplus and undivided profits \$40,950; total, \$178,850, and that it owns United States government bonds amounting to \$370,000. Counsel for the plaintiff in this case admitted that upon his theory this bank would not be required to pay taxes to the State, county or municipality. This illustration is given to show the practical effect of the plaintiff's claim if sustained.

The claim is made that although government bonds are purchased with the funds held by the bank, which were deposited by its customers, the amount of the bonds so purchased should be deducted from the assessment notwithstanding this court has adjudged that the funds so deposited by the bank as a quasi trustee for the depositors and is not subject to taxation in the hands of the bank.

I do not believe that either the State or Federal government intended or did devise a system of laws for the assessment of the property of the National banks which produces such gross inequality and injustice in gathering taxes for the support of government.

Judges Barker and Settle heard the case with me. Judge Barker gave the opinion that the law should be interpreted and administered as requested by the plaintiff. Judge Settle expressed no opinion on the merits of the case, but advised that the matter remain in statu quo until the full court could hear the case on appeal.

If this injunction is kept in force the State Board of Valuation and Assessment is unable to proceed with the execution of the law as it exists. The responsibility is placed upon me to determine what should be done, and believing, as I do, that the plaintiff has not shown that it is entitled to the relief sought, it is my opinion that the injunction should be dissolved, and an order to that effect will be made.

civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases, and so long as they keep within the jurisdiction assigned to them their general powers are adequate to the trial of any case.

2. Transfer of jurisdiction—In order to work a transfer of jurisdiction from the State to the Federal courts pursuant to section 641, United States Revised Statutes, three things are essential: First, it must appear that the defendant has a right that he is entitled to have enforced; second, such right must appear to be secured to him by a law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, that is, a right secured to him by the equal protection of the law's clause of the fourteenth amendment, and, third, it must appear that the defendant is denied such right, or can not enforce it in the State courts having jurisdiction of the prosecution against him within the meaning of section 641.

3. Jury—Selection of—Members of political parties—The defendant has the right to have the jurors from which the jury is to be empaneled selected from persons possessing the statutory qualifications without discrimination against those of them who are members of the same political party as defendant, because of their belonging to such party, and that this right is secured to him by the equal protection of the laws as guaranteed by the fourteenth amendment.

4. Removal of cause to Federal court—The defendant is entitled to have his case removed from the State to the Federal court if he is denied, or can not enforce, the rights guaranteed to him by the fourteenth amendment.

5. Pleading—No reply having been filed by the Commonwealth of Kentucky to the petition for a removal, and no issue having been taken with the defendant as to its allegations, they must be taken as true except as they may be contradicted by the transcript of the record of the trial in the lower court.

6. Evidence—Refusal to hear as to mode of selection of jury—A refusal to hear evidence offered by a defendant in a criminal prosecution that he has been illegally discriminated against in the selection of jurors, is a violation of the fourteenth amendment and a denial of the equal protection of the laws.

7. Power of Court of Appeals—Provision of Kentucky Code of Practice—This defendant can not enforce his right to the equal protection of the laws in the Court of Appeals of Kentucky, if denied in the circuit court, because of a legislative provision embodied in section 281 of Kentucky Criminal Code, to the effect that decisions of the trial court upon challenges to the panel and for cause, upon notice to set aside an indictment and upon motions for a new trial, shall not be subject to exception.

8. Same—The legislature has provided that the Court of Appeals of Kentucky shall not have jurisdiction to review challenges to the juries in criminal prosecutions for any cause whatsoever, and that the action of the circuit court is final in regard thereto.

9. Same—The Court of Appeals was correct in its ruling declining to pass upon the Federal question raised by the defendant in regard to the selection of jurors from which were selected the jury that tried him. It has not denied him the equal protection of the laws because it had no jurisdiction to pass on the question.

10. Res judicata—The question as to who was governor of Kentucky on the 10th of March, 1900, and as to the validity of the Taylor pardon, is a local one, and having been determined by the Kentucky Court of Appeals that Beckham was then governor, and that the pardon was invalid, this court is concluded by the judgment of that court.

11. Pleading—Jurisdiction—By virtue of the second paragraph of the petition the removal proceedings have worked a transfer of jurisdiction within the meaning of section 641, United States Revised Statutes.

That portion of section 641, material to quote, is as follows: "When any civil suit or criminal prosecution is commenced in any State court for any cause whatever against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, * * * such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease and shall not be resumed except as hereinafter provided."

The remaining portion of the section provides for filing the transcript of the record in the State court in the circuit court of the United States for docketing the cause therein. Before stating the proceedings which have been had under said section and considering their effect upon the constitutionality of said prosecution it will be well to do two things. One is to re-examine the constitutionality of said section and to come to an understanding of the basis of its constitutionality. This understanding will aid in its construction when we come to take that matter up. Its constitutionality was directly upheld in the case of *Strauder v. West Virginia*, 100 U. S., 303, assumed in the case of *Virginia v. Rives*, 100 U. S., 318, decided the next day, and in the cases of *Neal v. Delaware*, 108 U. S., 370, *Bush v. Kentucky*, 107 U. S., 110; *Gibson v. Mississippi*, 168 U. S., 565; *Smith v. Mississippi*, 168 U. S., 592, *Murray v. Louisiana*, 168 U. S., 101, and *Wicks v. Mississippi*, 170 U. S., 318, decided subsequently. Its peculiarity consists in the fact that it provides for the removal of a State prosecution for a State offense pending in a State court to a Federal Court. Section heretofore referred to, is like it in this particular. It, too, provides for removal of a State prosecution for a State offense pending in a State court to the Federal court, but in a different state of case from that provided for in section 641. That state of case is when the prosecution is against an officer appointed under or acting by authority of any revenue law of the United States, * * * or against any person acting under or by the authority of any such officer, or on account of any act done under color of the authority of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law," etc. This statute was enacted about the same time as that contained in section 641, in section 18 of the act of July 18, 1866, and was carried from thence into the revised act of 1873-4 as section 643.

On the same day that section 641 was held to be constitutional, in the case of *Strauder v. West Virginia*, supra, section 643 was held to be constitutional; also in the case of *Tennessee v. Davis*, 100 U. S., 257. This was March 1, 1880. It may be said to have been a great day in the history of Federal jurisprudence. On the same day section 18 of the act of July 1, 1875, making it an offense against the United States, punishable in the courts, for a State officer or other person charged with any duty to the

tion or summoning of jurors in State courts, to exclude or fail to summon any citizen possessing all other qualifications prescribed by law on account of race, color or previous condition of servitude, was held to be constitutional in the case of *Ex Parte Virginia*, 100 U. S., 339. At the same time section 641 was construed not only in *Strauder v. West Virginia*, *supra*, but also in *Virginia v. Rives*, *supra*.

A vigorous attack was made in said four cases thus disposed of on the same day upon the constitutionality of said sections 641 and 643 and section 18 of the act of March 1, 1875, by Justices Field and Clifford, and they dissented from the conclusion of the majority of the court as to the constitutionality of each statute. Justice Clifford wrote the dissenting opinion in *Tennessee v. Davis*, and Justice Field that in *Ex Parte Virginia*. Their views as to the constitutionality of section 641 were embodied in a separate opinion by Justice Field in *Virginia v. Rives*, in which concurrence was expressed with the opinion of the majority of the court in that case as to the construction of section 641 and its applicability to a case of that kind. The ground of their attack upon all three statutes was in substance that they were an invasion of the sphere of State action, there being nothing in the Federal Constitution to warrant them. In the case of *Ex Parte Virginia*, Justice Field, in referring to the criminal prosecution of a State officer in a Federal court under section 18 of the act of March 1, 1875, said: "The proceeding is a gross offense to the State; it is an attack upon her sovereignty in matters over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a local municipal corporation."

In the case of *Tennessee v. Davis*, Justice Clifford said: "Viewed in any light, the proposition to remove a State indictment for felony from a State court having jurisdiction of the case into the circuit court, where it is substantially admitted that the prisoner can not be tried until congress shall enact some mode of procedure, approaches so near to what seems to me both absurd and ridiculous that I fear I shall never be able to comprehend the practical wisdom which it, doubtless, contains."

Both judges made a great deal to do as to the mode of procedure in the Federal courts after the removal thereto of a criminal prosecution pending in the State court under either section 641 or 643.

Justice Field, in *Virginia v. Rives*, said: "There are many other difficulties in maintaining the position of the circuit court which the counsel of the accused and the attorney general have earnestly defended. If a criminal prosecution of an offender against the laws of a State can be transferred to a Federal court, what officer is to prosecute his case? Is the attorney of the Commonwealth to follow the case from his county, or will the United States District Attorney take charge of it? Who is to summon the witnesses and provide for their fees? In whose name is judgment to be pronounced? If the accused is convicted and ordered to be imprisoned, who is to enforce the sentence? If he is deemed worthy of executive clemency, who is to exercise it—the governor of the State or the president of the United States? Can the governor release from the judgment of a Federal court? These and other questions which might be asked show, as justly observed by the counsel of Virginia, the incongruity and obscurity of the attempted proceeding."

The necessity of congress having to enact some mode of procedure in such a case after its removal before the proceeding could be tried seems not to have been admitted, as Justice Clifford thought. Concerning this matter, Justice Strong, who delivered the opinion in behalf of the court in all four cases, in the case of *Tennessee v. Davis* said: "The imaginary difficulties and incongruities supposed to be in the way of trying in the circuit court an indictment for an alleged offense against the peace and dignity of a State, if they were real, would be for the consideration of congress. But they were unreal. While it is true there is neither in section 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when removed shall proceed as a cause originally commenced in the court. Yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State in tribunals of the general government grows entirely out of the division of powers between that government and the government of a State, that is, divisions of sovereignty over certain matters. When this is understood, and it is time it should be, it will not appear strange that even in cases of criminal prosecution for alleged offenses against a State, in which arises a defense under United States law, the general government should take cognizance of the case and try it in its own courts according to its own forms of proceeding."

The warrant found by the majority of the court in the Federal Constitution for section 643 was the second section of article 3 and the eighth section of article 1 thereof. By the former it is provided that the judicial power of the Federal government shall extend to all cases in law and equity arising under the Constitution and laws of the United States and treaties made under their authority. By the latter it is provided that congress shall have power to make all laws necessary and proper for carrying into execution all the powers vested by the Constitution in the government of the United States or in any department or officer thereof. It was held that a State prosecution for a State offense, pending in a State court in which the defendant claims that the act for which he is being prosecuted was done under the color of his office as a Federal official, was a case arising under the Constitution and laws of the United States, to which the judicial power thereof extended, and that a law providing for the removal of such prosecution to the Federal court was proper for carrying into execution such power.

The warrant so found for sections 641 and 642 and section 18 of the act of March 1, 1875, was the fourteenth amendment to the Federal Constitution, and particularly that part thereof contained in the last clause of the first section thereof, providing that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and in the fifth section

thereof, providing that "the congress shall have power to enforce by appropriate legislation the provisions of this article."

Said last clause of the first section, though in form a prohibition simply against State action, amounting to a denial to any person within its jurisdiction of the equal protection of its laws, conferred a right on such person to the equal protection of the laws which he was entitled to enforce. In the case of *Yick Wo v. Hopkins*, 118 U. S., 352, Justice Matthews said that it was "a pledge of the equal protection of the laws."

And in the case of *Strader v. West Virginia*, supra, Justice Strong said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right."

As to the protection it afforded, Justice Field had this to say in the case of *Santa Clara v. So. Pac. R. R. Co.*, 18 Fed., 398: "This protection attends everyone everywhere, whatever be his position in society or his association with others, either for profit, improvement or pleasure. It does not leave him because of any social or official position which he may hold or because he may belong to a political body or to a religious society, or be a member of a commercial, manufacturing or transportation company. It is the shield which the arm of our blessed government holds at all times over every man, woman and child in all the broad domain, wherever they may go and in whatever relation they may be placed."

Said sections 641 and 642 enforce said last clause of the first section, in that they provide that if in a civil or criminal prosecution pending in a State court the defendant therein is denied, or can not enforce therein any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction thereof, by which primarily, if not exclusively, is meant said clause, he shall be entitled to have the suit or prosecution removed to the Federal court. Said section 18 of the act of March 1, 1875, enforces said clause, in that it provides for the indictment and conviction in a Federal court of any State official charged with the duty of selecting or summoning jurors who discriminates against him because of his color, and to this extent denies him the right to the equal protection of the laws pledged by said clause.

So much, then, as to the constitutionality of section 641 and to the basis thereof.

The other thing which it will be well to do before stating the proceedings had under said section, and considering their effect upon the jurisdiction of the prosecution, is to give an outline of the proceedings had in the State courts before and up to the beginning of said removal proceedings, and thus fit the two together.

March 9, 1900, said prosecution was begun by the issuance of a warrant for defendant's arrest by the county judge of Franklin county. March 11, 1900, defendant was arrested under said warrant. March 27, 1900, after an examining trial, had before said county judge, he was held without bail to the grand jury of said county at the then next April term of the circuit court thereof. April 17, 1900, an indictment found by said grand jury was returned into court. May 2, 1900, the prosecution was transferred to the circuit court of Scott county, an adjoining county to Franklin, and in the same judicial district and within said Eastern district of Kentucky, on de-

defendant's motion for a change of venue. Beginning July 9, a special term of the said Scott Circuit Court was held, at which defendant was tried and found guilty by the jury, who fixed his punishment at imprisonment for life. The verdict was returned August 18, 1900, and judgment therein was entered September 5, 1900. The jurors from whom said jury was impaneled came from Scott county, and said jury was composed entirely of Scott county jurors. March 28, 1901, the Court of Appeals of Kentucky reversed this judgment, the court standing four to three in favor of the reversal, and remanded the prosecution to the lower court for further proceedings consistent with the opinion then delivered. The grounds of reversal were errors of the lower court as to the admissibility of testimony and instructions to the jury. October 10, 1901, at the regular October term, 1901, of said court, a second trial of defendant was had which terminated as the first trial. The verdict of the jury was returned October 26, 1901, and judgment therein was entered the same day. The jurors from whom this jury was impaneled came partially from Scott county and partially from Bourbon county, an adjoining county to Scott, and in the same State judicial district, and said jury seems to have been composed of six jurors from Scott and six from Bourbon. December 8, 1902, the Court of Appeals reversed this judgment, the court standing four to three in favor of reversal, and remanded the prosecution to the lower court for proceedings consistent with the opinion then delivered. The grounds of reversal were the same as on the first appeal, and, in addition, the refusal of the judge of the lower court to vacate the bench at the second trial therein, upon defendant's filing an affidavit under section 968 of the Kentucky Statutes, to the effect that said judge would not give him a fair and impartial trial and setting forth at large the facts upon which he based this claim. On the filing of the mandate of the Court of Appeals in the lower court said judge refused to vacate the bench, and thereafter was required to do so by a writ of prohibition from the appellate court. Thereupon a special judge was appointed by the governor to try the case at the next trial. Beginning August 3, 1903, a special term of the Scott Circuit Court was held, at which defendant was again tried and found guilty, but this time the jury fixed his punishment at death instead of imprisonment for life, as had been done by the two former juries. The verdict was returned August 29, 1903, and judgment thereon was entered the same day. The jurors from whom this jury was impaneled came from Bourbon county, and said jury was composed entirely of Bourbon county jurors. December 6, 1904, the Court of Appeals reversed this judgment, the court standing four to three in favor of reversal, and remanded the prosecution to the lower court for proceedings consistent with the opinion then delivered. The grounds of reversal were the entering of the judgment upon the verdict of the jury the same day it was returned, in violation of a Code provision, when defendant was seeking more time for filing additional grounds for new trial and improper conduct on the part of one of the employed counsel for the Commonwealth in his argument to the jury. Theretofore a jury in the Franklin Circuit Court had convicted James B. Howard, claimed to be the assassin of William Gooble, of his murder, and fixed his punishment at imprisonment for life. Said counsel, in his argument to the jury, made this statement in regard to that verdict.

to wit: "Howard was not hung, but eleven of the twelve jurors who tried him were in favor of hanging him and one was for life imprisonment, and the eleven had to come to the one," which the lower court permitted to be made against defendant's objection. The opinion delivered in the Court of Appeals on three separate hearings therein may be found reported as follows, to wit: Powers v. Commonwealth, 110 Ky., 886; Powers v. Commonwealth, 114 Ky., 287; Powers v. Commonwealth, 26 Ky. Law Rep., 1111.

The term of office of one of the judges of the Court of Appeals, who concurred in the said judgments of reversal, expired on the 1st day of January last, and he was succeeded by the judge of the Scott Circuit Court, who presided at the first two trials, having been elected to said position at the regular November election in 1904. Upon his vacating the office of circuit judge an appointment was made by the governor to fill the vacancy until the November election in this year. May 8, 1905, the third day of the May term, 1905, of said Scott Circuit Court, the mandate of the Court of Appeals issued upon its last judgment of reversal was filed in the Scott Circuit Court, and the prosecution was set for a fourth trial at a special term to begin the 10th of this month, three days hence, when a trial will be had in said court before the judge appointed to fill said vacancy, if jurisdiction of the prosecution remains in the State court.

It is now in order to state the proceedings had under section 641, and after doing so to consider the question whether their effect has been to work a transfer of jurisdiction. Those proceedings were begun in the Scott Circuit Court May 8, 1905, immediately upon the filing of the mandate of the Court of Appeals as hereinbefore stated. At that time defendant tendered to said court a petition for the removal of the prosecution from that court to this court, and moved that he be permitted to file the same. Upon the objection of the Commonwealth said court refused to permit said petition to be filed. The next circuit court of the United States in this district held thereafter was the London term, which began May 8, 1905, five days after the tendering of the petition for removal to the State court. On that day, upon defendant's motion, a partial transcript of the record of the State court—all that the clerk thereof was able to furnish in the meantime—was filed, and the cause was docketed in said court. The Commonwealth objected to this action of the court and upon its being had moved to set it aside, which motion was overruled. Leave was then granted to the defendant until the 8th day of June thereafter to procure and file an additional transcript, which has been done within the time limited. The motion for the writ of habeas corpus was made at the time of filing the partial transcript and docketing the cause, and after the filing thereof, to wit, on June 8, said motion was taken up, argued and submitted.

We are now in position to confront the question raised by said motion for a writ of habeas corpus, to wit: Whether the effect of said removal proceedings has been to work a transfer of jurisdiction. Three things are essential in order that they should have had that effect. The first thing is that it must appear that the defendant has a right which he is entitled to enforce. The second is, that it must appear that such right is a right secured to him by a law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, i. e., a right

secured to him by the equal protection of the law's clause of the fourteenth amendment. It is not sufficient that it be a right which he is entitled to enforce. It must be a right so secured to him. The third and last thing is, that it must appear that the defendant is denied such right, or can not enforce it in State courts having jurisdiction of the prosecution against him within the meaning of section 641.

The petition for removal contains two paragraphs, in each of which defendant states a separate right which he claims he is entitled to enforce is secured to him by said clause of the fourteenth amendment and is denied him and can not be enforced by him in the State courts in the prosecution therein against him. That stated in the first paragraph is the right to be released from further custody under the charge against him, because of a pardon for said offense issued to him March 10, 1900, the day after his arrest, by William S. Taylor, then claiming to be governor of Kentucky. That stated in the second paragraph is a right to have the jurors, from which the jury is to be impaneled that is to try him, selected from persons possessing the statutory qualifications, without discriminating against those of them who belong to the same political class to which he belongs, to wit, Republicans, because of their belonging to such class.

I prefer to take up the right stated in the second paragraph first, and consider and determine whether defendant has any such right—whether, if he has, it is secured to him by said clause of the fourteenth amendment—and whether, if it is, it is denied him or can not be enforced by him in the State courts in the prosecution against him. The first two questions go together, for it is not claimed that he has any such right other than by virtue of said clause of the fourteenth amendment. It is to be noted that if he has any such right it is only in relation to State action. It is not in relation to individual action apart from State connection. Of course it could not well be otherwise, for no one has anything to do with the selection of jurors but some person acting for and on behalf of the State. If it exists, however, it is a right in relation to State action through any of its agencies. Justice Field, in *Ho Ah Kow v. Nunan*, Fed. Cas., No. 6546, said: "This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities."

The right secured by said clause, when its language is departed from, is almost invariably, if not entirely, referred to as a right to have the State refrain from unjust or unreasonable discrimination. A State has a right to discriminate between persons within its jurisdiction, but such discrimination must be along just and reasonable lines. A discrimination that is without a just or reasonable basis is purely arbitrary. And, as said by Justice Matthews in *Yick Wo v. Hopkins*, supra, the principles upon which the institutions of our government are supposed to rest "leave no room for the play and action of purely personal and arbitrary powers." He said further therein as follows, to wit:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrim-

inations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

As a rule, at least, discrimination by a State between classes of persons within its jurisdiction is unjust and unreasonable. Justice Matthews, in the case last mentioned, in referring to the ordinance involved therein, which left the question as to who might carry on the laundry business in San Francisco, in wooden buildings, to the arbitrary consent of a board of supervisors, who, in administering it, refused consent to Chinese, said: "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion can not be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the fourteenth amendment of the Constitution."

In the case of *Holden v. Hardy*, 169 U. S., 366, in referring to a discrimination by a State through legislative action, Justice Brown said: "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

In the case of *Ho Ah Kow v. Nunan*, *supra*, Justice Field, in referring to similar discrimination, said: "But in our country hostile and discriminating legislation by a State against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment."

And in the case of *Gibson v. Mississippi*, *supra*, Justice Harlan said: "In the administration of criminal justice no rule can be applied to one class which is not applicable to all other classes."

In the matter of selecting jurors it is well settled that there may be a discrimination by the State between persons within its jurisdiction that is just and reasonable, and hence right under the fourteenth amendment. Justice Strong alluded to such discrimination in *Strauder v. West Virginia*, *supra*, when he said: "We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications. We do not believe the fourteenth amendment was ever intended to prohibit this. Looking at its history it had no such purpose."

Beyond such discrimination a class discrimination in the selection of jurors is unjust and unreasonable. In the cases heretofore cited, beginning with *Strauder v. West Virginia*, in which the constitutionality of section 641 was held or assumed, it was held or assumed that a discrimination in the selection of jurors against negroes because of their color was unjust and unreasonable, and hence in violation of the fourteenth amendment. No occasion has arisen heretofore to decide whether any other class discrimination in the selection of jurors was likewise unjust and unreasonable and

such a violation. But in the case of *Strauder v. West Virginia*, *supra*, Justice Strong said: "If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment."

Judge Barker, in his separate opinion rendered on the last hearing of this prosecution in the Court of Appeals (26 Ky. Law Rep., 1116) sums up the position of the Supreme Court of the United States, in this particular, in these words: "The Supreme Court of the United States, the final arbiter in all matters involving the Federal Constitution, has uniformly held that the exclusion from juries, grand or petit, of persons belonging to a class for the sole reason that they belonged to such class, is, as to a member of the excluded class being tried under a charge of crime, a deprivation of the equal protection of the laws. This question has generally arisen in cases involving the exclusion and trial of negroes. This might well be expected in the confusion of adjusting the rights of this race from their former condition of slavery to that of citizens under the thirteenth, fourteenth and fifteenth amendments. But the application of the principle under discussion is not confined to the rights of negroes. It extends to every person, whatever his race, color or political affiliation—if his legal rights have been denied solely because thereof."

There would seem, therefore, to be no room to question that the defendant has the right which he asserts in the second paragraph of his petition, to wit, to have the jurors from which the jury is to be impaneled, that is, to try him, selected from persons possessing the statutory qualifications, without discrimination against those of them who are members of the same political class as defendant, because of their belonging to such class, and that it is a right secured to him by the equal protection of the law's clause of the fourteenth amendment. The right which he thus has is a right against discrimination on that account. It is not a right to a mixed jury, i. e., to have the jury members of the political class to which he belongs. On this point Justice Strong had this to say in *Virginia v. Rives*, *supra*: "Nor did the refusal of the court and the counsel for the prosecution to allow a modification of the venire, by which one-third of the jury, or a portion of it, should be composed of persons of the petitioner's own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them or to any person by the laws of the State or by any act of congress, or by the fourteenth amendment of the Constitution. It is a right to which every colored man is entitled; that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioner by the State court, viz., a right to have the jury composed in part of colored men."

two persons, one of whom shall be clerk of the court, and the other a person of opposite politics to the clerk, and such, no doubt, is the rule in all the Federal courts.

It remains, so far as this branch of the case is concerned, to consider and determine whether within the meaning of section 641 it appears that defendant is denied, or can not enforce, in the State courts this constitutional right thus determined to be his. It will be noted that he is entitled to a removal if either he is denied or can not enforce such right therein. Justice Bradley, in the case of *Texas v. Gaines*, Fed. Case No. 13,847, in referring to the third section of the original Civil Rights Act of April 9, 1868, substantially the same as section 641 in wording, said: "What says the third section? How does it describe and define those who are within the meaning of the act? It defines them as 'persons who are denied or can not enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act.' Here are two classes: First, persons who are denied any of the rights secured to them by the first section of the act; second, persons who can not enforce in the courts any of said rights."

And, first, does it appear that the defendant is so denied the right in question? Here, too, the question breaks in two. What facts appear in relation to a denial thereof? And what is the proper legal construction to be placed upon such facts?

It will aid in presenting them to make a preliminary statement in regard to two matters. One relates to the method of selecting jurors prescribed by the statutes of Kentucky. A certain number of jurors are selected annually by three jury commissioners appointed annually for each county by the judge of the circuit court. In Scott county the jury commissioners seem to be appointed each year at the regular October term of the circuit court thereof. The names of the jurors thus selected are placed by the commissioners in a wheel, and the regular grand and petit jurors for each term thereafter during the year are drawn from the wheel. The commissioners draw the panels for the first term thereafter, and the circuit judge draws them for the subsequent terms. The statute provides that the commissioners shall be intelligent and discreet housekeepers of the county, over twenty-one years of age, resident in different portions of the county, and having no action in court requiring the intervention of a jury. They are required to select the jurors from the intelligent, sober, discreet and impartial citizens, resident housekeepers in different portions of the county, over twenty-one years of age. It is provided that the judge of the circuit court may at any time during the term when it is necessary, when the regular panel is for any reason exhausted, draw and select from the wheel other persons to act as grand and petit jurors, or he may, in his discretion, direct that such jurors be supplied from bystanders.

The other matter referred to is the number of peremptory challenges allowed in the State courts in a felony prosecution. They are five to the Commonwealth and fifteen to the defendant.

Now as to the facts that appear in relation to a denial of defendant's said constitutional right. And, first, what facts are alleged in the second paragraph of the petition?

Four circumstances are alleged that have a tendency to induce a suspicion, if not an actual belief, that in the selection of the jurors from which the jury that tried defendant on each occasion came those persons qualified for jury service who belonged to the same political class as defendant, to wit, Republicans, were purposely excluded therefrom, and thus discriminated against. The first is the existence of a state of feeling against the defendant on the part of those of opposite politics because of his alleged offense. It is alleged that at the regular election for governor and other State officials, in November, 1899, said William Goebel was the Democratic candidate for governor; said William S. Taylor was the Republican candidate therefor, and the defendant was the Republican candidate for the office of secretary of state; that said Taylor, defendant, and the other Republican candidates were declared elected and inducted into their respective offices; that thereafter Goebel contested Taylor's right to the office of governor; defendant's opponent contested his right to the office of secretary of state, and like contests were had as to the other offices; that it was pending said contest that Goebel was assassinated; that the public mind was greatly inflamed and bitter, and intense political animosities were excited and fostered by reason of said election, contest and assassination; and that such feelings existed at each of said three trials, and still existed against him on the part of Goebel Democrats throughout the State, and particularly in Scott county. At the election in 1899 there was a split amongst the Democrats. John Young Brown ran as an independent, and by Goebel Democrats is meant those that supported Goebel. The second is that those who had to do with selecting the jurors from whom the three juries came were all Goebel Democrats. The third is that at the time of each of the trials there were in Scott and Bourbon counties such a number of Republicans, qualified for jury service that it is not likely that a jury would have been obtained having no Republicans upon it. It is alleged that at the presidential election in November, 1900, 2,500 Democratic and 2,100 Republican votes were cast in Scott county; that in the presidential election in 1896, 2,600 McKinley and 2,200 Bryan votes were cast in Bourbon county, and that at the State election in 1899 Taylor received twenty-seven more votes than Goebel in Bourbon county.

It appears from the returns that at the last three presidential elections in said two counties the vote was as follows:

SCOTT COUNTY.

	Dem. votes.	Rep. votes.
1896	2,874	1,718
1900	2,539	2,107
1904	2,237	2,111

The average Democratic vote for the three elections was 2,878, and the average Republican vote for same was 1,977. For the last two years the former average was 2,888 and the later 2,109.

BOURBON COUNTY.

	Dem. votes.	Rep. votes.
1896	2,210	2,578
1900	2,411	2,217
1904	2,586	2,147

The average Democratic vote for the three elections was 2,402 and the average Republican vote for the same was 2,314. For the last two years the former average was 2,498 and the latter 2,182. It is further alleged that the number of white Republican voters in Scott county is about 1,300, and that in Bourbon county three-fifths of the Republican voters are negroes, which would make the white Republican voters in Bourbon county about 900. The proportion of Democratic voters to Republican white voters in Scott county is not as great as two to one. In Bourbon county it is somewhat less than two to one, and not as great as three to one. If then, no more in proportion of Democratic voters were disqualified or excusable from jury service than Republican white voters—which it is reasonable to conclude is the case—it follows that the proportion of Democratic qualified and nonexcusable jurors to Republican white qualified and nonexcusable jurors in Scott county was not as great as two to one, and in Bourbon county it was between three to one and two to one. The fourth and last circumstance referred to is, that upon neither one of the three juries that tried defendant was there a single Republican. As to the composition of the first jury, it is alleged that it was composed "almost, if not entirely, of Goebel Democrats, and no Republicans;" as to the second jury, that it was composed "entirely of Goebel Democrats;" and as to the third, that it was composed "entirely of Goebel Democrats—one juror a Goebel supporter, but of doubtful politics, excepted."

Then certain acts are alleged in relation to the selection of the jurors from which said juries were impaneled, and to the impaneling of the juries therefrom, which, taken in connection with said circumstances, establish, if true, that in such selection Republicans were discriminated against and purposely excluded therefrom, in order that there might not be any of them on the jury to try defendant, and that the Scott Circuit Court held that such discrimination was not illegal, and that the defendant had no right to have it refrained from. It is alleged as to the first trial at the July-August, 1900, special term that there were in the wheel the names of 100 undrawn jurors, placed there prior to the election of 1899 and the assassination of Goebel by impartial and unbiassed jury commissioners appointed by the circuit judge in October, 1899; that upon the regular panel being exhausted defendant moved said judge to select additional jurors required from the wheel, and that he refused to do so, and directed the sheriff of Scott county to summon first 100 men and then forty men for jury service from said county, and to summon no man from Georgetown, the county seat of said county, but to go out in the county for that purpose; that the men so summoned were, with the exception of three or four Republicans and Independent Democrats, known to be partisan Democrats, and were, with said exception, purposely summoned because of their known party affiliation; that when the men so summoned appeared in court they were seated on the side of the court room separate and apart from the spectators and other persons, and said judge, without notice to defendant or his counsel, or making any request of either of them, left the bench, went to the place where said veniremen were seated, called them up to him one at a time, not in defendant's or his counsel's hearing, and, without swearing them, excused such of them as he saw fit from jury service; and that from the jurors so summoned the

first jury was obtained. As to the second trial at the regular October term, 1900, it is alleged that at the October term, 1900, when an appeal was pending from the judgment entered upon the verdict of the first jury, and there was a possibility of its being reversed and another trial had, said judge appointed as jury commissioners John Bradford, Ben Mallory and H. H. Haggard, all Goebel Democrats; that said jury commissioners placed in the wheel the names of 200 citizens of Scott county, 195 of whom were Goebel Democrats, and five of whom were Republicans; that of the names so placed in the wheel 75 were drawn at the regular February and May, 1900, terms of said court, and 125 were drawn at the regular October, 1901, term, upon defendant's second trial; that of the five Republicans so placed in the wheel at the beginning, one was drawn at the February term, one at the May term, and the other three at the October term; that of the three drawn at the October term two were disqualified by previously formed opinions, and the other was peremptorily challenged by the Commonwealth; that the jury was not obtained from said Scott county jurors, probably as much as six jurors being obtained therefrom, and the sheriff was directed to summon veniremen from Bourbon county; that he summoned 168 veniremen from said county, all of whom were Goebel Democrats except three, who were Republicans; and that from the jurors so summoned the remaining jurors of the second jury were obtained. As to the third jury at the last trial at the special term in August, 1903, it is alleged that 178 jurors were summoned from Bourbon county and of them three, or possibly four, were Republicans, and the remaining 172 or 173 were Goebel Democrats, and were summoned because they differed politically from defendant. It is further alleged that on each of said trials Republicans and Independent Democrats qualified for jury service were intentionally passed by in selecting and summoning venireman, in order that defendant might not have a fair trial by a jury of his peers impartially selected, but to the end that a jury might be selected to convict him; that in the second trial he objected to the formation of a jury from the veniremen summoned, and moved the court to discharge the entire venire on the ground that he could not obtain a fair trial before a jury selected therefrom, and filed an affidavit in support thereof; but although the statements in said affidavit were true, and known to be true by the court, he was forced to submit to trial before a jury composed as heretofore stated; that on the third and last trial he asked the court to admonish the sheriff to summon an equal number of men of each political party, which request was refused; that he then asked the court to instruct him to summon the talesmen as he came to them, regardless of political affiliation, which request was also refused; and that at each of said trials the facts in relation to the jurors, as heretofore stated, were embraced in affidavits filed in support of challenges to the panel and the venire, and objections to the formation of the jury from the men so summoned, and also in the motions and grounds for new trial, prepared and filed on behalf of defendant at each of the trials; but they were disregarded by the court, and defendant's challenges to the panels and to the venire and motions for new trial in each instance were overruled.

The Commonwealth of Kentucky has not filed a reply to said petition for

allegations thereof. Said allegations must, therefore, be accepted as true save in so far as they may be contradicted by the transcript on file heret.

In the case of *Dishon v. C. & N. O. & T. P. Ry. Co.*, 133 Fed., 471, Judge Richards, in discussing the affirmative allegations of a petition for removal in a civil suit under the jurisdictional acts of 1887-1888, said: "If these averments were not true, the plaintiff should have denied them, and an answer would then have been made for the court below to try and determine. No answer was filed, no issue in any other way was taken. The plaintiff contented himself with making a motion to remand, and which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out."

In the case of *Whitton v. Tomlinson*, 160 U. S., 231, Justice Gray, in referring to a petition for a writ of habeas corpus under sections 751-753 U. S. Revised Statutes, said: "In a petition for a writ of habeas corpus, verified by oath of the petitioner, as required by U. S. Revised Statutes, section 751, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted unless distinct and unambiguous."

The allegations of the petition for removal are not borne out by the transcript in all their detail. They are, however, borne out to a substantial degree, and are not contradicted in any substantial particular. It establishes the discrimination complained of in the selection of the jurors by the subordinate officers having to do therewith on the second and third trial etc. that on both trials the Scott Circuit Court held that such discrimination was not illegal, and the defendant had no right to complain thereof. It being claimed that the jurors selected did not possess the statutory qualifications. As to the first trial, all that the transcript shows is, that it was one of the grounds of defendant's motion for new trial; that the circuit court, after the regular panel was exhausted, had refused to draw from the wheel the names of jurors placed there in the fall of 1899, before any notice of discrimination had arisen, concerning which Judge DuRelle had this to say in the opinion delivered by him, on behalf of the majority of the Circuit Court of Appeals, on the first appeal: "In the grounds relied on in the motion for new trial it is stated that the court overruled motion of appellant for the regular panel was exhausted, to draw the remaining names necessary to complete the jury from the jury wheel. It is to be regretted that it was not adopted which so much feeling existed the simple and easy method of having a trial by jury impartially selected. This will doubtless be done upon the succeeding trial."

There seems to have been no challenge to the venire or the panel on the first trial on account of any discrimination.

As to the second trial the transcript shows that the defendant challenged the Scott county jurors drawn from the wheel, and each of two Boone county venires, before the panel was completed, and the panel, after being completed, because of the discrimination complained of—and that the challenges were overruled. It further shows that defendant filed to suppress

said challenges the affidavits of himself and three citizens of Scott county and one citizen of Bourbon county, and that the Commonwealth filed the affidavits of one citizen of Scott county, one of its employed counsel, of the deputy sheriffs of Scott and Bourbon counties, who summoned and assisted in summoning the Bourbon county jurors, and of two citizens of Bourbon county against the challenges. The state of political feeling, and the political complexion of the voters of Scott and Bourbon counties, of the qualified voters therein, of the three jury commissioners appointed in October, 1900, pending the first appeal, when there was the possibility of another trial, of the Scott county jurors placed in the wheel by said commissioners, and those remaining therein at the second trial, and of the Bourbon county jurors summoned at said trial, was made out by said affidavits the same as stated in the second paragraph of the petition as heretofore cited. Said affidavits specified the names of the five out of two hundred Scott county jurors placed in the wheel by the jury commissioners, appointed in October, 1900, pending the first appeal, and when another trial was possible, and the three out of 168 Bourbon county jurors summoned by the deputy sheriffs, who were Republicans. The facts thus stated, as shown by said affidavits, were not contradicted by any statement in any counter affidavit, save as to the political complexion of the jurors summoned from Bourbon county. The sole fact stated in any of the affidavits, as to the Scott county jury commissioners, and as to the Scott county jurors, was that they possessed the statutory qualifications. As to the political complexion of the Bourbon county jurors, one of the Bourbon deputy sheriffs stated that the claim that only two of the first venire were Republicans was untrue, and that many more of them voted for McKinley in 1896 and against Goebel in 1899. Another of said sheriffs stated that the claim that only one of the second venire was a Republican, and that many more of them had voted as aforesaid, and the two citizens of Bourbon stated that not less than eight of the first venire voted against Goebel, and that not less than five of the second venire were Republicans. Neither of these affiants specified the name of any person upon either venire who was a Republican, other than the three specified in the defendant's affidavits. The showing made by these affidavits amounted, at the most, to this: That out of 168 jurors summoned from Bourbon county, as many as eight voted against Goebel, and as many as five were Republicans. In each of the affidavits of the Bourbon county sheriffs and citizens it was stated that the Bourbon county jurors were sober, discreet, intelligent, good citizens of Bourbon county, thus coming up to the statutory requirement, and in the affidavits of the Scott county deputy sheriffs, who did the actual summoning of the Bourbon county jurors, they state that they told the deputy sheriffs of Bourbon county that they desired men who had the qualifications of jurors. In view of the precedent action of the judge of the Scott Circuit Court in refusing at the first trial to draw from the wheel the names of jurors placed there in the fall of 1899, when no motive for making the discrimination complained of existed, and in appointing three Goebel Democrats as jury commissioners in.

said challenges, the reasonable inference is that the challenges were overruled not because it was held that there had not been the discrimination complained of, but because it was held that such a discrimination was not illegal, and the defendant had no right to complain of it, inasmuch as it was not questioned that the jurors selected possessed the statutory qualifications.

As to the third trial, the transcript shows that the defendant challenged each venire summoned from Bourbon and the panel after it was completed, because of the discrimination complained of, and that said challenges were overruled. It further shows that the defendant filed in support of said challenges the affidavit of himself and of two citizens of Bourbon county, and that the Commonwealth filed the affidavits of the officers who summoned and assisted in summoning the two venires, against the challenges. The political complexion of the two venires was shown by defendant's affidavits to be as alleged in the second paragraph of the petition. In addition it was specifically shown how the discrimination complained of was actually practiced as to the first venire, as follows, to wit: That in Paris and on the Millersburg pike the officers summoned six Goebel Democrats and passed by four Republicans and one Independent Democrat; that on the Mayaville, Lexington and Clintonville pikes they summoned eleven Goebel Democrats and passed by seven Republicans and one Independent Democrat; that on the Jackson pike they summoned five Goebel Democrats and passed by three Republicans; that on the North Middletown and Flat Rock pikes they summoned four Goebel Democrats and passed by three Republicans; that in the town of Ruddle's Mill and on the Millersburg and Ruddle's Mill pike they summoned eight Goebel Democrats and passed by two Republicans and one Independent Democrat; and in the vicinity of Clay's Cross Roads and the territory included by the Clay and Kiser pikes, and the Georgetown and Cynthiana pikes, they summoned three Goebel Democrats and passed by four Republicans and eleven Independent Democrats. The affidavits specified the name of each Goebel Democrat so taken, and each Republican and Independent Democrat so left in these various portions of Bourbon county, and that each Republican and Independent Democrat so left was a qualified juror. The affidavits of the officers filed by the Commonwealth denied that they had been guilty of the discrimination charged, and stated that the persons summoned were sober, discreet and intelligent housekeepers of Bourbon county qualified for jury service; that many of the persons passed by were not qualified for jury service, some of them being United States revenue officials, others old and infirm, and other practicing physicians; that of the ninety-five constituting the first venire more than two were Republicans and a number were Prohibitionists, Republicans and Independent Democrats, and that at least 90 per cent. of the persons qualified for jury service were Democrats, and many of the Republicans who would otherwise be competent as jurors were in the service of the United States government as storekeepers, gaugers, rural carriers, post-office and other employment, and that a number of the persons named as Republicans and Independent Democrats were life-long Democrats. No

specifications were made, however, as to who of the persons so named were such Republicans or Democrats. On overruling the challenge to the first venire the court gave its reasons for so doing, and entered it of record. On overruling the challenge to the second venire and the panel no reason was given so far as the record shows. The reasonable presumption is that it was for the same reason that the first challenge was overruled; that reason was that it was not claimed in the grounds of the challenge that the jurors were not sensible, discreet and sober men and housekeepers of Bourbon county, over twenty-one years of age, and it was expressly stated and entered of record that the challenge was overruled without any reference to the affidavits. The transcript further shows that before the venires were summoned the defendant moved the court to instruct the sheriff to summons persons without regard to political affiliation, which motion was overruled. There can be no question then but that the Scott Circuit Court held on this third and last trial that defendant had no right to have jurors summoned without discrimination against the political class to which he belonged. As said by Judge Barker, in the separate opinion heretofore referred to: "It is clear that the trial judge was of opinion that it was not an offense against the fourteenth amendment to exclude Republicans from the jury solely because they were Republicans, provided the selected Democrats were possessed of the statutory qualifications required for jury service. There was no decision upon the evidence offered as to whether in fact there had been the discrimination complained of, it being necessarily assumed that this was, if true, an immaterial circumstance."

That a refusal to hear evidence offered by the defendant in a criminal prosecution, that he has been illegally discriminated against in the selection of jurors, is a violation of the fourteenth amendment and a denial of the equal protection of the laws guaranteed by it, has been settled by the Supreme Court of the United States in the recent cases of *Carter v. Texas*, 177 U. S., 442; *Rogers v. Alabama*, 192 U. S., 226.

The *Carter* case was an indictment against a negro found in the State court. The defendant moved to quash the indictment because of discrimination against his racial class in selection of the grand jury. After reading his motion he asked leave of the court to introduce witnesses, and offered them to prove and sustain the allegations therein made. The court refused to hear any evidence in support of said motion and overruled it without investigating into the truth or falsity of the allegations of said motion. The Supreme Court reversed the judgment against him on this ground. Mr. Justice Gray said: "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as grand jurors in a criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the fourteenth amendment of the Constitution of the United States."

And again: "The necessary implication is that the defendant has been denied a right duly set up and claimed by him under the Constitution and laws of the United States."

The *Rogers* case was also an indictment against a negro found in the

crimination against his racial class in the selection of the grand jury. The State court struck the motion from the files because of its prolixity. The Supreme Court held the action of the State court in this particular was a denial to defendant of the equal protection of the laws, and reversed its judgment against him.

It, therefore, appears from the second paragraph of the petition for removal, in connection with the transcript, that in the selection of the jury on the second and third trials the defendant has been discriminated against by those who have had to do therewith, and that on each trial it was held by the Scott Circuit Court that the defendant had no right to complain thereof inasmuch as the jurors selected possessed the statutory qualifications. He has, therefore, been denied the equal protection of the laws guaranteed him by the fourteenth amendment, both by said subordinate court and said court. There is no claim put forward in the petition that the Court of Appeals decided against defendant's said constitutional right on either appeal, or that he has been denied the equal protection of the laws by said court. By section 281 of the Criminal Code of Kentucky it is provided as follows: "The decisions of the court (trial court) upon challenges to the panel and for cause, upon motions to set aside an indictment and upon motions for a new trial, shall not be subject to exception."

Because of this Code provision the Court of Appeals refused, on the second and third hearings therein, to pass upon the action of the Scott Circuit Court on the second and third trials therein in relation to the defendant's challenges to the venires and panels. It held that jurisdiction had not been conferred upon it to hear and pass upon such questions, and hence declined to express any opinion in regard thereto. On the second hearing in the Court of Appeals Judge O'Rear, who delivered the opinion on behalf of the majority, said: "Objections were made by affidavit and motion to the manner of selecting the jury in this case, and to the venire because of its composition. The charges made are of a most serious import, if true. But it is proper to state that they are controverted, except as to the fact of the political affiliation of the panel summoned in the case. It should not be said, and it is not true, that per se a Democrat is disqualified from fairly trying a Republican charged with crime, or vice versa. If men should be selected as jurors whose prejudices would be relied on to procure a conviction or acquittal of one whom they are trying, charged with crime, we are fully persuaded that the fact of the politics of such jurymen would not be the basis of such selection. It would be the character of those so selected. But it has been held (*Terrill v. Commonwealth*, 18 Bush. 246; *Kennedy v. Commonwealth*, 14 Bush. 842; *Forman v. Commonwealth*, 86 Ky., 606, 9 Ky. L. Rep., 759) that objection to the panel of the jury shall not be subject to review by this court. It is the opinion of the court (a point upon which, however, we have not been in entire accord) that under paragraph 281, Criminal Code of Practice, this court has no jurisdiction to pass upon these questions. In the opinion of some of the members, when jurisdiction is conferred upon this court of this class of cases, it is not competent for the legislature to limit the court as to what errors it may reverse for, or as to what shall be the subject of reversal; that to so allow is to leave the property

legality of the proceedings in the court to legislative, and not judicial, control. The majority of the court adheres to the former rulings on this subject. The manner of selecting the jury, except as regulated by statute, is within the control of the trial court. To its sense of fairness and desire to dispense that justice in trials whose essence is impartiality, this question must be left."

On the third hearing, though the Court of Appeals reversed the judgment of the lower court, it refused to do so on the ground that it had erred in its action as to the challenges. Judge Barker delivered the opinion of the majority of the court setting forth the grounds upon which the reversal was had, as heretofore set forth. He also filed a separate opinion, from which I have quoted quite liberally, in which two other of the judges concurred, and in which it took the ground that the judgment should be reversed upon the error of the lower court as to the challenges. He said: "Having written the opinion of the court in this case on the only theory upon which a majority of the members could agree, the deep conviction I have on the Federal question contained in the record constrains me to express in a separate opinion my personal views on that subject."

And, after doing this, he said: "In conclusion, I am of the opinion that the trial judge should have passed upon the question of fact presented by the appellant as to the summoning of the jurors, and if there was even a well-grounded suspicion that unfairness had prevailed, the jury should have been discharged and others summoned under such safeguards as would preclude indulgence in partisan methods."

He took the position that the Court of Appeals had jurisdiction to pass on said question by virtue of article 6 of the Federal Constitution, which provides that: "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

It is not expressly stated in the opinion delivered on the last hearing that the court refused to pass on this Federal question because of said section 281, but there can be no doubt that such was its reason in not doing so.

So far as the action of said subordinate officers and the Scott Circuit Court in denying the equal protection of the laws are concerned, it has not been contended otherwise on behalf of the Commonwealth on the hearing of the motion; nor has one serious word been said to the effect that the claim of defendant in this particular is not entirely correct. The sole question taken on the part of the Commonwealth has been that such action by said subordinate officers and by said court is not a denial in the judicial tribunals of the State of the equal protection of the laws within the meaning of section 641. It is contended that defendant's sole remedy is, in case such action is repeated on another trial, to take the case to the Supreme Court of the United States by writ of error, and get it to correct the wrong done him.

Are this position and contention correct? What is the proper legal construction to be placed upon such action of said subordinate officers and said court? Because of it, can it be said that the defendant is denied the equal

action is pending, within the meaning of section 641?

The determination of this question demands ascertainment by us of the true intent and meaning of said section in this particular. But before entering upon its construction, a word or two as to whether the section should be liberally or strictly construed. It is well settled that the fourteenth amendment should be liberally construed. In the case of *Strader v West Virginia*, supra, Mr. Justice Strong said: "If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally to carry out the purposes of its framers."

As section 641 was enacted to enforce said amendment, there would seem to be some ground for holding that it, too, should be construed liberally. Another consideration that may be thought to lead in the same direction is this: The object of the jurisdictional acts of 1887-1888, as is well known, was to restrict Federal jurisdiction in civil suits. This it did by enlarging the amount in controversy essential to jurisdiction, and cutting down the time within which a petition for removal might be filed, and perhaps in other ways. But by section 5 thereof sections 641, 642 and 643 were continued in force without a change in any of their provisions. On the other hand, attention may be directed to the fact that the jurisdiction conferred by section 641 is a delicate one, and in its exercise calculated to disturb the harmony that should exist between the Federal and State jurisdictions. This thing of taking a State prosecution for a State offense, pending in a State court, out of said court bodily and transferring it to a Federal court under circumstances that can not help be construed as a reflection upon the State court and the State itself, is a very serious matter, and in view of this I am inclined to believe that the section should be strictly construed. Judge Rives characterized the Federal jurisdiction thus acquired as "absolutely jurisdiction," and in the case of *Fowlkes v Fowlkes*, Fed. Cas. 510, he thus expressed himself as to how section 641 should be construed: "It is observable that the late comprehensive act of March 3, 1875, embraces cases only originally cognizable by the Federal courts. The same is the case of removal on the ground of prejudice or local influence. The exceptions to this applies to cases of public officers and to persons denied or protected from enforcing in the courts of the State their equal civil rights. This departure from the fundamental principle of limiting removals to cases originally cognizable in the Federal courts results from the duty of the government to protect officers and the obligations of congress to enforce, by appropriate legislation, the provisions of the fourteenth amendment. These exceptions, therefore, are to be strictly construed. Interpreted, if practicable, in subordination to and conformity with the theory of our judicial system, State and Federal, and the provisions of the Constitution."

But, however this may be, the statute is not to be frittered away by construction, because of the delicacy of the jurisdiction it confers. In reference to section 642, in *Tennessee v. Davis*, supra, Mr. Justice Strong said: "If the act of congress does provide for the removal of criminal prosecutions for offenses against the State laws where there arises in them the claim of a Federal right or authority is too plain to admit of denial. Such is its peremptive language, and it is not to be argued away by presenting the supposed

dividual action, much less with an individual or community state of mind. The statute probably could not have made such state of mind a ground of removal. It certainly did not intend to make it so.

The question was then considered and discussed, whether action by a State, through any of its agencies, legislative, executive or judicial, within the prohibition of said clause of the fourteenth amendment, could amount to such a denial, and, therefore, justify a removal. It prohibited State action through either action. Could a removal be had for State action within the prohibition of either agency? Judge Rives, of Virginia, stated in the cases of *Fowlkes v. Fowlkes*, supra, and *Ex parte Reynolds*, supra, that it could, or, in other words, that section 641 was as broad as said clause of the fourteenth amendment. In the *Fowlkes* case he said: "When we construe this language in subordination to the constitutional amendment it seems to me it clearly points to the action of the State in one of its three capacities, legislative, executive or judicial. Ought not the petition in such a case to designate some law, some judicial ruling, some executive act, as the denial of his equal and civil rights, or as constituting the obstacle to his obtaining them?"

And again: "This enactment of congress was designed to secure him the equal protection of the laws and his equal civil rights when invaded by the State in any part of its administration, legislative, executive or judicial?"

In the *Reynolds* case he said: "A State is a sort of trinity: it exists, acts and speaks in three capacities, legislative, executive and judicial. What is forbidden to it in one capacity is forbidden to it in each and all. It may not infringe this article by legislation, but it may equally do so by its courts or its executive authorities, hence it seems to me it is in strict pursuance of this article to base the intervention of the Federal courts on the inability to enforce in the judicial tribunals of the State, or in some part thereof, the equal civil rights secured by this article. The mischief is the same whether the deprivation proceeds from the law, the courts or the executive. It is equally attributable to the State. The laws of the State may be all conformable to the requirements of the article, but its infraction may rest with the courts or executive authorities of the counties. The amendment to be potential and attain its end should be enforced, as these enactments purport, by providing a remedy for the dereliction in whatever quarter it may appear, hence to find a casus for the application of this law of Federal intervention under the theory of this article, we are not restricted to the action of the legislature alone; it clearly contemplates the failure of executive or judicial remedies for the enforcement of these equal civil rights."

Judge Rives, however, seems to have overlooked the words of the statute, and not to observe that the denial which it provided should be a cause for a removal was a denial "in the judicial tribunals of the State." When the *Reynolds* case came before the Supreme Court, as it did under the style of *Virginia v. Rives*, it was laid down that by reason of this limitation the statute was not as broad as the Constitution. Justice Strong said: "The constitutional amendment is broader than the provision of that section."

And he pointed out in his opinion an instance in which it was broader. The grounds for removal stated in the petition in the case were three. One

was that a strong prejudice existed in the community against the defendants, independent of the merits of the case, and based solely upon the fact that they were negroes, and the man they were accused of having murdered was a white man. Another one was that negroes had never been allowed to serve as jurors, either in civil or criminal cases in the county, in any case, civil or criminal, in which negroes were interested. The third one was that the court before the trial had overruled defendants' motion that a portion of the jury by which they were to be tried should be composed in part of competent negroes. Judge Rives held that the petition stated a case within section 641, and under a writ of *habeas corpus* took custody of the negroes. Of course no case was stated in the allegations as to the prejudice, as Judge Rives had held in the Fowlkes case. Nor was any case stated in the allegation that negroes had not been allowed to serve as jurors, for that may have been true, and yet the exclusion may not have been the result of discrimination on account of race. He, therefore, based his action on neither one of these grounds, but solely upon the refusal of the State court to provide a mixed jury. Thereupon the State of Virginia applied to the Supreme Court of the United States for a mandamus to compel restoration of the prisoner to State custody, which made the case of *Virginia v. Rives*. The court granted the writ, holding that the defendants were not entitled to a removal on either ground stated in the petition. I have heretofore quoted what Justice Strong had to say on the ground as to mixed jury. This was really all that was up for decision in that case. But the fact that this was the first time that section 641 was before the Supreme Court and the broad position taken by Judge Rives led to a consideration of the statute somewhat at large. In the course of the argument it was stated that the officer having to do with selecting the juror from which were drawn the juries that indicted and tried defendant had illegally discriminated against them because of their race and color. This statement led the court to consider and determine whether such discrimination by such an officer was within the statute, and it was held that it was not. Justice Strong said: "If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the person from whom the juries for the indictment and trial of the petitions were drawn, disregarding the statute of the State, confined his selection to white persons, and refused to select any persons of the colored race solely because of their color, his action was a gross violation of the spirit of the State's laws, as well as of the act of congress of March 1, 1875 (18 Stat. at L., 885), which prohibits and punishes such discrimination. He made himself liable to punishment, at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State, and was prohibited by the constitutional amendment. But inasmuch as it was a criminal misuse of the State law, it can not be said to have been such a denial or disability to enforce in the judicial tribunals of the State the rights of the colored men as is contemplated by the removal act, section 641. It is to be observed that act gives the right of removal only to a person who is denied or can not enforce in the judicial tribunals of the State his equal civil rights, and this is to appear before trial."

And again he said: "But when a subordinate officer of the State, in vio-

ground for removal; it was made after the petition was denied and was overruled, not because it was held that a discrimination on account of race was not illegal, but because there was no evidence of such discrimination. Chief Justice Waite, who had concurred with the majority in the decision of March 1, 1880, dissented from the holding that the judgment of the State court should be reversed because of its action on the motion to quash, on the ground that sufficient proof of the fact of discrimination because of color had not been introduced.

In the Gibson case one of the grounds upon which removal was sought was that the officers who had to do with selecting the grand jurors who returned the indictment against the defendant had great prejudice against him because of his race, and had illegally discriminated against his race in selecting said grand jurors. It was held that defendant was not entitled to a removal on said ground. The Smith and Murray cases were like the Gibson case.

In the Smith case, however, a motion to quash the indictment on the ground of illegal discrimination had been made and overruled prior to the filing of the petition for removal, but no evidence was introduced in support of this motion. In the Murray case, which was like the Smith case, in the fact of prior challenge of the grand jury, the evidence showed that there had been no illegal discrimination. In neither case was the action of the court in overruling the motions to quash or challenge to the jury made a ground for removal.

It is, therefore, well settled that a class discrimination in the selection of jurors, grand or petit, by subordinate officers charged with their selection, nothing else appearing, is not a denial in the judicial tribunals of the State of the equal protection of the laws within the meaning of section 641.

On the other hand, it is equally well settled that where there is a statute providing for such discrimination, though unconstitutional and null and void, there is such a denial. This was held in the case of *Wilson v. Strauder*, supra. That was a prosecution against a negro in the State courts of West Virginia, whose statutes provided that jurors should consist of white male persons who were twenty-one years of age, and who were citizens of the State. The ground upon which it was so held is stated by Justice Strong, in *Virginia v. Rives*, in these words: "When a statute of a State denies his right or interposes a bar to his enforcing it in the judicial tribunals the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for removal. Such a case is clearly within the provisions of section 641."

A contrary presumption is indulged in in a proceeding under sections 751-755 to obtain release from State custody, on the ground that detention is had in violation of the Constitution or a law of the United States. Justice Harlan, in *Ex parte Royall*, 117 U. S., 241, said: "The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred

solution and laws of the United States.

In *Neal v. Delaware*, supra, it was held that, though the statute of Delaware passed prior to the fifteenth amendment prescribed the same qualifications for jurors as for suffrage and for suffrage that the person should be white, yet if, since the adoption of said amendment, the State had treated the statute as to suffrage repealed by the fifteenth amendment and the jury statute affected to like extent thereby, the statute did not amount to a denial within section 641.

And in *Bush v. Kentucky* it was held that inasmuch as the Court of Appeals had held that a statute passed after the fourteenth amendment, making an illegal discrimination as to jurors, was unconstitutional because in violation of the fourteenth amendment, it no longer amounted to a denial within such meaning.

And in the *Gibson, Smith, Murray and Williams* cases it held certain statutes and laws as not amounting to such denial.

Such, then, is the full extent to which the applicability of section 641 has been determined by the courts. It is held that an illegal discrimination by subordinate officers is not within the statute, and that such a discrimination by the legislature is. It follows, therefore, that in so far as the illegal discrimination complained of by defendant was on the part of subordinate officers who had to do with selecting the juror from whom came the jury that tried him, and the second paragraph of the petition does not state a case for removal. It follows further that in so far as said discrimination was on the part of the Scott Circuit Court, said paragraph states a case that is beyond any case that has yet arisen under section 641, and hence a case that is as yet undetermined by the courts. The only case in which judicial action prior to the filing of the petition for removal was made a ground of the right to removal was in the case of *Virginia v. Rives*, and it was held therein that said judicial action so relied on was not a good ground for removal, not because it was judicial action and not legislative action, but because the judicial action complained of was not a denial of the equal protection of the laws. It was simply a refusal to provide a mixed jury, to which defendants were not entitled under the fourteenth amendment.

It is claimed, however, on behalf of the Commonwealth, that it has been laid down by the Supreme Court in the various cases coming before it, involving the application of section 641, in certain general remarks on that section, that judicial action can never make a case under it, and that the only thing that can do so is legislative action. As, for instance, in *Virginia v. Rives*, supra, Justice Strong said: "The statute authorizes removal of the case only before trial, not after trial has commenced. It does not, therefore, embrace many cases in which a colored man's rights may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence or the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of the State, may be, and generally will be, after the trial has commenced. It is then during or after the trial that denial of a defendant's right by judicial tribunals occurs. Not often until then. Nor can the defendant know until then that

to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Taking up, then, the first part of this statement of Justice Harlan, the negative branch of it, that which undertakes to point out what sort of a case section 641 does not embrace, what does it amount to? Does it go to the extent of saying that under no circumstances can judicial action make a case within section 641? I submit that it does not. The only judicial action to which reference is had is judicial action that comes after the filing of the petition for removal. It is "judicial action during the trial or in the sentence, or in the mode of exercising the sentence," or judicial action after the trial has commenced. The judicial action had in view here is the final judicial action in the prosecution and in the trial court. No other judicial action is thought of. This is settled by the reason given why it can not make a case within section 641, and what is said as to how it can be taken advantage of. The reason so given is that it comes after the petition for removal is filed. Of course the petition for removal can not be based upon that which has no existence when it is filed. The way pointed out for taking advantage of it is by carrying up to the higher courts, and, if necessary, on error, to the Supreme Court of the United States. Of course the only judicial action that can be so taken advantage of is judicial action in the prosecution and judicial action that is final. It follows that judicial action outside of the prosecution, or judicial action in the prosecution prior to the filing of the petition for removal, is not within the negative part of Justice Harlan's statement.

Then take the latter part thereof, the affirmative part, in which he undertakes to state what section 641 refers to. He says that it refers to a denial resulting from the Constitution or laws of the State rather than judicial action at the final hearing. He, however, does not say that it refers exclusively to such a denial. He is more cautious than that. He says that it refers to such a denial, "primarily, if not exclusively." Again, what are the laws of a State within the meaning of those words as used by Justice Harlan in this connection? Did he have in mind solely the statutes of a State or did he include rules of action laid down by the judiciary?

Then as to the statement by Justice Strong at the close of the last quotation made from the opinion in *Virginia v. Rives*, in these words: "In other words, the statute has reference to a legislative denial or an inability resulting from it."

Bearing in mind the rule of Chief Justice Marshall quoted above, should not that be confined to a case where there has been a denial by subordinate officers, and the meaning held to be that in such a case legislative denial is essential in order to bring it within section 641?

There is no escape, therefore, from the conclusion that we have here a brand new case, a case beyond any that has been heretofore decided or had in contemplation. Does it then come within the true intent and meaning of section 641? Though it is beyond the cases heretofore decided, we can obtain help from them in answering this question. The result of those cases we have found to be is, that an alleged discrimination of the kind complained of by the subordinate officers who select the jurors when there is nothing in the statute requiring it, is not within section 641. On the other hand,

such an illegal discrimination made by statute is within said section. Now it would seem that if we can get a firm grasp of the idea why the one discrimination is held not to be a denial in the judicial tribunals of the State and the other discrimination is so held to be such a denial, we will have obtained some help to the solution of said question. The reason why a discrimination by subordinate officers is held not to be a denial is, as stated by Justice Strong in a quotation already made from his opinion in *Virginia v. Rives*, this: "It ought to be presumed the court will redress the wrong."

Or again: "The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court."

The reason why a discrimination by legislative action is held to be a denial is, as likewise stated, this: "When a statute of the State denies his right or interposes a bar to his enforcing it in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions."

The one discrimination is not a denial, therefore, because it will not affect the judicial tribunals of the State prejudicially to the defendant. The other discrimination is a denial, because it will so affect said tribunals. It will not affect them absolutely or certainly. It may not affect them at all. Indeed it is their duty not to be affected by it. Article 6 of the Federal Constitution requires that they should not be affected by it. But they may be, and the presumption is to be indulged that they will be, notwithstanding that in a habeas corpus case, under sections 751 755, an account of one claiming to be in custody in violation of the Constitution the contrary presumption is indulged in.

Does it not follow from this that any other State action involving an illegal discrimination which will in a real sense affect the judicial tribunals of the State—in as real a sense as legislative action will—is within the meaning of section 641? I think it is.

We reach the same conclusion if we consider the purpose of the section, the end it was intended to accomplish, its spirit which has been congealed in the words of the statute, and from that lofty height view and construe the language. What was that purpose or end? Was it not to secure in the State judicial tribunals a free and full exercise and enjoyment of the equal protection of the laws, as full and free as ought to be obtained, or can be obtained, in the Federal tribunals, and was it not intended to provide that if a defendant in a prosecution pending there could not obtain such exercise and enjoyment of such protection in those tribunals—if there was any real hindrance or obstacle to obtaining them there, then he should have the right to have the prosecution removed to the Federal court? It seems to me that these two considerations lead to the conclusion that the denial referred to, and within the meaning of the statute, was not a denial that had its place in the judicial tribunals of the State, but a denial that in a real sense had an effect there without any limit as to where it took place, provided it had an effect there. If so, then prior judicial action, either outside of or within the particular prosecution which would affect the State court having to do with such prosecution in affording the defendant therein the equal protection of the laws in its further handling of the prosecution, was within the meaning of the statute. As, for instance, suppose the Court of Appeals, though reversing the judgments against him on the various grounds asked,

free from such discrimination, would that not have made a clear case of a denial to the defendant of the equal protection of the laws and authorized a removal under section 641? Such judicial action would have affected the lower court in its further handling of the case in just as real a sense as an unconstitutional statute providing for the discrimination. There would seem to be no question as to this, and that such a case would be clearly within section 641.

The position that what amounts to a denial of the equal protection of the laws by judicial action prior to the filing of the petition for removal may be within section 641 is strengthened by two considerations. One is that the denial called for by said section is not limited in its words to a denial by legislative action. There is not a word said about legislative action in this section. The other is that the section authorizes a petition for removal to be filed after judicial action has been had, not only outside of the prosecution, but within it. The time fixed for filing it is "at any time before the trial or final hearing of the cause." In the case of *Ayers v. Watson*, 113 U. S., 594, Justice Bradley said: "This language has been held to apply to the last and final hearing." (*Home Life Ins. Co. v. Dunn*, 86 U. S., 214; *Vannoy v. Bryant*, 86 U. S., 4; *Jenkins v. Sweetser*, 103 U. S., 177; *B. & O. R. Co. v. Bates*, 119 U. S., 464; *Fisk v. Henarie*, 142 U. S., 450; *City of Detroit v. Detroit City Ry. Co.*, 54 Fed., 10.

In *Bush v. Kentucky*, *supra*, the case was removed from the State court on the first application, after a reversal by the Court of Appeals of a judgment in the trial court. And in *Davis v. So. Carolina*, 107 U. S., —, a removal was had under section 643, which has same language as 641 as to the time after a trial and verdict, and a new trial granted.

The statute, therefore, contemplated a removal after several trials and the case had gone to the Court of Appeals several times, as here, and, therefore, after judicial action had in the prosecution that might affect the last and final trial.

Besides all this, the cases in which the Supreme Court has had to do with the construction of section 641 are not without intimation that judicial action prior to the filing of the petition for removal might make a case for removal.

In the case of *Virginia v. Rives*, in holding that a case for removal had not been made on the ground that before the filing of the petition the State court had refused to provide the defendant with a mixed jury, the only case that has arisen in which judicial action prior to the filing of the petition has been made a ground of removal, the Supreme Court did not base its ruling upon the ground that prior judicial action could not be made a cause for removal, but on the ground that the prior judicial action complained of therein was not a denial of the equal protection of the laws, inasmuch as a mixed jury was not an element of such protection; and it seems to be implied that prior judicial action that was a denial thereof might be made a cause for removal.

And in the case of *Neal v. Delaware*, Justice Harlan expressly said as follows: "Had the State since the adoption of the fourteenth amendment

passed any statute in conflict with its provisions or with the laws enacted for their enforcement, or had its judicial tribunals by their decisions, repudiated that amendment as a part of the supreme law of the land, or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial upon its part of equal civil rights, or such an inability to enforce them in the judicial tribunals of the State as under the Constitution and within the meaning of section 641 would authorize a removal of the suit or prosecution to the circuit court of the United States."

This language is repeated in one of the subsequent cases.

Again in *Bush v. Kentucky*, it was held that a statute illegally discriminating against negroes, passed after the fourteenth amendment which, nothing else appearing, would have amounted to a denial in the judicial tribunals of the State under *Strauder v. West Virginia*, did not amount thereto in that case, because prior to the filing of the petition for removal the Court of Appeals had held the statute unconstitutional. If then a denial could be removed by judicial action, could it not as well be created thereby?

The Commonwealth's contention really comes down to a question of tenses. Its position amounts to this: A defendant in a prosecution in a State court, who has been denied therein the equal protection of the laws prior to the filing of a petition for removal, is not entitled to a removal because the denial is a past denial and not a present one. The position is fallacious in that it assumes that such a past denial may not be a present one. Though past in being made, if never set aside, it is present in force and effect.

Conceding then that it is possible for judicial action in a prosecution in a State court prior to the filing of the petition for removal to make a case for removal, is the prior action of the Scott Circuit Court at the second and third trials of defendant, in holding that he had no right to be exempt from the discrimination complained of, and in thus denying him the equal protection of the laws, sufficient to entitle defendant to a removal? It all depends upon whether such action is a hindrance or obstacle in a real sense to a free and full exercise and enjoyment of such right at another trial in said court, just as much so as an unconstitutional statute which said court should disregard and refuse to follow would be. Though the judgments of conviction in said court have been reversed, they have not been reversed on the ground of such action, but on other grounds. The Court of Appeals has held that it had no jurisdiction to consider or question said action, and has declined to do so. The Scott Circuit Court is the highest court in the State that had, or has, a right to deal with that question. It has on two occasions held that the defendant had not the right which he claims, and has entered upon its records that the defendant is not entitled thereto, and that entry has never been expunged or set aside. It remains there to-day. It must be conceded that this action and this entry will have an influence upon the future action of the court in this particular. The granting to defendant of the right asserted by him at another trial will be a change of front on the part of the court. To grant it, it will have to reverse its former action.

It can not be urged that said prior action of the Scott Circuit Court denying the defendant the right he claims is not a real hindrance and obstacle in the way of the future assertion of that right in said court, because there is now a new judge on the bench. A change of judges in the past has not effected a change in action with reference to defendant's right. Indeed such a change, instead of being a reason for expecting a change in such action, may be regarded as a reason for not expecting it, on the ground of comity. In courts of original jurisdiction comity, as a rule, at least, requires that the successor of another judge in a case shall adhere to the latter's former action therein.

I, therefore, conclude that the prior action of the Scott Circuit Court, denying the defendant the equal protection of the laws, is a real hindrance and obstacle to his asserting his right thereto in a future trial therein, just as real as an unconstitutional statute would be, and that the defendant is denied the equal protection of the laws in said court within the meaning of said section, and entitled to a removal on account thereof. He is denied in said court the equal protection of the laws because he has been denied, and such denial has never been set aside, but remains in full force and effect.

But thus far we have only dealt with one-half of the statute. It remains to consider briefly the other half thereof. It is claimed in the petition of removal that defendant can not enforce his right to the equal protection of the laws in the judicial tribunals of the State, and because of this he is entitled to a removal. By an inability to enforce in the judicial tribunals of the State is meant, as I construe the statute, any judicial tribunals of the State that may have jurisdiction of the prosecution. It was intended

force his rights to the equal protection of the laws in the Court of Appeals of this State can have a removal to the Federal court of such inability.

The conclusion I have reached, therefore, is that this case comes within both halves of the statute. It is no answer to defendant's right to the removal sought that he could have had the denial of his right to the equal protection of the laws corrected by the Supreme Court of the United States on error thereto, had either of the last two judgments against him been affirmed by the Court of Appeals, or that he can obtain such correction if there is a similar denial in the future, and a judgment of conviction against him is allowed to stand. Notwithstanding this remedy, he is entitled to the remedy of removal, if the case comes within the statute. Congress has seen fit to provide him with this remedy, and all that is essential to entitle him to it is that his case shall come within the terms of the statute, and that I have found to be the case.

But, to say the very least, it is not certain that defendant can correct the denial complained of if repeated at another trial, and, so far as my research has gone, I have been unable to find a decision of the Supreme Court of the United States which would authorize a writ of error in this sort of a case. If entitled to such writ, it must be to re-examine either the judgment of the Scott Circuit Court or the judgment of the Court of Appeals affirming that judgment. It is difficult to see how it could, in any state of the case, be to re-examine the judgment of the Scott Circuit Court, either before or after a judgment of affirmance by the Court of Appeals. Section 709, U. S. Revised Statutes, relating to writs of error as to judgments and decrees of State courts, expressly provides that the judgment or decree of a State court which the Supreme Court may re-examine and reverse, or affirm upon writ of error, is the "final judgment or decree in the highest court of a State in which a decision in the suit could be had." The Scott Circuit Court is not the highest court of the State in which a decision in the prosecution against the defendant can be had. The Court of Appeals is that court.

An extreme application of this requirement is the case of *Great Western Tel. Co. v. Burnham*, 162 U. S., 842. There the circuit court of Wisconsin had overruled a demurrer to the petition. The appellate practice of the court of that State authorized an appeal to the Supreme Court from such an order, and an appeal was taken therefrom. It was held that the demurrer should have been sustained, the order was reversed and the cause was remanded to the circuit court for further proceedings according to law. The lower court thereupon sustained the demurrer and dismissed the petition. It was held that the judgment of the circuit court was not subject to a writ of error; that an appeal should have been taken to the Supreme Court of the State, notwithstanding it was bound by its former ruling, and would affirm the case as a matter of course, and upon its doing so the judgment of affirmance should have been made the subject of the writ.

The following cases on error from Massachusetts, to wit, *McGuire v. Commonwealth*, 3 Wall., 269; *McDonald v. Massachusetts*, 18 U. S., 311, and *Rothschild v. Knight*, 184 U. S., 834, in which it is held that the judgment of the Superior Court of Massachusetts, and not that of the Supreme Court, is the subject of the writ of error, should be distinguished. This was because the Superior Court of that State is the highest court in which a

final judgment or decree in such a suit can be had, the Supreme Court simply passing on exceptions and certifying its ruling to the Superior Court.

Likewise this case on error from New York, to wit, *Green v. Van Buskirk*, 8 Wall., 448, in which it was held that an affirmance by the Court of Appeals of that State of a judgment of the Supreme Court thereof, and sending the record to the Supreme Court, with directions to enter judgment, which was accordingly done, a writ of error might be taken to the latter court, should be distinguished. This was because a writ of error may be taken to either court where the judgment of the highest court may be found. On such writ of error, however, it is the judgment of the highest court of the State, and not that of the lower court, which is re-examined.

Justice Story, in *Gelston v. Hoyt*, 3 Wheat., 204, said as follows: "It must be directed either to that tribunal which can execute it; to that in which the record and judgment to be examined are deposited, or to that whose judgment is to be examined, although from its structure it may have been rendered incapable of performing the act required by the writ. Since the law requires a thing to be done, and gives the writ of error as the means by which it is to be done, without prescribing in this particular the manner in which the writ is to be used, it appears to the court to be perfectly clear that the writ must be so used as to effect the object. It may then be directed to either court in which the record and judgment on which it is to act may be found. The judgment to be examined must be that of the highest court of the State having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ."

As distinguishing the Massachusetts and New York cases see *Atherton v. Fowler*, 91 U. S., 143, and *Crane Iron Co. v. Hoagland*, 105 U. S., 701.

So it is that it has always been the practice in taking cases to the Supreme Court of the United States from Kentucky, after the affirmance of a judgment of the circuit court by the Court of Appeals, to take the writ of error from the Court of Appeals. The following cases were so taken, to wit: *Patterson v. Kentucky*, 97 U. S., 501; *Crutcher v. Kentucky*, 141 U. S., 47; *Cov. and Cin. E. R. and T. B. Co. v. Kentucky*, 154 U. S., 224; *Henderson Bridge Co. v. Kentucky*, 166 U. S., 150, and *C. & O. R. R. Co. v. Kentucky*, 179 U. S., 388.

If, then, defendant would be entitled to a writ of error at all in case of a future denial, it could only be taken from the judgment of the Court of Appeals affirming the judgment of the Scott Circuit Court, to re-examine said judgment of affirmance. It is difficult to see how it could lie to said judgment, because it would not be against any Federal right of the defendant. The legislature has provided that the Court of Appeals of Kentucky shall not have jurisdiction to review challenges to the juries in criminal prosecutions for any cause whatsoever, and that the action of the circuit court is final in regard thereto. At least the Court of Appeals has so construed section 281, and that construction is binding on this court. It was not bound to provide that any appeal might be taken from a judgment of the circuit court in a criminal case. It might have made the judgment of the circuit court final. An appeal, therefore, being a matter of grace and not of right, it could be granted on such terms as the legislature saw fit

(*Missouri v. Lewis*, 101 U. S., 22; *Andrews v. Swartz*, 156 U. S., 272; *Kohl v. Lehiback*, 160 U. S., 293; *Millett v. North Carolina*, 161 U. S., 589.)

In this State the legislature has seen fit to grant an appeal, but has provided that on an appeal rulings of the lower court, as to challenges to the jury, as to motions to set aside the indictment and as to motions for new trial, can not be considered by the Court of Appeals. This it had a right to do. It seems to me, therefore, that the Court of Appeals was correct in its rulings heretofore declining to pass on the Federal question raised by defendant in regard to the selection of the jurors from which came the jurors that tried him. It has not denied him the equal protection of the laws, because it had no jurisdiction to pass on the question. And here I feel constrained to differ from Judge Barker's position in his separate opinion in the last hearing. He based his opinion that the Court of Appeals had jurisdiction of the Federal question on article 6 of the Federal Constitution, which provides that the Constitution and laws of the United States shall be the supreme law of the land, and that the judges in every State shall be bound thereby. But this article of the Federal Constitution does not undertake to confer jurisdiction on State judges and courts. It simply provides that State judges and courts, in disposing of matters of which they have jurisdiction, shall be bound by the Federal Constitution and laws, and nothing more.

If, then, the Court of Appeals has no jurisdiction of the Federal question involved here, and it declines to pass upon it, how can a writ of error be taken to its judgment? It has passed on no Federal question adversely to defendant. In the case of *Great Western Tel. Co. v. Burnham*, supra, Justice Gray said: "This court has no jurisdiction upon writ of error to review a judgment of a State court unless it was a final judgment by the highest court of the State in which a decision in the suit could be had, and against a right set up under the Constitution and laws of the United States."

In *Gelston v. Hoyt*, supra, Justice Story said: "The judgment to be examined must be that of the highest court of the State having cognizance of the case."

And in *Fashnacht v. Frank*, 23 Wall., 416, Chief Justice Waite said: "We act only upon the judgment of the Supreme Court. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error."

In the cases cited above, which went to the Supreme Court of the United States on error from Kentucky, in which a reversal was had, to wit, the *Crutcher and Cov.* and *Cin E. R. and T. B. Co.* cases, the judgments of the Supreme Court were that the judgments of the Court of Appeals of Kentucky be reversed—not a word being said about the judgments of the circuit court which had thereby been affirmed.

What makes me hesitate to take the position that no writ of error would lie to the Supreme Court in the case under consideration is that it is hard to conceive of its being possible that there should be a case where a denial by a State Court of a Federal right could not be carried on error to the Supreme Court. To prevent such *casus omissus* one would be justified in straining the language of section 709 to the utmost limit, and it is evident that it would not be favored by the Supreme Court. In the case of *Lurton*

v. North River Bridge Co., 147 U. S., 836, it was held that a writ of error would not lie to the circuit court of the United States for the District of New Jersey, to reverse an order appointing commissioners to assess damages in a condemnation proceeding, because such an order was not final. In the prior case of Wheeling and B. Bridge Co. v. Wheeling Bridge Co., 138 U. S., 287, it was held that a writ of error would lie to the Supreme Court of West Virginia, affirming the order of a lower court appointing commissioners for such purpose in such proceeding. In distinguishing this case from the latter case Justice Gray said that the former was accounted for by the fact that the Supreme Court of West Virginia had held that the order of the lower court was a final order from which error lay to it, and said: "To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the Constitution and laws of the United States; for if the highest court of the State held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of validity of the condemnation except by writ of error to the order appointing commissioners."

And in the case of Great Western Tel. Co. v. Burnham, supra, in response to the position of plaintiff in error that a writ of error to the circuit court was the only way the Federal question involved in that case could be reviewed, Justice Gray said: "If all this were so there would be strong ground for sustaining the present writ of error."

I am not unmindful of the fact that in Bush v. Kentucky, supra, the Supreme Court of the United States reversed the judgment of the Court of Appeals because it affirmed a judgment of the circuit court, which had overruled a motion to set aside an indictment found, when the discriminatory statute of Kentucky had not been declared unconstitutional, when it should have sustained the motion, and that a code provision similar to section 281 was then in force. But no attention seems to have been called to the existence of this code provision, or as to its having any bearing upon the question. So far as the opinion of that case shows the Court of Appeals considered and passed on the question. At least there is nothing showing that it did not.

If, then, no writ of error would lie to the Supreme Court in case defendant should hereafter be denied the equal protection of the law, all the more reason for holding that this case comes within section 641. In that event, the alternative remedies would be either a removal under section 641, or, if convicted, a release from State custody and from further prosecution for the offense in any court upon writ of habeas corpus under sections 751-55. The latter is the more delicate remedy of the two, and of the two the former is to be preferred. If, however, it can not be said certainly that a writ of error will not lie, only that it is uncertain whether it will lie, and that it will take the Supreme Court to determine the question, then it will hardly be right to let go a remedy for a wrong that is practically conceded on the idea that another remedy exists therefor, until it has been settled beyond question that the other remedy exists, for if I shall decide that the remedy of removal under section 641 does not exist, and hence overrule the motion,

It would be a letting go of that remedy. This action would have to be followed by an order remanding the cause to the State court, and no appeal or writ of error could be taken therefrom, nor could I be compelled to take jurisdiction by mandamus. It was so decided by the Seventh Circuit Court of Appeals in *Cole v. Garland*, 107 Fed., 759. On the other hand, if I decide to take jurisdiction my action is not final. Application can be made to the Supreme Court for a mandamus commanding me to restore defendant to State custody, as was done in *Virginia v. Rives*, and the whole question as to defendant's remedies can be settled for all time to come. That the fact that the grave questions which I have considered herein can not be carried further if I decide against defendant, and that they can be carried further if I decide in his favor, should have something to do with controlling my action, and just what it should have to do therewith is well stated by Judge Sanborn in the recent case of *Boatmen's Bank v. Fritzlan*, 135 Fed., 655. He there said: "Every conscientious judge, every thoughtful man, upon whom is laid the grave responsibility and the heavy burden of determining the rights of his fellows, rejoices in the thought, wherever such is the case, that his decision may be reviewed, and that, if erroneous, it will not work irreparable injustice to him whom he deems it his duty to defeat. When a case has been removed from a State to a Federal court, and a motion to remand is made, or when a motion to remove is presented in the first instance to the Federal court, the petitioner either has or he has not the right to the trial and decision of his controversy in that court. That right is not of sufficient value and gravity to be guaranteed by the Constitution and acts of congress. If it exists, and the circuit court denies its existence, and remands or refuses to remove the suit, the error is remediless, and it deprives the petitioner of his constitutional right. If the right does not exist, and the court affirms its existence and retains the suit, the error may be corrected by the Supreme Court. An error that the aggrieved party may correct is less grievous than one that is without remedy. And the true rule is that motions to remand and for removals should be decided, not by the existence of doubts, but by the preponderance of the facts, the law and the reasons which condition them in view of the fact that the right to invoke the jurisdiction of the Federal court is a valuable constitutional right, and an erroneous affirmance of the claim of that right may be corrected by the Supreme Court upon a certificate of the question of jurisdiction, while an erroneous denial of the claim is remediless."

It remains to say a word or two in conclusion in regard to the first paragraph of the petition, in which it is claimed that defendant is entitled to a removal because the State courts have denied the validity of the pardon issued by Taylor. In order for that to be a good ground for removal it is necessary, in addition to such denial, that defendant had a right to be released from custody because of such pardon; and further, that the right to such release was secured to him by the fourteenth amendment. As to the right to be released from custody because of said pardon, I do not think that I have the right to pass upon the question on its merits. The question as to who was the governor of Kentucky *de jure* and *de facto* on the 10th of March, 1900, and as to the validity of said pardon, is a local one, and it has been determined by the Court of Appeals of Kentucky that Beckham was

said pardon is invalid, and I think I am concluded by that determination. Furthermore, even if said right existed, I do not think that it is one secured to the defendant by the equal protection of the laws clause of the fourteenth amendment. If it is, then every right one has is so secured, and every decision by the State courts against such a right would present a Federal question and a ground for removal. This certainly can not be the case.

My conclusion, therefore, is that by virtue of the second paragraph of the petition the removal proceedings have worked a transfer of jurisdiction. It seems to me that it would be hard to get a case that more certainly comes within section 641. The defendant has been, and is, denied the equal protection of the laws in the Scott Circuit Court, and he can not enforce his right thereto in the Court of Appeals.

The motion for the writ is sustained.

Ex. J. M.
12/1/05

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